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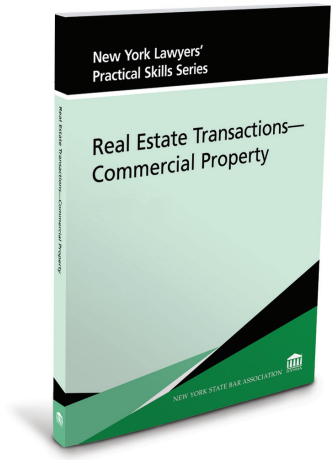
Real Estate Transactions—Commercial Property



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Commercial real estate is a vast field, encompassing the selling, financing and leasing of numerous types of properties, and involving a plethora of professionals including attorneys, real estate and mortgage brokers, accountants, tax lawyers, title insurance representatives and lenders.

Real Estate Transactions—Commercial Property provides an overview of the major issues an attorney needs to address when representing a commercial real estate client, and suggests some practical approaches to solving problems that may arise in the context of commercial real estate transactions.

Author commentary has been updated throughout the chapter for this edition. Three new forms have been added, and several existing forms have been updated.

This practice guide also includes a set of **Downloadable Forms**. The 2019-2020 release is current through the 2019 legislative session.

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Beware: The Doctrine of Caveat Emptor Is Alive and Well in New York

By R. Randy Lee

Courts may be somewhat split on the issue, but the doctrine of caveat emptor is still very much the guiding law in New York State.This fundamental principle of real estate law mandates that the buyer beware and imposes no duty upon a vendor "to disclose any information concerning the property in an arm's length real estate transaction."[1] Despite the state Legislature's attempt to modify this longstanding principle back in 2002, courts are still taking a hard line on buyers who do not complete their own due diligence, so be careful.

In 2017, the Appellate Division affirmed dismissal against the sellers, noting that active concealment was required to overcome the presumption of caveat emptor despite some evidence of a property defect.[2] The defendant sellers in *Gallagher v. Ruzzine* had purchased the property from another couple, who provided them with an inspection report, noting no evidence of foundation movement. The new owners subsequently discovered a crack in the basement wall and repaired it. When they decided to sell the property to the plaintiff buyers, they did not include the original inspection report from when they themselves had purchased the property. The buyers hired an inspector who concluded that "there were no concerns with the property," but after moving in, they discovered cracks starting to appear, evidence of past repairs, water leakage in the basement, and fixtures pulling away from the property.[3] The new owners filed suit for fraud, breach of contract, and other claims against the defendants and the former owners of the property, but the trial court granted defendants' motion for summary judgment and dismissed the complaint.

A decade earlier, in *Adrien v. Estate of Zurita*, a defendant property seller appealed a New York Supreme Court judge's denial of summary judgment and won. The Appellate Division Second Department ruling confirmed that the doctrine of caveat emptor has been a perennial principle in New York State.[4]

The plaintiff in *Adrien* sued to recover damages for fraud arising out of his purchase of property in Warwick, N.Y. He closed on the property aware that a holdover proceeding had been commenced against the existing tenants and that the proceeding was not scheduled to be heard until a few days after the closing. He even signed a post-closing survival agreement acknowledging that the tenants had not yet left and agreed to a $4,000 holdover escrow to cover the costs of the proceeding. Still, he claimed that the defendant's attorney failed to disclose, misrepresented, and concealed facts

R. Randy Lee

concerning the property, specifically the future outcome of the holdover proceeding.

Since the plaintiff knew about the tenants and took steps to address the situation, the Second Department reversed the denial of summary judgment and held:

> Pursuant to the doctrine of caveat emptor, the plaintiff had a duty to inquire whether the tenants had a written lease and, if so, request a copy of the lease or request any other documents pertaining to the tenancy. The plaintiff's claim of justifiable reliance on alleged misrepresentations of [defendant's attorney] regarding the lease and the status of the tenancy is unsupportable. Thus, we reject the plaintiff's claim that [defendant's attorney's] alleged fraudulent misrepresentations rather than his own failure to exercise due diligence caused him damages when the

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holdover proceeding was determined in favor of the tenants.[5]

Caveat Emptor and the Property Condition Disclosure Statement

In addition to the nature of the ruling in *Adrien*, it is important to note that the seller disclosed to the plaintiff in a Property Condition Disclosure Statement (PCDS) that somebody other than the seller had a lease to use the property. This is mandated by the Property Condition Disclosure Act (PCDA),[6] a 2002 law in which the New York State legislature radically altered the caveat emptor landscape by placing an affirmative duty on the seller to disclose certain specified property details.

The legislation provides assurances that overt fraud is minimized in arm's length real estate transactions, but is not designed to relieve a buyer's obligation to carefully examine a prospective piece of property, along with related public record. For instance, a month before the Second Department decided *Adrien*, the Third Department issued its decision in *Boyle v. McGlynn*.[7] In *Boyle*, a month after plaintiffs purchased a 133-acre Otsego County property, they learned about the construction of large wind turbines on the neighboring parcel and filed an action seeking rescission of the contract. While the defendants claimed that the doctrine of caveat emptor was a complete defense to this action, the trial court denied defendant's motion for summary judgment and the Third Department held:

> . . .We find that questions of fact have been raised concerning whether defendants knew about the subject wind turbine project when they placed their home on the market and whether they thereafter made material misrepresentations which deceived plaintiffs and induced them to purchase the property.[8]

According to plaintiffs, the status of the adjacent parcel was specifically discussed with defendants prior to the closing and defendants reassured plaintiffs that the property was "protected." And, though the plaintiffs could have discovered the plans to construct the wind turbine project prior to the closing, the court ruled that because there was only a single published article about the project in a local newspaper and the actual plans were not filed with the local planning board until one month after the closing, there was a triable issue of fact.

Active concealment of the nature claimed in Boyle has always been an exception to caveat emptor and requires disclosure,[9] but the PCDA still requires every seller of residential real property pursuant to a real estate purchase contract to deliver a property condition disclosure statement to the buyer or the buyer's agent prior to the buyer signing a binding contract of sale.[10] While the statute is applicable only to the re-sale of previously or currently occupied residential housing,[11] it does impact a large percentage of real estate transactions.

Answering the Disclosure Statement

The seller is required to answer all 48 of the PCDS statutory questions based on his actual knowledge, and may answer "N/A" to inapplicable questions or "UNKN" where he does not know the answer.[12] The questions cover:

- General information about the property's age and title.
- Specific environmental and structural conditions.[13]
- Mechanical systems and services, including the existence of defects in those systems.[14]

Once complete, the seller must certify that the statement is accurate, and must provide a revised statement if he acquires actual knowledge of anything that renders the prior statement "materially inaccurate" until the earlier of title transfer or occupancy by the buyer.[15] If the seller fails to deliver the statement prior to the buyer signing the binding contract of sale, the buyer will receive a $500 credit towards the purchase price.[16] If the seller provides the statement, he can be held liable only for "willful failure to perform the requirements" of the PCDA,[17] making him liable for actual damages suffered by the buyer in addition to any other existing equitable or statutory remedy.[18]

Even when the Supreme Court denied a motion to dismiss by the sellers of a Harrison, NY home in a 2016 case where they had completed a mold remediation project prior to the sale and the property was sold "as is," with the buyers accepting a $500 property condition disclosure credit in lieu of a PCDS,[19] the Appellate Division, Second Department reversed finding that because the contract of sale for the subject premises included a specific disclaimer of reliance on representations as to the condition of the premises, there was no fraud

"The legislation provides assurances that overt fraud is minimized in arm's length real estate transactions, but is not designed to relieve a buyer's obligation to carefully examine a prospective piece of property, along with related public record."

despite mold reappearing and requiring over $1 million in repairs.[20] It based its decision in part on the doctrine of caveat emptor.[21]

What Is the Seller's Potential Liability Under the PCDA?

The legislative history clearly states that "[t]his act is not intended to and does not diminish the responsibility of buyers to carefully examine property which they intend to purchase and, in fact, highlights the importance of professional inspections and environmental tests."[22] In addition, the disclosure statement itself contains a provision that it is neither a warranty nor a substitute for any inspections, tests, or searches of the public record by the buyer.[23] Actually, the PCDA "does not limit any existing legal cause of action or remedy at law, in statute or in equity"[24] and it does require the seller to affirmatively disclose certain information, while before he could remain silent.[25]

Under the statute as written, a seller with actual knowledge of defects on the property could simply refuse to provide the required statement prior to the contract signing, limiting his liability to $500.[26] In *Bishop v. Graziano*,[27] the First Department held that where the defendant sellers did not elect to complete a property condition disclosure statement under the PCDA[28] and sold their property "as is," there was no fraud and, therefore, no recovery.[29] It stated:

> The Court can think of no situation wherein the intent and conduct of the parties is as clearly delineated as where a party pays for the right to invoke a statutory authorization to expressly be relieved of the obligation to make representations. Absent an express or implied misrepresentation, there exists no fraud.[30]

Given how strongly the benefit of offering the $500 credit outweighs the potential liability for providing a disclosure that is incorrect or viewed as some type of misrepresentation, "the provision truly has the effect of offering an option for sellers to buy-out of their statutory obligation."[31]

Even if a seller provides the disclosure and answers "N/A" on a disclosure form, when he is arguably aware of a problem, he may still only be liable for the $500.[32] Furthermore, where a seller denies actual knowledge of basement seepage resulting in standing water on the PCDS, but does disclose outside the document the frequent running of a pump during a heavy rain and that the basement has flooded before, and no actual damages result, such a claim under PCDA may be properly dismissed.[33]

But sellers take note—if you do answer the disclosure statement and you do indicate that some element of the property has "no material defects," you could be liable for a willful failure and have to pay the buyer's actual damages.[34] In *Fleischer v. Morreale*, a Suffolk County judge ruled that because the seller erroneously indicated on her disclosure statement that there were no material defects with respect to her roof and any flooding matters, she was liable for damages of $11,000.[35]

In addition, the language of the disclosure statement seems to indicate that there is a cause of action under the statute for a misrepresentation.[36]

In the first case to address the PCDA following enactment of the statute, *Malach v. Chuang*, the plaintiffs alleged that the defendants had improperly completed the PCDA disclosure statement because they failed to reveal some rot at the base of a swimming pool.[37] The court concluded that the PCDA did not create a cause of action for a seller's alleged misrepresentation in the disclosure form, and criticized subsection 465(2) of the PCDA, stating, "It is not clear that a reasonable person can understand what it means."[38] The court noted that the statute failed to provide any guidance as to what a "willful failure to perform the requirements of this article" was, and that if the legislature was attempting to create a new legal right, the statute needed to be clear and unequivocal.[39] It concluded that the PCDA's remedies, other than the $500 credit, were void for vagueness, and dismissed the plaintiffs' case.[40]

Now that the courts have had a few years to evaluate the PCDA and its impact on real property transactions, one would think that cases like *Fleischer,* raised above, provide additional guidance. One would, of course, be mistaken to draw such a conclusion. While the *Fleischer* court found a cause of action for misrepresentation, the court in *Renkas v. Sweers*, decided two months before, held that the PCDS does not raise a cause of action for breach of contract because the parties used a merger clause.[41]

The more it looks like a seller engaged in acts amounting to active concealment, or attempting to thwart a buyer's efforts to inspect a property, the more likely the seller will be liable. By misrepresenting facts or lying on a PCDS, a seller may be providing evidence of active concealment, which could support an action for fraud. However, PCDS disclosures are based on a seller's "actual knowledge," and where a seller has taken steps to repair issues in the past, and other red flags are raised by independent inspections, a fraud claim may be dismissed.[42]

What Can a Seller Do?

While the PCDA has influenced the doctrine of caveat emptor, it has in no way replaced it. The court in *Gabberty* confirmed that "[t]here is no indication in the [legislative history] that the law was intended to completely subvert or replace many decades of well-established common law."[43] In fact, *Renkas* confirmed that the Property Condition Disclosure Statement only

reinforces the doctrine of caveat emptor and reminds buyers to inspect and investigate the property they are purchasing.[44]

Renkas indicates that New York courts may remain willing to continue to enforce merger and disclaimer clauses to bar a buyer's claims of inducement into a transaction, or a seller's misrepresentations or omissions in the PCDS.[45] To be effective, a merger and disclaimer clause must contain a disclaimer of reliance as to the specific representation or omission which the buyer later claims induced her or him into the transaction.[46] Even a specific disclaimer, however, will not act as a bar where the facts not disclosed are particularly within the knowledge of the party invoking it, and not discoverable by reasonable means.[47]

The courts have not retreated from this understanding. In *Gallagher v. Ruzzine*, to support its affirmation of the dismissal of fraud claims against sellers who were aware of dampness in the basement and repaired a crack thought to cause such dampness, the Appellate Division reasoned that, although the PCDS was silent with respect to seepage or dampness, the plaintiffs' home inspection report put them on notice of that issue and, therefore, they could not justify relying on the silence in the PCDS.[48]

The contract should contain an explicit representation by the buyer that the buyer has:

•Examined the subject premises.

•Had ample opportunity to perform tests.

•Consulted independent professionals concerning the property and surrounding area.

•Made necessary inquiries with city, state and federal agencies about environmental conditions on the property and in the surrounding area.

•Had the opportunity to thoroughly investigate all zoning issues, certificates of occupancy, and other matters that might affect the value, reputation, or use of the property.

The contract should also state that:

•Any and all representations about the subject property or any matter that might affect its value, reputation, or use have been explicitly included in the written contract.

•The buyer has not relied on any representation on any matters not contained in the contract.

•The contract represents the full and complete understanding between the parties.

•The buyer has relied exclusively on his or her own investigation.

It once appeared as if the PCDA represented a substantial legislative erosion of the common law doctrine of caveat emptor.[49] Over two decades later, however, New York courts still apply the core logic of the doctrine of caveat emptor, even to claims brought under the PCDA.[50] Sellers should, therefore, incorporate well-crafted merger and disclaimer clauses into their contracts to ensure additional protection from both common law claims as well as those arising under the PCDA.[51] While caveat emptor reminds the buyer to beware, it is the seller who must often be mindful of all potential consequences.

Endnotes

1. *See Rector v. Calamus Group*, 17 A.D.3d 960, 961, 794 N.Y.S.2d 470, 471 (3d Dept. 2005); *Gizzi v. Hall*, 300 A.D.2d 879, 881, 754 N.Y.S.2d 373, 377 (3d Dept. 2002); *Raizen v. Robbins*, No. 6739/04 (N.Y. Sup. Feb. 16, 2006). *See also Devine v. Meili*, 89 A.D.3d 1255, 1255-56, 932 N.Y.S.2d 581, 582 (3d Dep't 2011) (affirming prior cases).
2. *Gallagher v. Ruzzine*, 147 A.D.3d 1456, 46 N.Y.S.3d 323 (N.Y. App. Div. 2017).
3. *Id.*
4. *Adrien v. Estate of Zurita*, 29 A.D.3d 498, 814 N.Y.S.2d 709 (2d Dep't 2006).
5. *Id.* at 499, N.Y.S.2d at 710; *see Goldman v. Strough Real Estate*, 2 A.D.3d 677, 770 N.Y.S.2d 94 (2d Dep't 2003); *Cohen v. Cerier*, 243 A.D.2d 670, 663 N.Y.S.2d 643 (2d Dep't 1997).
6. The Property Condition Disclosure Act, N.Y. Real Prop. Law § 460 *et seq*. (which became effective on March 1, 2002).
7. *Boyle v. McGlynn*, 28 A.D.3d 994, 814 N.Y.S.2d 312 (3d Dep't 2006).
8. *Id.* at 995, N.Y.S.2d at 313-14.
9. *Jablonski v. Rapalje*, 14 A.D.3d 484, 788 N.Y.S.2d 158 (3d Dep't 2005).
10. N.Y. Real Prop. Law § 462[1].
11. "Residential real property" is defined as "real property improved by a one to four family dwelling used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons." N.Y. Real Prop. Law § 461[5], held unconstitutional by *Goldman v Fay*, 8 Misc 3d 959 (N.Y. Civ. Ct. 2005) (holding that it is against the equal protection provisions of the Constitution to exclude owners of condominiums and co-ops from the PCDS requirements.)New legislation removing these restrictions, and thus any constitutional objection to the law, has been proposed by the New York Assembly, 2005 NY A.B. 6361 (NS) (March 2005), however such restrictions have not been removed from the law. See also, N.Y. Real Prop. Law § 463. The fourteen exceptions to the requirement for a disclosure statement deal with transfers through legal proceedings, transfers by or between fiduciaries, transfers of newly constructed residential real property which has not been previously inhabited, or transfers between co-owners.
12. N.Y. Real Prop. Law § 462[2]. *See also*, N.Y. Real Prop. Law § 461[3] (defining "knowledge" for the purposes of the PCDA as "only actual knowledge of a defect or condition on the part of the seller of residential real property").
13. N.Y. Real Prop. Law § 462[2].

14. *Id.*

15. *Id. See also*, N.Y. Real Prop. Law § 464 (requiring seller to deliver a revised statement if he acquires knowledge which renders "materially inaccurate" the previously provided statement).

16. N.Y. Real Prop. Law §§ 462[2], 465[1].

17. N.Y. Real Prop. Law § 465[2].

18. *Id.*

19. *Comora v. Franklin*, No. 62504/2015, 2016 WL 11598589 (N.Y. Sup. Ct. May 3, 2016).

20. *Comora v. Franklin*, 171 A.D.3d 851, 97 N.Y.S.3d 734 (2d Dep't 2019).

21. *Id.* at 736.

22. 2001 Sess. Law News of NY Ch. 456 (s. 5539-a) (McKinney).

23. N.Y. Real Prop. Law § 462[2] ("THIS DISCLOSURE STATEMENT IS NOT A WARRANTY OF ANY KIND BY THE SELLER OR BY ANY AGENT REPRESENTING THE SELLER IN THIS TRANSACTION. IT IS NOT A SUBSTITUTE FOR ANY INSPECTIONS OR TESTS AND THE BUYER IS ENCOURAGED TO OBTAIN HIS OR HER OWN INDEPENDENT PROFESSIONAL INSPECTIONS AND ENVIRONMENTAL TESTS AND ALSO IS ENCOURAGED TO CHECK PUBLIC RECORDS PERTAINING TO THE PROPERTY.").

24. N.Y. Real Prop. Law § 467.

25. N.Y. Real Prop. Law §§ 462[2], 464.

26. N.Y. Real Prop. Law § 465[1].

27. *Bishop v. Graziano*, 10 Misc. 3d 342, 804 N.Y.S.2d 236 (1st Dep't 2005).

28. N.Y. Real Prop. Law § 462.

29. *Bishop*, 10 Misc. 3d at 346, 804 N.Y.S.2d at 239.

30. *Id.*

31. Philip Lucrezia, *New York's Property Condition Disclosure Act: Extensive Loopholes Leave Buyers and Sellers of Residential Real Property Governed by the Common Law*, 77 St. John's L. Rev. 401, 413 (2003). *See also*, Karl B. Holtzschue, *Property Condition Disclosure Act Enacted*, 30 N.Y. Real Prop. L.J. 15 (2002).

32. *Gabberty v. Pisarz*, 10 Misc. 3d 1010, 810 N.Y.S.2d 799 (Sup. Ct. N.Y. 2005).

33. *Meyers v. Rosen*, 69 A.D.3d 1095, 893 N.Y.S.2d 354 (3d Dep't 2010).

34. N.Y. Real Prop. Law § 465[2]. *See also*, *Malach v. Chuang*, 194 Misc. 2d 651, 754 N.Y.S.2d 835 (NY Civ. Ct. 2002) (discussing the question of whether, the Article as written, encourages a seller not to file the disclosure statement in order to limit the buyer to a $500 recovery).

35. *Fleischer v. Morreale*, 11 Misc. 3d 1004, 810 N.Y.S.2d 624 (Sup. Ct. N.Y. 2006), *declined to follow by Middleton v. Calhoun*, 13 Misc. 3d 949, 821 N.Y.S.2d 444 (Rensselaer County 2006), holding that the PCDS has not successfully created any cause of action for willful misrepresentation.

36. N.Y. Real Prop. Law § 462[2] ("A KNOWINGLY FALSE OR INCOMPLETE STATEMENT BY THE SELLER ON THIS FORM MAY SUBJECT THE SELLER TO CLAIMS BY THE BUYER PRIOR TO OR AFTER THE TRANSFER OF TITLE." [Emphasis added.])

37. *Supra* note 34.

38. *Malach*, Misc. 2d at 656, 754 N.Y.S.2d at 839.

39. *Id.* at 654, N.Y.S.2d at 840.

40. *Id.* at 665-6, N.Y.S.2d at 846.

41. *Renkas v. Sweers*, No. 2003/08882 (N.Y. Sup. Ct. Nov. 7 2005).

42. *See, e.g.*, *Klafehn v. Morrison*, 75 A.D.3d 808, 906 N.Y.S.2d 347 (3d Dep't 2010) (dismissing fraudulent inducement claim against defendant sellers where sellers had stated on the PCDS there was "seasonal dampness," years prior black ooze had been found but had been drained and lumber replaced, and buyer was aware through own observations and inspector's report that waste lines may need to be replaced).

43. *Gabberty*, 10 Misc. 3d at 1014, 810 N.Y.S.2d at 802.

44. *Renkas v. Sweers*, 2005 N.Y. Slip. Op. 52247U at *5.

45. *Id.*at *6; *See also McMullen v. Propester,* No. 2006-0149, 2006 WL 3112196 (N.Y. Sup. Ct. Oct. 30, 2006).

46. *See Dannan Realty Corp. v. Harris*, 157 N.E.2d 597, 599-600, 184 N.Y.S.2d 599, 603 (N.Y. 1959) (holding that where the other party has the means available of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject representation, it must make use of those means, or it will not be heard to complain that it was induced to enter the transaction by misrepresentation). This basic principle applies to conditions beyond those "readily observable" such as zoning restrictions, non-exemption from rent-stabilization laws, and cracks hidden behind paneling. *See also Di Filippo v. Hidden Ponds Associates*, 146 A.D.2d 737, 537 N.Y.S.2d 222 (2d Dep't 1989).

47. *See Stambovsky v. Ackley,* 169 A.D.2d 254, 259-60, 572 N.Y.S.2d 672, 677 (1st Dep't 1991) (finding that caveat emptor did not require dismissal where defendant had publicized in the local community that subject house was haunted, but failed to disclose same to buyer, reasoning that no inspection by plaintiff would have uncovered ghosts or unearthed property's local reputation and emphasizing that defendant had herself created the house's reputation for being haunted. *See also Tahini Investments, Ltd. v. Bobrowsky*, 99 A.D.2d 489, 470 N.Y.S.2d 431 (2d Dep't 1984).

48. *Gallagher v. Ruzzine*, 147 A.D.3d 1456, 1459, 46 N.Y.S. 3d 323, 327 (4th Dep't 2017).

49. *Supra* note 26.

50. *Gabberty*, 10 Misc. 3d at 1014, 810 N.Y.S.2d at 802.

51. The following proposed Merger and Disclaimer Clause, although never the subject of litigation, would seem to be quite comprehensive in general terms, as well as in its attention to the PCDA. It is drafted for a transaction concerning previously occupied housing, but could be modified to cover builders/developers of new housing:

PURCHASER agrees, warrants and represents that PURCHASER has received the statutorily mandated Property Condition Disclosure Statement (PCDS) made by the SELLER and has thereafter examined the PREMISES agreed to be sold herein and has been given ample opportunity to review the contents of the PCDS, in particular, but without limitation, matters referable to those answers marked "unknown" and/or "non-applicable (N/A)" and to thereafter perform any and all tests and/or to consult independent professionals concerning the PREMISES and the area surrounding same and all matters referable to any and all answers contained in the PCDS, and, in addition, has had an ample opportunity to make inquires with governmental agencies relative to conditions on and off the PREMISES as well as zoning and building laws and regulations and other matters that may affect the value, reputation and/or use of the PREMISES, and, therefore, is fully and completely familiar with the use and condition thereof. Except as may otherwise be stated in this contract, PURCHASER further agrees, warrants and represents that (*i*) SELLER has not made any representations as to the following: the physical state or condition of the PREMISES including, without limitation, environmental hazards or regulation, asbestos, lead, mold, radon or other toxic substances or matters; the condition of the plumbing, septic, heating, air-conditioning and electrical systems, the roof and basement; the manner or method of construction; the quantity or quality of any material used; the items of personal property and fixtures which are included in the sale and their condition and state of repair; present or prospective rents, taxes or other expenses of operating or maintaining the PREMISES; the legal status of the PREMISES or the uses to which same may be put or the Certificate of Occupancy, if any; or any other matter or thing affecting or relating to the aforesaid PREMISES, and*(ii)* the PCDS is not a warranty or guaranty of any kind by SELLER or any agent of the SELLER in this transaction and is not a substitute for any inspections or warranties the PURCHASER may wish to obtain. Therefore, if, as a part of the contract to sell the property, the SELLER warrants the condition of

any portion of the property, then, to the extent there is a conflict between this contract's warranties and any representations contained in the PCDS, the terms of this sales contract shall control. It is further agreed, warranted and represented by PURCHASER that the answers and contents of the PCDS and all prior discussions, understandings and agreements between the parties, as well as brokers and/or agents, nominees or representatives of PURCHASER or SELLER, or anyone else not a party to this contract, are merged in this contract, which fully and completely expresses the parties agreement, and that the contract is entered into after testing and investigation, with neither party relying upon any statement or representation not expressly embodied in this contract made by the other. Therefore, PURCHASER hereby irrevocably agrees to accept the PREMISES and the personalty, fixtures, equipment and systems included in this sale, "AS IS" "AS IS" "AS IS" on the date hereof, subject to normal wear and tear to the time of CLOSING, EXCEPT, HOWEVER, the plumbing, heating (including air-conditioning, if any) and electrical systems will be in working order and roof free of leaks at the time of CLOSING and that within five (5) days of such date, PURCHASER shall receive vacant possession of the PREMISES, subject to present tenancies and uses, in broom-clean condition. PURCHASER further agrees and represents that the maximum liability of SELLER, for any reason whatsoever, for any matter, in law or equity, arising from or concerning the Property Condition Disclosure Act (PCDA), the PCDS or the answers therein, shall be limited to $500 and no further, and that any proceeding or action, in law or equity, which relies upon the PCDA or PCDS or contains any allegation which is based upon the answers and contents of said PCDS or anything whatsoever therein, must be brought within one (1) year of the date of this contract, and that, thereafter, it will be considered, by agreement of the parties herein, to be irrevocably time barred for all purposes. It is understood that SELLER has relied on the agreements, warranties and representations herein made by PURCHASER, and that without same, SELLER would not have entered into this contract. The agreements, warranties and representations herein made by PURCHASER shall survive the CLOSING.

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The Adverse Impact of the Statewide Housing Security and Tenant Protection Act of 2019 on Co-ops

By Justin R. Bonanno

A major overhaul of statewide legislation governing landlords' and tenants' rights, the Statewide Housing Security and Tenant Protection Act of 2019 (HSTPA), was signed into law by Governor Cuomo on June 14, 2019. The HSTPA, most of which took effect immediately, made changes and additions to New York's Real Property Law (RPL), Real Property Actions and Proceedings Law (RPAPL), and other laws that significantly affect all aspects of New York's housing industry. Because cooperative housing corporations ("co-ops") are lessors under their proprietary leases and are considered landlords for most purposes, and because the HSTPA does not expressly exclude them, the HSTPA applies to co-ops.[1] Whether the HSTPA was *intended* to apply to co-ops is up for debate.

The relationship between a tenant-shareholder and a co-op differs from a traditional landlord-tenant relationship because co-ops are non-profit corporations that are owned by, and operated for the benefit of, their tenant-shareholders, whereas rental buildings are owned by traditional landlords who are generally profit-motivated.[2] Unlike rental tenants, tenant-shareholders have, through the election process, a say (and a legitimate interest) in how their buildings are operated, including, among other things, what fees and expenses are charged, what rules are set and followed by the community, and what co-op procedures are implemented. Certain sections of the HSTPA could significantly restrict co-ops' freedom of action in these areas.

Some real estate industry groups have filed a federal litigation challenging provisions of the HSTPA. A lobbying effort has also been commenced seeking to convince the Legislature to amend the law so that it would not apply to co-ops. Those efforts already appear to be bearing some fruit as Senator John C. Liu introduced a bill (S6770) on October 9, 2019, which seeks to exclude co-ops from certain provisions of the HSTPA.[3] The Legislature may consider this new proposal in its current 2020 session but, of course, there is no guarantee the bill will be passed and enacted into law. Thus, for now, the HSTPA will continue to apply to co-ops. Following is a discussion on how this could have perhaps unintended adverse consequences on co-ops and their tenant-shareholders.

Justin R. Bonanno

Co-op Boards Are More Likely to Outright Reject Prospective Purchasers with Credit Issues

First, the HSTPA amended General Obligations Law (GOL) § 7-108 to limit any required security "deposit or advance" payable by a tenant to the amount of one month's rent. This HSTPA provision applies to "any lease or rental agreement or renewal of a lease or rental agreement" entered into on or after July 14, 2019, and thus does not affect deposits related to leases or rental agreements already in place as of that date. The HSTPA imposes potentially serious penalties for a violation of this provision, as it provides that "any person" who violates it "shall be liable for actual damages," and in addition, that "a person found to have willfully violated this subdivision shall be liable for punitive damages of up to twice the amount of the deposit or advance."

This provision could be interpreted to limit the amount that potential tenant-shareholders are required to deposit under maintenance escrow agreements. Maintenance escrows are typically used to permit an otherwise financially questionable applicant to acquire the stock and proprietary lease appurtenant to an apart-

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ment by depositing (as security) several months' (or more) worth of maintenance into escrow, which can later be drawn upon by the co-op in the event of a monetary default. Co-op boards will likely find that an escrow account holding just one month's worth of maintenance does not provide enough security to justify approving such an application. While boards could consider some alternatives to a maintenance escrow account, such as requiring a guarantor, if the potential tenant-shareholder does not have an acceptable guarantor, this change in the law could result in boards rejecting these types of purchasers. This would make less housing available for prospective purchasers with limited or poor credit history, which appears to be the antithesis of the purpose of the HSTPA.

In addition, while the HSTPA, on its face, does not appear to address security deposits required by co-ops under alteration agreements, it could, based on a very conservative reading of the statute, also be interpreted to limit the amount of alteration deposits to one month's rent as well. Co-op alteration agreements often contain provisions that classify the fees and charges tenant-shareholders are required to pay as "additional rent" under their proprietary leases, which can then be deducted from the alteration security deposits. These "cross-default" provisions relating alteration agreements to proprietary leases might be enough to bring alteration security deposits within the scope of this amendment.

If the courts interpret this provision to apply to co-op alteration agreements, this will present a potentially serious problem for co-op boards. Alteration agreements typically require a substantial security deposit to provide protection against any loss, cost or expense to the co-op arising from or relating to tenant-shareholders' renovations, such as damage to the building, the fees of any construction professionals retained by the co-op to review plans and the progress of the work, and the co-op's attorneys' fees. Limiting alteration deposits to "one month's rent" will not provide adequate protection to the co-op during tenant-shareholder renovations.

Unless the Legislature clarifies whether this amendment applies to co-ops, this will put boards in an untenable position. If boards decide that GOL § 7-108 does not apply to alteration deposits, they run a risk that the statute will later be interpreted to apply to such deposits, potentially subjecting them to the serious penalties set forth in the statute. If, on the other hand, boards decide not to take that risk, this will leave them looking for other ways to find adequate protection, a feat that could be difficult to achieve.

Board Due Diligence Concerning Prospective Purchasers Will Be Significantly Hindered

The HSTPA also adds a new § 227-f to the RPL which prohibits the "landlord of a residential premises" from refusing to offer a lease to a potential tenant because "the potential tenant was involved in a past or pending landlord-tenant action or summary proceeding." In addition, this section of the HSTPA prohibits landlords from relying on tenant screening databases in deciding whether to offer a lease. The new law imposes a "rebuttable presumption" that this section has been violated if information about an applicant was requested from a tenant screening bureau or court records were inspected and the landlord subsequently refuses to rent or offer a lease to the applicant.

This provision effectively prohibits co-ops from requesting information about, considering, or relying on a prospective purchaser's history of litigation with prior landlords in rejecting a purchase application. For co-op boards, this change in the law is a serious impediment to their due diligence process. It has long been the law in New York that a co-op can reject a prospective purchaser for any reason or for no reason at all, so long as the rejection does not violate an anti-discrimination statute. As the Court of Appeals stated as long ago as 1959, "there is no reason why the owners of [a] co-operative apartment house [cannot] decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholders' meetings, their management problems and responsibilities and their homes."[4] An applicant's involvement in prior landlord-tenant litigation, in which the applicant may have taken unreasonable positions or in which the court papers may reflect misconduct by the applicant in his or her prior home, is a critical piece of information that boards typically consider to make an informed decision about potential new tenant-shareholders. A litigious shareholder could cost the co-op large sums of money, while a shareholder with a history of engaging in improper behavior while living at other residences could make life less pleasant or more difficult for the other residents of the building.

Increased Litigation in the State's Already Overburdened Court System

Another new section of the law (RPAPL § 702) defines what types of "rent" can be recovered in a summary proceeding in landlord-tenant court (also known in New York City as Housing Court, as opposed to a separate action in county civil court or state Supreme Court). The rent recoverable in summary proceedings now excludes any "fees, charges or penalties," even if they are specifically authorized by the lease and are classified in the lease as "additional rent." Unpaid co-op charges such as late fees, utilities, repair costs and possibly even special assessments now cannot be sought in a summary proceeding commenced on or after June 14,

2019, and can only be sought in a separate civil court or Supreme Court action.

This will likely result in an increase in litigation in this state's already overburdened court system. In the process, this section of the HSTPA will substantially increase the attorneys' fees and disbursements co-ops must incur in order to collect unpaid fees, charges or penalties, or cause co-ops to decide that pursuing separate litigation is not cost-effective and temporarily forgo collection efforts. Ultimately, it will fall on the other tenant-shareholders to cover the additional costs or shortfalls due to another tenant-shareholder's failure to pay all of his or her "fees, charges or penalties."

Delinquent Tenant-Shareholders Can Now Use Co-ops to "Finance" Their Cash-Flow Needs

Similarly, the HSTPA added § 238-a to the RPL, which precludes a "landlord, lessor, sublessor or grantor" from, among other things, charging late fees that are in excess of $50, or 5% of the monthly rent, whichever is less. This provision will prevent co-ops from charging their customary late fees and interest, which typically exceed $50 per month. The purpose of charging these fees is to encourage tenant-shareholders to pay their maintenance on time. Co-op tenant-shareholders who chronically pay their maintenance late can now take advantage of the new law, and use the co-op to "finance" their other cash flow needs. It will fall on the other tenant-shareholders to cover the deficits created by those who choose to pay, for example, their higher interest rate credit cards first before paying their maintenance.

Managing Agents Could Decide to Cease Processing Purchase Applications Unless the Co-op Agrees to Pay Their Purchase Application Processing Fees

Finally, the new RPL § 238-a also prohibits landlords from charging a fee for processing, reviewing, or accepting "an application" to rent property, except a fee for a background or credit check, which cannot exceed $20 or the actual cost of the background or credit check, whichever is less. A copy of the background or credit check and the receipt or invoice from the entity that conducted the check must be provided to the applicant before the fee can be collected. Moreover, if an applicant provides his or her own background or credit check that was conducted within the past 30 days, then no fee can be charged for the landlord to conduct a check.

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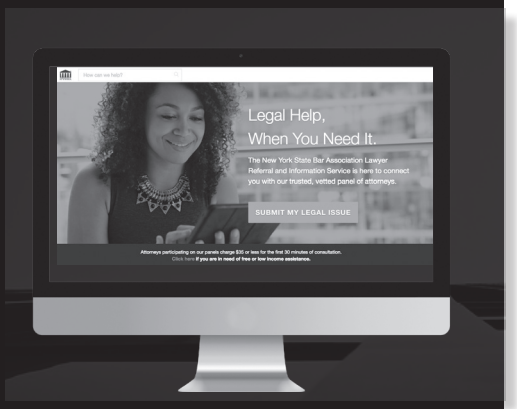

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This provision may be interpreted to preclude co-ops from imposing application fees of more than a nominal amount (which is typically required to compensate managing agents for reviewing and processing purchase applications) or even passing on the actual cost of background or credit checks to potential tenant-shareholders seeking to obtain a proprietary lease. Most co-op application fees run into the hundreds of dollars. Most often, application fees are charged by and paid to the co-op's managing agent rather than the co-op directly. The new law does not expressly prohibit an *agent* of any "landlord, lessor, sublessor or grantor" from charging an application fee that exceeds $20. This raises the question whether managing agents are truly exempt or whether they are merely performing a ministerial task on behalf of the co-op and are also barred from charging more than $20. If the courts determine that the HSTPA does prohibit managing agents from charging their standard application processing fees, managing agents could decide to cease processing purchase applications unless the co-op agrees to pay the managing agent's full fee. This will force co-op boards in the precarious position of either having the entire tenant-shareholder community pay the fee or (more likely) pass it on to sellers.

While, as discussed above, the Legislature has not weighed in on whether the HSTPA was intended to apply to co-ops, in September 2019 the New York Department of State provided a "glimmer of hope" when it issued a "Guidance for Real Estate Professionals Concerning the Statewide Housing Security & Tenant Protection Act of 2019" that addresses this provision.[5] According to the Department of State, the $20 limit does not apply (i) "[w]hen a property is being sold including within a COOP or Condo," and (ii) to "[a]pplication fees imposed by [a] COOP/Condo board (i.e., fees charged by persons other than the unit owner)." Unfortunately, the "guidance" offered by the Department of State is not authoritative or legally binding on the courts. Thus, for now, the limitation on application fees still appears to apply to co-ops.

Conclusion

It is unclear whether the HSTPA was intended to apply to co-ops. What is clear is that the HSTPA has several provisions that, if applied to co-ops, could have significant adverse consequences for co-op management and operations. The examples set forth above are just a few. While there are efforts underway to amend the act to exclude co-ops, the success of those efforts is uncertain and, even if they are ultimately successful, it will take time to play out. In the meantime, co-op boards would be wise to speak to counsel to look for ways to insure compliance with these new laws, while mitigating any negative impact.

"What is clear is that the HSTPA has several provisions that, if applied to co-ops, could have significant adverse consequences for co-op management and operations."

Endnotes

1. *See, e.g.*, *Lincoln Guild Housing Corp. v. Stuckelman*, No. LT058129/91, 1992 WL 12667689 (N.Y. Civ.Ct. 1992) (finding "[w]here the legislature wishes to exclude proprietary leases from coverage by a section of the Real Property Law, it specifically carves out the exception, such as RPL 226-b(3)"); *Southridge Coop. Section No. 3, Inc. v. Menendez*, 141 Misc. 2d 823, 827, 535 N.Y.S.2d 299, 302 (Civ. Ct. Queens County 1988) (stating "the courts have concluded that the language, 'lease or rental agreement for residential premises' is not intended by the Legislature to except proprietary leases from Real Property 235-b").

2. *See 40 W. 67th St. Corp. v. Pullman*, 100 N.Y.2d 147, 155, 790 N.E.2d 1174, 1180, 760 N.Y.S.2d 745, 751 (2003) (finding "the relationships among shareholders in cooperatives are sufficiently distinct from traditional landlord-tenant relationships"); *see also Suarez v. Rivercross Tenants' Corp.*, 107 Misc. 2d 135, 137, 438 N.Y.S.2d 164, 166 (App. Term, 1st Dep't 1981) (quoting *Matter of State Tax Commn. v. Shor*, 43 N.Y.2d 151, 154, 371 N.E.2d 523, 400 N.Y.S.2d 805 (1977)) (stating "the relationship created [between co-ops and tenant-shareholders] has also been called *sui generis*, i.e., peculiar, unique, different . . . As Chief Judge Breitel, writing for a unanimous Court of Appeals, observed (p 156): 'One has, therefore, a mixed concept and terminology, superficially resembling the traditional rental apartment lease, except, for example, that the lessee pays monthly maintenance charges and is subject to assessments instead of rent. For some purposes it is a lease; for others it is a compact between co-operative corporation and co-operative tenant'").

3. Amendment to Housing Stability and Tenant Protection Act, S. 6770, 116th Cong., General Obligations Law (as introduced by S. Liu on the Judiciary, October 9, 2019).

4. *Weisner v. 791 Park Ave. Corp.*, 6 N.Y.2d 426, 434, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959).

5. *Guidance for Real Estate Professionals Concerning the Statewide Housing Security & Tenant Protection Act of 2019*, https://www.dos.ny.gov/licensing/pdfs/DOS-Guidance-Tenant-Protection-Act-9.13.19.pdf (October 23, 2019).

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New York Court of Appeals Case Flips Over Tax Grievance Challengers

By Keith P. Brown and David W. Pernick

Keith P. Brown

David W. Pernick

The New York Court of Appeals recently decided a case that will dramatically change the requirements for initiating review of real estate tax assessments, triggering additional concerns that property owners in New York State should consider when drafting lease agreements. In *Larchmont Pancake House v. Bd. of Assessors*, 32 N.Y.3d (2019), the Court of Appeals ruled in favor of the municipality, finding that the beneficiary to a trust lacked proper standing to authorize the commencement of a tax certiorari action in connection with a parcel of real property that was held in the trust's corpus, when that action was commenced not in the name of the trust or record owner, but in the name of the family business that operated the property and paid the taxes.

Under New York State's Real Property Tax Law (RPTL), a party who is dissatisfied with a property value assessment may seek administrative review by filing a tax grievance with the municipal assessor or board of assessment review. Section 524 of the RPTL requires that a complaint be "made by the person whose property was assessed, or by some person authorized in writing by the complainant or his officer or agent to make such a statement who has knowledge of the facts stated herein." Once an action to grieve property taxes is properly filed, the party may seek judicial review of the tax assessment.

This appeal arose out of four property tax certiorari proceedings challenging the annual tax assessments on real property located in the Town of Mamaroneck and operated as an "International House of Pancakes" restaurant. The property was originally owned by Frank and Susan Carfora, the proprietors of the restaurant (operated under the corporate name, Larchmont Pancake House, Inc.). The Carforas held the property jointly until Frank's death, after which Susan became the sole owner. Susan died in 2009 and the property was transferred to a revocable trust, pursuant to her will. Pursuant to the trust, four years later the property was transferred to an LLC controlled by Carfora's daughters, Irene and Portia. During the four years between Susan's passing and the transfer of title to her daughters, Portia, as petitioner on behalf of the trust, authorized the grievance of the subject property tax assessments filed in the name Larchmont Pancake House. Each action was contested by the municipality based upon the petitioner's alleged lack of standing after four years.

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Ultimately, the Court of Appeals concurred with the local municipality, finding that Larchmont Pancake House lacked standing to bring these actions because, although it paid the taxes, it had no written, legal obligation to do so. Liability to pay the property taxes rested with the trust, not the petitioner. As the Court of Appeals found, the petitioner lacked standing to bring the certiorari proceedings because: (1) it had no direct legal obligation to pay the taxes; and (2) no written right to commence the proceedings. A lengthy dissent criticized the majority for the Court's abandonment of the pleading requirements in a case, which involved a small closely held family business.

This decision will have a dramatic impact on the terms included in commercial and residential lease agreements. Property taxes are generally paid by the tenant as part of their rent payment. However, tax grievance clauses are heavily negotiated among multinational and sophisticated property owners and real estate developers who may not want to afford their tenants the ability to grieve the taxes. The *Larchmont* decision means that the tenant no longer has the right to bring the grievance, unless they *both*: (1) directly pay the property taxes; and (2) have a contractual obligation to do so. Thus, from the tenant's point of view, it would be important to include a section in a lease agreement that expressly grants the tenant the permission to challenge the tax assessment.

The Court of Appeals' decision in *Larchmont* has caused landlords and tenants to more closely examine lease provisions to ensure the right to bring a tax certiorari claim is clearly spelled out and conforms to the *Larchmont* holding. It is no longer sufficient for a tenant to merely pay the property taxes. According to § 524 of the RPTL, to effectively afford the tenant standing to grieve the annual real property taxes, the tenant must be contractually obligated to do so. Without such a contractual obligation, the property owner is the only party with standing to grieve the property taxes.

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IN MEMORIAM

PROFESSOR VINCENT DI LORENZO

The New York State Bar Association Real Property Law Section joins the St. John's Law School community and innumerable family, friends and colleagues in mourning the loss of Professor Vincent Di Lorenzo, who passed away on Thursday, November 28, 2019.

Since 2007, Professor Di Lorenzo served on the Publications Committee of the Real Property Law Section and on the Executive Committee of the Section. Concurrently with his service on these committees, Professor Di Lorenzo served as faculty advisor to the *Real Property Law Journal*'s student editorial board. In the fall of 2019, the student editors presented Professor Di Lorenzo with an award recognizing his years of service to the *Journal* and its student editors.

For almost 34 years, Professor Di Lorenzo was a mainstay on the St. John's Law faculty, teaching courses in property, banking law, real estate transactions, and condos and co-ops to generations of students. He also taught at other institutions, including Fordham Law School.

Professor Di Lorenzo received his J.D. from Columbia University Law School, where he was a Harlan Fisk Stone Scholar and Associate Articles Editor of the *Columbia Journal of Law and Social Problems*. Before joining the St. John's Law faculty in 1986, he was a member of the faculty at the Wharton School of the University of Pennsylvania and was associated with Cadwalader, Wickersham & Taft, practicing in the firm's real estate-banking department. At St. John's Law, Professor Di Lorenzo's academic research focused on behavioral decision theory and non-linear dynamics or chaos theory. He applied those theories in his writings to issues of community reinvestment and development, consumer protection, and corporate ethics and social responsibility. His many articles and books in the field of banking law and regulation, real estate law, and real estate finance include: *The Law of Condominiums and Cooperatives*, *Banks and the Securities Law Volume 5*, *Treatise on Banking Law*, *New York Condominium and Cooperative Law*, and *Basic Legal Transactions*.

In addition to his service to the NYS Bar Association, Professor Di Lorenzo was also a fellow of the American Bar Foundation, and a senior research fellow at the Vincentian Center for Church and Society at St. John's University.

Per the request of Professor Di Lorenzo's family, memorial gifts may be made to the Professor Vincent Di Lorenzo Scholarship Fund at St. John's Law. Donations can be made by way of this link: https://www.stjohns.edu/law-giving (select "Vincent Di Lorenzo Scholarship Fund" on the dropdown menu) or by contacting Brian Woods, Associate Dean for Law School Advancement, at 718-990-5792 or woodsb1@stjohns.edu.

On September 5, 2019, the student editorial board of the ***N.Y. Real Property Law Journal*** and the St. John's Law Real Property Law Society honored **Prof. Vincent Di Lorenzo** for his many years of inspiration and guidance as the ***Journal***'s faculty advisor. (Sadly, please see previous page for a memoriam of Prof. Di Lorenzo.)

On June 5, 2019, current and past staff members of the ***N.Y. Real Property Law Journal*** gathered for an Alumni Reception at Connolly's Pub, Manhattan, which was hosted by ***Journal*** alumni Thomas Maira, Max Patinkin and Sarah Mannix. The ***NY Real Property Law Journal*** and the Mattone Family Institute for Real Estate Law co-sponsored this event.

Bank of N.Y. Mellon v. Slavin: How the Third Department Has Created a Never-Ending Foreclosure Case Using the "Savings Statute" CPLR 205

By Mark Anderson with Andrew Fisher

Introduction

For many, the financial collapse now seems a distant memory.[1] The stock market is soaring, property values are steadily increasing, and unemployment has hit an all-time low. But—like a debris field from a plane crash—the wake of the Great Recession has left homes with mortgages that are seemingly uncollectible. And these dying mortgages are big businesses for many: property investors, mortgage services, appraisers, and, most importantly, the attorneys who steadfastly represent their bank clients with arguments that attempt to reanimate these dead and dying mortgages.

Mark Anderson

Many of these leftover mortgages are now time-barred, unless you ask a bank attorney. If you ask a bank attorney, they will tell you a throng of defenses that have now been rejected or are silly, but remain up for debate, as there has not been a decision on the issue.[2] But, as unbelievable as some of the arguments may seem, there is always one trial court decision that buys the argument and issues a misguided decision.[3] And misguided as it may be, the day after it is issued, the decision becomes gospel for bank attorneys and floods into each motion paper written for the next five years until the Appellate Division steps in to say "enough is enough."

On the forefront of these "creative" arguments raised by banks are cases that cite to *Bank of N.Y. Mellon v. Slavin*, a Third Department case.[4] *Slavin* involved the recommencement of a foreclosure proceeding that occurred after a decision had been rendered against the bank on appeal in the prior case.[5] To expand, the trial court originally *sua sponte* dismissed the first foreclosure action for default pursuant to 22 NYCRR § 202.27 because the Plaintiff-bank failed to appear at a scheduled conference.[6] The Third Department then affirmed the decision.[7] After the decision was affirmed and within six months of dismissal, the bank recommenced an action that was two years past the statute of limitations.[8] The defendant-borrower filed a motion to dismiss the action as time-barred, which was granted.[9] On appeal, a split court determined that the action was timely under the savings statute, CPLR 205(a).[10]

The decision from the Third Department is problematic, however, since CPLR 205 only extends the statute of limitations for six months from the "termination" of the original action.[11] "Termination" occurs when appeals as of right are exhausted.[12] In this instance, the original dismissal was for Plaintiff's default, and no appeal lies from a default dismissal.[13] However, the Third Department extended CPLR 205 to mean that "termination" includes not only motions to vacate dismissal but the appeals that flow from them.[14]

This decision has now opened a floodgate of bank attorneys—in some of the most ridiculous circumstances—filing motions to vacate dismissals of prior cases or just recommencing new actions (or doing both simultaneously), claiming that, since they could potentially file a motion to vacate

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the dismissal of a prior order, they have timely filed the new action.[15]

The *Slavin* decision eviscerates the purpose of the statute of limitations. To be clear, using the *Slavin* decision, the banks are arguing (and the Third Department is apparently agreeing)[16] that if a prior case was dismissed for any reason (other than neglect to prosecute with a detailed discussion of the pattern of neglect)[17] a new action could be recommenced within six months of the appeal of a denial of a motion to vacate that was filed *at any time*.[18] In theory, the bank could wait a decade after dismissal, file a motion to vacate the dismissal, appeal that decision, get a denial in the appeals court, and then file a new case within six months of that denial and the action would be timely.[19]

Andrew Fisher

This article explores this erroneous ruling and its far-reaching consequences.

The Savings Statute—CPLR 205

When litigants fail to diligently pursue their rights, they negate fundamental societal objectives of order and commercial predictability. The New York Court of Appeals has emphasized the importance of the application of statutes of limitation in the application of New York law:

> Our statutes of limitation serve the same objectives of finality, certainty and predictability that New York's contract law endorses. Statutes of limitation not only save litigants from defending stale claims, but also express a societal interest or public policy of giving repose to human affairs.[20]

The statute of limitations for mortgage foreclosure in New York is governed by CPLR 213(4) which states the following actions must be commenced within six years: "an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein."[21]

An action to foreclose a mortgage may be brought to recover unpaid sums that were due within the six-year period immediately preceding the commencement of the action.[22] "[W]ith respect to a mortgage payable in installments, there are separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due."[23] "However, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt."[24] "The filing of the summons and complaint and lis pendens in an action accelerate[s] the note and mortgage."[25] "Once the mortgage debt [is] accelerated, the borrowers' right and obligation to make monthly installments cease[s] and all sums bec[ome] immediately due and payable."[26]

But sometimes, it is not that simple. CPLR 205, known as the "Savings Statute," operates to save a case by letting the Plaintiff file a new case if certain circumstances exist.

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the Plaintiff … may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination.[27]

The Court of Appeals summarized the intent and operation of CPLR 205 earlier this year:

> This provision implements the Legislature's 'policy preference for the determination of actions on the merits' (*Goldstein v. New York State Urban Dev. Corp.*, 13 N.Y.3d 511, 521, 921 N.E.2d 164, 893 N.Y.S.2d 472 [2009]). The statute is remedial in nature and, where applicable, 'allow[s] Plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits where . . . a prior action was commenced within the limitations period, thus putting defendants on notice of the claims' (*Malay v City of Syracuse*, 25 NY3d 323, 329, 12 N.Y.S.3d 1, 33 N.E.3d 1270 [2015]). The Court has also warned that the provision's 'broad and liberal purpose is not to be frittered away by any narrow construction' (*Matter of Morris Invs. v Commr. of Fin. of City of New York*, 69 N.Y.2d 933, 935, 509 N.E.2d 329, 516 N.Y.S.2d 635 [1987], quoting *Gaines v City of New York*, 215 NY 533, 539, 109 N.E. 594 [1915]). 'The effect of the statute is quite simple: if a timely brought action has been terminated for any reason other than one of the . . . reasons specified in the statute, the Plaintiff may commence another action based on the same transactions or occurrences within six months of the dismissal of the first action, even if the

> second action would otherwise be subject to a Statute of Limitations defense, so long as the second action would have been timely had it been commenced when the first action was brought' (*George v Mt. Sinai Hosp.*, 47 NY2d 170, 175, 390 N.E.2d 1156, 417 N.Y.S.2d 231 [1979]). 'The statute by its very terms comes into operation in instances where a proceeding has been terminated for some fatal flaw unrelated to the merits of the underlying claim . . . and it is to be liberally construed' (*Morris*, 69 NY2d at 936, 516 N.Y.S.2d 635, 509 N.E.2d 329).[28]

The essential question is what constitutes a "termination" and, consequently, when the six month tolling period within CPLR 205 begins to accrue.

"Termination"

Without further activity, an action is "terminated" pursuant to CPLR 205 when the action is dismissed.[29] However, if that decision is appealed as of right or if discretionary appeal on the merits is requested and granted, then the accrual under CPLR 205 does not commence until a decision has been entered by the intermediate appeals court.[30] If the plaintiff fails to perfect their appeal or the appeal is dismissed as unappealable, CPLR 205 accrual commences on the original dismissal date.[31] CPLR 205 is not extended if a discretionary appeal from the intermediate court decisions are denied.[32] If the leave to appeal from an intermediate court to a higher court is *granted*, CPLR 205 protection is extended.[33]

In situations where the dismissal is not appealable as of right, such as a dismissal for default or a *sua sponte* order, the termination date is the date the clerk enters the original dismissal order.[34] For example, the rule for *sua sponte* orders flows from the case law that states that no appeal as of right lies from a *sua sponte* order.[35] This analysis does not change and CPLR 205 protection is not extended when the plaintiff files a motion to vacate and it is denied.[36] Logically, the termination date remains the date of the original dismissal since there was no appeal as of right from the original order of dismissal.[37]

The *Slavin* Decision

The 2016 Supreme Court Decision

In October 2006, plaintiff Bank of New York Mellon commenced a mortgage foreclosure action against Defendant Erin Slavin.[38] Defendant later defaulted and the court granted plaintiff a default judgment in August 2009.[39] Thereafter, the court *sua sponte* dismissed the matter for Plaintiff's default pursuant to Uniform Rule § 202.27 after Plaintiff failed to appear at a mandatory conference in January 2013.[40] After Plaintiff again failed to appear at a mandatory conference, the court rejected Plaintiff's law office failure excuse and denied Plaintiff's multiple requests to vacate the 2013 dismissal.[41] In July 2015, the Third Department subsequently affirmed the Supreme Court's denial of the motion to vacate.[42]

In August 2015, plaintiff commenced a second foreclosure action for the same mortgage and note as the 2006 action.[43] Plaintiff moved for summary judgment and was opposed by defendant who noted that the prior foreclosure had been dismissed and that the statute of limitations had run.[44] Plaintiff replied by claiming that the tolling provision of CPLR 205(a) applied and that the new action was timely commenced within six months after the Appellate Division affirmed the 2013 dismissal.[45] Specifically, Plaintiff claimed that the action "terminated" for CPLR 205(a) purposes after the Appellate Division decision affirming the denial of the motion to vacate, not after the 2013 dismissal, and that the dismissal was for a single failure to appear, not neglect to prosecute.[46]

The Supreme Court began its CPLR 205 discussion by first noting that the 2015 action, commenced eight years after acceleration of the mortgage, was either time-barred or saved by CPLR 205, since plaintiff had not revoked its acceleration of the mortgage.[47] The court determined that the 2013 dismissal was based on plaintiff's "overall pattern of neglect, which culminated in the 2013 dismissal after Plaintiff failed to appear at a conference that the Court scheduled solely on account of [P]laintiff taking no steps to move the matter along after it took a default judgment in 2009."[48] The pattern of neglect included multiple missed appearances, including one at a hearing to vacate the dismissal which was based on a failure to appear at a prior conference.[49] The court noted that, while the "dilatory acts in prosecuting the foreclosure action" were not specifically recited, the record could only be taken as neglect to prosecute on the part of Plaintiff.[50] On that basis, the Supreme Court granted Defendant's cross motion for summary judgment and dismissed the complaint.[51]

The 2017 Third Department Decision

Majority

On appeal, after determining that the action was not dismissed for neglect to prosecute, the Third Department focused on whether the six-month period in CPLR 205 began to run after the 2013 dismissal or after the Third Department affirmed the dismissal in 2015.[52] The court immediately noted that the 2013 dismissal was not appealable as of right because it was due to Plaintiff's default.[53] However, the court stated that Plaintiff, "as required," moved to vacate the default, which then permitted Plaintiff to appeal.[54] Based on this, the court determined that the default order did not constitute a final termination of the action under CPLR 205(a) since Plaintiff had saved the action by filing a motion to

vacate which gave it an appeal.[55] The Court further insisted that ruling otherwise would be "procedurally and logically unsound" since "success in the motion court or upon appeal would reinstate the action."[56] Therefore, the court found that commencing the new action in August 2015 was timely because the Third Department had affirmed the dismissal of the motion to vacate in July 2015, which is when the court claimed the action was finally "terminated" under CPLR 205.[57]

Dissent

Justice Aarons wrote a lone dissent, agreeing with the majority that plaintiffs could use CPLR 205, but finding the six-month tolling period in CPLR 205 began to run in July 2013 when the original default dismissal occurred, not in July 2015.[58] Justice Aarons first addressed whether the underlying dismissal was for neglect to prosecute, since this would render CPLR 205 inapplicable.[59] Agreeing with the majority, Justice Aarons found that the 2008 amendment to CPLR 205 required a more severe pattern of delay than what appeared in the record.[60] Thus, Aarons also found that the plaintiff could use CPLR 205.[61]

Second, Aarons addressed when the six-month period of CPLR 205 began to run, noting that "termination" occurs when all appeals as of right are exhausted.[62] Aarons found that no appeal as of right existed from the 2013 dismissal since it was entered upon Plaintiff's default, from which there is no appeal as of right.[63] In Aarons' view, plaintiffs could have recommenced the action within six months of the 2013 dismissal in accordance with CPLR 205, but instead waited two years to use the savings statute after pursuing the appeal of their failed motion to vacate.[64]

Aarons directly disputed the contentions of Plaintiff and the majority in claiming that the six-month tolling period did not run until July 2015 because the motion to vacate the 2013 dismissal gave rise to an appeal from any order deciding that motion.[65] Rather, Justice Aarons noted that the majority cited to zero authority for the proposition that the action did not "terminate" until denial of the appeal in July 2015.[66] Aarons also pointed out the majority's reliance on the general rule that no appeal lies as of right from a default dismissal, without more, and that the majority ignored essential points of the cases it cited to.[67] In particular, Aarons pointed to three cases from both the First and Second Departments stating that "the salient point remains that the actions therein were deemed terminated on the date of the respective Plaintiffs' defaulting acts, even when a motion to vacate the default was timely made." [68] In one sentence, Justice Aarons highlighted the fatal flaw in the majority's analysis.

The majority's misguided holding was not the biggest problem, according to Aarons, who, quite perceptively, feared that the ruling would permit plaintiffs to evade the consequences of default dismissals by following the majority's framework.[69] While Plaintiff could not appeal from the original 2013 dismissal, it would have been able to recommence the action within six months. Rather than taking that route, Plaintiff chose to "focus on whether its default should be vacated" and "apparently wanted to be judged on whether it had a reasonable excuse for failing to appear at the mandatory court conference and a meritorious claim."[70] Because of this, and despite their bad luck on the motion to vacate and subsequent appeal, Aarons found that Plaintiff "should not then be able to invoke CPLR [205(a)] when it had already passed on the chance to do so."[71]

Now, as Aarons points out, according to the majority's ruling "a defaulting party can perpetuate the termination of an action and, with such power, also perpetuate the time within which an action must be recommenced under CPLR [205(a)]," due to the fact that a defaulting party "is not absolutely bound by the one-year period to vacate a default."[72] Though overlooked by the other four justices, Justice Aarons was able to plainly see the issues that have now plagued foreclosure actions with bank after bank attempting to utilize the misguided *Slavin* framework.

Why *Slavin* Was Wrong and the Aftermath

The Third Department stated that CPLR 205 should be extended beyond the appeal of the motion to vacate because the motion to vacate or the subsequent appeal may succeed and reinstate the action.[73] Thoroughly confident in its conclusion, the court stated it would be "procedurally and logically unsound" to conclude otherwise.[74] This, however, is itself logically flawed. Stated differently, the Third Department ruled that even if the request for a motion to vacate is denied, and even if the appeal of a denied motion to vacate is also denied, the mere possibility that either of those routes may have been successful should be enough to extend CPLR 205 beyond those motions, despite the plethora of statutory and case law indicating otherwise.[75] Though it should be unnecessary to explain that the possibility of success under one statute does not change the operation of another statute for conclusory and blanket policy reasons, clearly it has become necessary.

The main point that the majority misses is that where an action is dismissed in a way that is not appealable as of right, filing a motion to vacate has no effect on the "termination" date for CPLR 205 purposes.[76] This point is directly addressed by the dissent in its discussion of *Burns*, *Haber*, and *Jelinek*.[77] As stated by Justice Aarons, "the majority relie[d] on decisions merely stating the general rule that no appeal lies as of right from an order entered on default."[78] But the majority failed to heed the next part of the rule it cited to those cases for. Namely, that all the actions in *Burns*, *Haber*, and *Jelinek* "were deemed terminated on the date of the respective

Plaintiffs' defaulting acts, even when a motion to vacate the default was timely made."[79]

What is worse than the majority misapplying these three cases is the fact that there are many more like them. In fact, it is a well-established New York rule that where the underlying dismissal was not appealable as of right, a motion to vacate that dismissal is also not appealable as of right.[80] Thus, for CPLR 205 purposes, the action terminates after the original dismissal that is not appealable as of right, which has long been held to be the date of termination.

Though he corrects the majority's use of *Burns*, *Jelinek*, and *Haber*, Justice Aarons' dissent does not fully explain why a motion to vacate does not save those cases.[81] Specifically, while the dissent of Justice Aarons revealingly showed how the majority misinterpreted the cases it cited, Aarons also missed a key point in the motion to vacate analysis: CPLR 5701. Pursuant to CPLR 5701(a)(3):

> An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court … from an order, where the motion it decided was made upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice.[82]

What this statute proves is that the majority's policy reasoning behind its decision (and even the dissent's) is completely superfluous. The statute mandates that no appeal as of right manifests out of a motion to vacate if you would not have had an appeal as of right to begin with, and thus intuitively requires that "termination" occurs after the original unappealable dismissal.[83] The logical and procedural concerns of the majority distracted it from following what the legislature mandated.

That said, the policy concerns expressed by the dissent are well worth discussing because, as a result of *Slavin* becoming accepted as good law, those concerns have started to come true. Indeed, *Slavin* has already begun to bleed into other courts and in one case has been misapplied as a binding Second Department case.[84]

Indeed, some trial level courts have used the logic in *Slavin* to deny summary judgment in quiet title actions to remove the mortgages that are the subject of the original foreclosure actions.[85] But, let's play this out. How bad are the implications of the *Slavin* decision? Well, I'll tell you:

In *Gold*, for example, when faced with an action sounding in foreclosure by the plaintiff and a counterclaim for quiet title to void the mortgage from the borrower, the Court determined that both actions should be dismissed because (a) the mortgage was time-barred, and (b) a prior foreclosure action remained "pending" because the time to appeal a *sua sponte* order had not expired.[86] This decision then led to the plaintiff to attempt to vacate the dismissal of the prior foreclosure action[87] and, when denied, appeal that decision.[88] Undoubtedly, after their appeal is rejected, the plaintiff will then commence yet another foreclosure action and argue that it is timely under the *Slavin* interpretation of CPLR 205.

"What this statute proves is that the majority's policy reasoning behind its decision (and even the dissent's) is completely superfluous."

This decision is just one example of the difficult situation that will be created if *Slavin* is sustained by the other Departments and/or the Court of Appeals. A case must end, especially in situations where the law and the facts would indicate that it did.[89] In the end, the Third Department ignored precedents and went with a convenient *deus ex machina* argument for the bank.[90]

The possible far-reaching ramifications of this precedent are very clear: a never-ending case. Anyone who practices foreclosure law in New York has seen a dead or dying case that is well over a decade old. There are seemingly limitless ways that these cases could be disposed. To name a few, CPLR 3215(c),[91] CPLR 3216,[92] 22 NYCCR § 202.27,[93] NYCCR § 202.48,[94] CPLR 3404,[95] Foreclosure Part Rules,[96] the new zombie property laws,[97] discontinuance by the plaintiff, lack of service, or a random *sua sponte* order that really had no basis in law. Whatever the case, there are many and they sit on the court's docket for years as the time to collect the mortgage accrues and only after the time to collect has expired do the banks become reinvigorated by the thought of collecting the mortgage.

How bad could this be? Imagine this scenario: a 2008 foreclosure action is dismissed because of the plaintiff's failure to show up at several scheduled status conferences. The court then issues a decision dismissing the case for the bank's failure to appear. The mortgage is now time-barred. But, not only does the bank not commence a new action within six months, they do not do anything for, let's say, ten years. The homeowner

now wants to sell their property but they obviously do not want to pay the mortgage that is now time-barred. In that case, they would file a quiet title action under RPAPL § 1501 to have the mortgage marked as extinguished.[98]

But now the bank wakes up and realizes someone is going to get a free house and does the following: (1) files a motion to dismiss the quiet title action by saying that CPLR 205 permits the bank to recommence an action within six months of the final decision of an appeal of a motion to vacate the ten-year-old dismissal order that they have not even written yet; (2) they file a new foreclosure action, since, under their theory, a new action would be timely until a final decision of an appeal of a motion to vacate the ten-year-old dismissal order that they still have not written; and, for good measure, (3) they finally file a motion to vacate the ten year-old dismissal order. Under some interpretations,[99] the plaintiff would be able to recommence the foreclosure action within six months of dismissal under CPLR 205. The bank's law firm can be heard chanting "*Slavin*! *Slavin*! *Slavin*!"

The homeowner is now reeling. This litigation is expensive. The motion practice and appeals will go on for years. But they want to sell and are forced to settle, despite their attorney's eagerness to lay waste to the bank's argument.

This example is precisely the reason why *Slavin* needs to be overturned, and quickly.

Whatever the path the bank chooses, there are consequences. Thankfully, the trial courts have seemed to feel the same way. In *Gold*, the plaintiff attempted to revive the old foreclosure case by filing a motion to vacate an aged dismissal order when they had already commenced a new one that was four years beyond the savings statute of CPLR 205.[100] As Judge Lawrence Knipel wrote in response: "the Plaintiff charted their own course."[101] The court is saying the banks cannot have it both ways.[102] Pick a direction and live with the consequences.

But, still, lingering in the background is the *Slavin* decision, giving hope to banks of reviving lifeless cases that banks had no interest in pursuing until the Third Department gave them an easy way out.[103] Hopefully, the remaining Departments and the Court of Appeals shut it down.

For practitioners, there should be no debate as to what can be done when faced with a dismissal order that permits CPLR 205 recommencement. If you are confident that the dismissal was improper and you can vacate the decision, file a motion to vacate and risk having a time-barred case.[104] This should not be a difficult decision for a practitioner that is monitoring its cases, and a client that cares about their collateral. If you are not confident, file a new action and be saved by CPLR 205. It's that simple. To do otherwise, would be "procedurally and logically unsound," to quote the Third Department.[105, 106]

Endnotes

1. While the economy has improved, the foreclosure actions and banking issues that were created by the financial collapse are still playing themselves out in court. One of these issues is the subject of this article.
2. During my career as a foreclosure defense attorney, I have seen a variety of these arguments: (1) *Nationstar Mortg., LLC v. MacPherson*, 56 Misc. 3d 339, 54 N.Y.S.3d 825 (Sup. Ct. 2017) (holding that the discontinuance of a prior action creates triable issues of fact as to whether a mortgage was accelerated), *abrogated by Bank of N.Y. Mellon v. Dieudonne*, 171 A.D.3d 34, 96 N.Y.S.3d 354 (2d Dep't 2019) (holding that extinguishment of mortgagor's right to decelerate mortgage is not condition precedent to mortgagee's acceleration); (2) Matthew B. Nevola, *Foreclosure Madness: Using Mortgage Deceleration to Evade the Statute of Limitations*, 46 Hofstra L. Rev. 1453 (2018) (analyzing bank attorneys' use of discontinuance to decelerate mortgages and evade statute of limitations); (3) *BSD 265, LLC v. HSBC Bank USA N.A.*, No. 504656/16, 2017 WL 2778454, at *3 (N.Y. Sup. Ct. 2017) (partial payment does not renew the statute of limitations); see also *UMLIC VP, LLC v. Mellace*, 19 A.D.3d 684, 799 N.Y.S.2d 61 (2d Dep't 2005) (rejecting Plaintiff's argument that the mere acceptance of a partial payments decelerated the mortgage); (4) *BSD 265,* No. 504656/16, 2017 WL 2778454, *1 (hardship letter submitted for a short sale is not an acknowledgement of the debt that renews statute of limitations); (5) *Wells Fargo Bank, N.A. v Burke*, 155 A.D.3d 668, 64 N.Y.S.3d 228 (2d Dep't 2017) (when mortgage is time barred, lender is not entitled to an unjust enrichment claim for carrying costs due to the voluntary payment doctrine); (6) *Halfon v. U.S. Bank, Nat'l Ass'n*, 169 A.D.3d 653, 93 N.Y.S.3d 675 (2d Dep't 2019) (action commenced by a lender without standing prevents the mortgage from being accelerated and can create a triable issue of fact in case alleging the mortgage is time-barred); and (7) *In re Kurzban*, No. 09-30656, 2017 WL 3141915, *1 (Bankr. S.D. Fla. July 24, 2017) (putting "surrendered" in the statement of intentions in a bankruptcy filing somehow prevents a homeowner from defending themselves in a future foreclosure action). And these are just a few examples.
3. *See, e.g.*, *U.S. Bank v. Taveras*, Index No. 524549/2017 (Sup. Ct. Kings Cnty, April 1, 2019).
4. *Bank of N.Y. Mellon v. Slavin,* 156 A.D.3d 1073, 67 N.Y.S.3d 328 (3d Dep't 2017).
5. *Id.* at 1073, 67 N.Y.S.3d at 330.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1074, 67 N.Y.S.3d at 330.
11. CPLR 205(a) (McKinney 2019).
12. *Malay v. City of Syracuse*, 25 N.Y.3d 323, 328, 12 N.Y.S.3d 1, 4 (2015) (citing *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 N.Y.3d 514, 519, 806 N.Y.S.2d 453, 455 (2005)); *see Lehman Bros. v. Hughes Hubbard & Reed, L.L.P.*, 92 N.Y.2d 1014, 1016-17, 684 N.Y.S.2d 478, 479 (1998).
13. "An aggrieved party or a person substituted for him may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." CPLR 5511 (McKinney 2019).
14. *Slavin*, 156 A.D.3d at 1075, 67 N.Y.S.3d at 331 (2017).

15. *See, e.g.*, *Taveras*, Index No. 524549/2017. *Taveras* further perpetuates the problematic existence of the *Slavin* decision as it erroneously cites *Slavin* as a Second Department case.

16. *Slavin*, 156 A.D.3d at 1075, 67 N.Y.S.3d at 331 (2017).

17. CPLR 205(a) states that "[w]here a dismissal is one for neglect to prosecute the action…, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." (McKinney 2019)

18. *See generally*, *Slavin*, 156 A.D.3d at 1081, 67 N.Y.S.3d at 336 (Aarons, J., dissenting).

19. *Id.*

20. *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 593, 15 N.Y.S.3d 716, 720-21 (2015) (quoting *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 550, 415 N.Y.S.2d 785, 789 (1979) (internal quotation omitted)).

21. CPLR 213(4) (McKinney 2019).

22. *Id.*; *see Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 982, 943 N.Y.S.2d 540, 542 (2d Dept. 2012).

23. *Wells Fargo Bank, N.A. v. Cohen*, 80 A.D.3d 753, 754, 915 N.Y.S.2d 569, 571 (2d Dep't 2011) (internal quotation omitted).

24. *Burke*, 94 A.D.3d at 982, 943 N.Y.S.2d at 542.

25. *Clayton Nat'l v. Guldi*, 307 A.D.2d 982, 763 N.Y.S.2d 493 (2d Dept. 2003) (citing *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 476 (1932); *City Sts. Realty Corp. v. Jan Jay Constr. Enters Corp.*, 88 A.D.2d 558, 559, 450 N.Y.S.2d 492, 493 (1st Dep't 1982)).

26. *Fed. Nat'l Mtge. Ass'n v. Mebane*, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88, 90 (2d Dep't 1994).

27. CPLR 205(a) (McKinney 2019). As a practitioner, one could see how almost every word in this provision could be litigated.

28. *U.S. Bank Natl. Ass'n. v. DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 72, 78, 98 N.Y.S.3d 523, 526 (2019).

29. CPLR 205 (McKinney 2019).

30. *See Lehman Bros. v. Hughes Hubbard & Reed, L.L.P.*, 92 N.Y.2d 1014, 1016, 684 N.Y.S.2d 478, 479 (1998) ("[W]here an appeal is taken as a matter of right, or where discretionary appellate review is granted on the merits, the six-month period does not commence since termination of the prior action has not yet occurred"). The court in *Lehman Bros.* refers to discretionary appellate review on the merits in the context of a case that has already been appealed to an intermediate appellate court. Thus, that case only refers to discretionary appellate review that is granted by an intermediate appellate court, not discretionary review from a trial court. Therefore, the rule applies where an appeal as of right has been filed, or where a discretionary appeal is granted from an intermediate appellate court to review the case on the merits. *Id.*

31. *See Cohoes Hous. Auth. v. Ippolito-Lutz, Inc.*, 65 A.D.2d 666, 667, 409 N.Y.S.2d 811, 812 (3d Dep't 1978), *aff'd*, 49 N.Y.2d 961, 428 N.Y.S.2d 948 (1980) ("The grant of a motion for leave to appeal would result in a continuance of an otherwise terminated proceeding; however, the motion does not otherwise affect the termination of the matter appealed").

32. *Id.* ("[I]t is not the purpose of the statute to permit a party to extend the time to commence a new action by merely taking appellate action").

33. *See supra* notes 29-31. The Court of Appeals picked up where *Lehman Bros.* left off with its 2015 decision in *Malay v. City of Syracuse*, holding that in an appeal as of right "the prior action terminates for purposes of CPLR 205 (a) when the nondiscretionary appeal is truly 'exhausted,' either by a determination on the merits or by dismissal of the appeal…." 25 N.Y.3d 323, 329, 12 N.Y.S.3d 1, 4 (2015).

34. *Jelinek v. City of New York*, 25 A.D.2d 425, 425, 266 N.Y.S.2d 766, 768 (1st Dep't 1966); *Haber v. Telson*, 4 A.D.2d 677, 677, 163 N.Y.S.2d 503, 503 (2d Dep't 1957), *aff›d*, 4 N.Y.2d 687, 171 N.Y.S.2d 83 (1958); *Burns v. Pace Univ.*, 25 A.D.3d 334, 335, 809 N.Y.S.2d 3, 5 (1st Dep't 2006), *lv denied 7 N.Y.3d 705, 819 N.Y.S.2d 872 (2006).*

35. As stated in *James v. Powell*, an order denying a motion to vacate is "appealable as of right only where the prior order, had it been on notice, would have been appealable as of right." 30 A.D.2d 340, 341, 292 N.Y.S.2d 135, 136 (1st Dep't 1968), *aff'd*, 23 N.Y.2d 691, 296 N.Y.S.2d 139 (1968); *see generally Romano v. Boice*, 133 A.D.2d 937, 938, 520 N.Y.S.2d 465, 466 (3d Dep't 1987). "With limited exceptions, an appeal may be taken to the Appellate Division as of right from an order deciding a motion made upon notice when—among other possibilities—the order affects a substantial right." *Sholes v. Meagher*, 100 N.Y.2d 333, 335, 763 N.Y.S.2d 522, 523 (2003). "There is, however, no right of appeal from an ex parte order, including an order entered sua sponte." *Id.*; *see generally U.S. Bank Nat'l Ass'n v. Dorvelus*, 140 A.D.3d 850, 32 N.Y.S.3d 631 (2d Dep't 2016).

36. CPLR 5701(McKinney 2019). *See generally Dunham v. Wing*, 295 A.D.2d 309, 310, 743 N.Y.S.2d 877, 878 (2d Dep't 2002) (holding that trial court's order *sua sponte* dismissing tenant's action was not appealable as of right and refusing to grant leave to appeal as of discretion); *see also Bardel v. Tsoukas*, 303 A.D.2d 344, 345, 755 N.Y.S.2d 648, 649 (2d Dep't 2003) (holding that there was no appeal as of right from an order entered *sua sponte* and denying leave to appeal pursuant to CPLR 5701(a)(2)); *see also Fabozzi v. Coppa*, 5 A.D.3d 722, 723, 774 N.Y.S.2d 555, 556 (2d Dep't 2004) (dismissing an appeal when the trial court's dismissal was *sua sponte* because no appeal of right existed and Plaintiffs did not obtain leave to appeal); *see also Taub v. Schon*, 148 A.D.3d 1200, 1201, 51 N.Y.S.3d 127, 129 (2d Dep't 2017) (holding that there was no appeal as of right when *sua sponte* order directed dismissal and order did not decide a motion made on notice).

37. The dissent in *Slavin* cites *Jelinek*, 25 A.D.2d at 425, 266 N.Y.S.2d at 768 and *Haber*, 4 A.D.2d at 677, 163 N.Y.S.2d at 503 in support of the position that an action not appealable as of right is deemed terminated when the Plaintiff defaults, even when a motion to vacate default is timely made. *Slavin*, 156 A.D.3d at 1080, 67 N.Y.S.3d at 335-36 (Aarons, J., dissenting).

38. *Bank of N.Y. Mellon v. Slavin*, 54 Misc. 3d 311, 312, 41 N.Y.S.3d 408, 409 (Sup. Ct. 2016), *rev'd*, 156 A.D.3d 1073, 67 N.Y.S.3d 328 (3d Dep't 2017).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 313, 41 N.Y.S.3d at 409.

45. *Id.* at 313, 41 N.Y.S.3d at 410.

46. *Id.*

47. *Id.* at 314, 41 N.Y.S.3d at 410.

48. *Id.* at 316, 41 N.Y.S.3d at 412.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Slavin*, 156 A.D.3d at 1074, 67 N.Y.S.3d at 331.

53. *Id.*

54. *Id.*

55. *Id.* at 1075, 67 N.Y.S.3d at 331.

56. *Id.*

57. *Id.* at 1075, 67 N.Y.S.3d at 331-32.

58. *Slavin*, 156 A.D.3d at 1080, 67 N.Y.S.3d at 335 (Aarons, J., dissenting).
59. *Id.* at 1078, 67 N.Y.S.3d at 334.
60. *Id.* at 1079, 67 N.Y.S.3d at 334.
61. *Id.* at 1079, 67 N.Y.S.3d at 335.
62. *Id.* at 1079-80, 67 N.Y.S.3d at 335.
63. *Id.* at 1081-82, 67 N.Y.S.3d at 336-17.
64. *Id.* at 1080, 67 N.Y.S.3d at 335.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1080, 67 N.Y.S.3d at 335-36.
69. *Id.* at 1080, 67 N.Y.S.3d at 336.
70. *Id.* at 1081, 67 N.Y.S.3d at 336.
71. *Id.*
72. *Id.*
73. *Slavin*, 156 A.D.3d at 1075, 67 N.Y.S.3d at 331.
74. *Id.*
75. *Id.*
76. *See supra* notes 35-36.
77. *Slavin*, 156 A.D.3d at 1075, 67 N.Y.S.3d at 331-32.
78. *Slavin*, 156 A.D.3d at 1080, 67 N.Y.S.3d at 335 (Aarons, J., dissenting).
79. *Id.* at 1080, 67 N.Y.S.3d at 336.
80. CPLR 5701(a)(3) (McKinney 2019); *see James v. Powell*, 30 A.D.2d 340, 341, 292 N.Y.S.2d 135, 136 (1st Dep't 1968) (holding that an order denying a motion to vacate is "appealable as of right only where the prior order, had it been on notice, would have been appealable as of right"), *aff'd*, 23 N.Y.2d 691, 692, 296 N.Y.S.2d 139 (1968); *see generally, Romano v. Boice*, 133 A.D.2d 937, 938, 520 N.Y.S.2d 465, 466 (3d Dep't 1987); *In re Scotti*, 53 A.D.2d 282, 285-86, 385 N.Y.S.2d 659, 661-62 (4th Dep't 1976).
81. *Slavin*, 156 A.D.3d at 1080, 67 N.Y.S.3d at 336 (Aarons, J., dissenting).
82. CPLR 5701(a)(3) (McKinney 2019).
83. *See id.*
84. *Taveras*, Index No. 524549/2017 (Sup. Ct. Kings Cty., April 1, 2019).
85. *Bank of N.Y. Mellon v. Gold*, No. 501016/18 at *1, *2 (Sup. Ct. Kings Cty., August 21, 2018) (denying motion for summary judgment in quiet title action).
86. *Id.*
87. *Chase Home Finance LLC v. Gold*, No. 11803/08, at *1 (Sup. Ct. Kings Cty., July 12, 2019).
88. *Id.* (appealing dismissal order of July 12, 2019).
89. *See* discussion concerning objectives of statutes of limitation: finality, certainty and predictability *supra* note 20.
90. *Slavin*, 156 A.D.3d 1073, 67 N.Y.S.3d 328.
91. CPLR 3215(c) (McKinney 2019) (default judgment).
92. CPLR 3216 (McKinney 2019) (want of prosecution).
93. 22 NYCCR § 202.27 (McKinney 2019) (defaults).
94. 22 NYCCR § 202.48 (McKinney 2019) (submission of orders, judgments and decrees for signature).
95. CPLR 3404 (McKinney 2019) (dismissal of abandoned cases).
96. *See, e.g.* Part F, Rule 8 of the Kings County Supreme Court Uniform Civil Term Rules; *see also Bank of Am., N.A. v. McAlpin*, 171 A.D.3d 999, 96 N.Y.S.3d 866 (2d Dep't 2019) (trial court should have considered motion to dismiss under Rule 8, as they did not provide a reasonable excuse for not filing for Judgment of Foreclosure and Sale within one year of obtaining Summary Judgment).
97. *See* RPAPL § 1351 (McKinney 2019) (Plaintiff in a foreclosure action must proceed to sale within 90 days of obtaining Judgment of Foreclosure and Sale); *but see Bank of New York as Trustee Under the Pooling and Servicing Agreement Series 1999-F v. Odzer*, 2996/02, NYLJ 1202715494627, at 1 (Sup., Na., Decided Jan. 5, 2015).
98. RPAPL § 1501 (McKinney 2019).
99. *Slavin*, 156 A.D.3d 1073, 67 N.Y.S.3d 328 (2017).
100. *Gold*, No. 11803/08, at *1-2.
101. *Id.*
102. *Id.*
103. *Slavin*, 156 A.D.3d 1073, 67 N.Y.S.3d 328.
104. *See, e.g.*, CPLR 5015 (a) (McKinney 2019) ("The court which rendered a judgment or order may relieve a party from it upon such terms as may be just…").
105. *Slavin*, 156 A.D.3d at 1075, 67 N.Y.S.3d at 331.
106. The author owes a huge debt of gratitude to the talented members of his staff at Shiryak, Bowman, Anderson, Gill & Kadochnikov, who tirelessly researched this issue while maintaining their caseload in my office. I owe the most to Andrew Fisher, who spent nearly three months going down every rabbit hole to find every possible argument and counter argument, going back to the 1800s. Andrew helped this blog post idea plume into this article. Federica Marini spent hours expertly correcting style and poring over footnotes. Thank you to Brandon Auerbach for his last minute stylistic critiques. And, of course, I want to thank the attorneys at Shiryak, Bowman, Anderson, Gill & Kadochnikov—Dustin Bowman, Alexander Kadochnikov, Matthew Routh, Btzalel Hirschhorn, and Andreas Christou—who have diligently argued these very issues in court. I am proud to work with these courtroom warriors.

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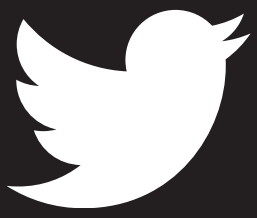

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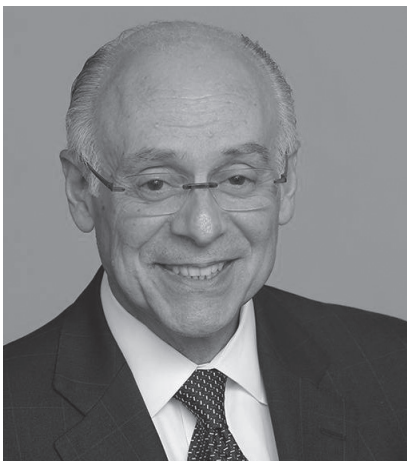
Rules Governing Anticipatory Repudiation of Contracts

By Adam Leitman Bailey and John M. Desiderio

Adam Leitman Bailey



John Desiderio

In the practice of real estate law today, very few legal issues are getting as much attention and at the same time being applied incorrectly by practitioners as anticipatory repudiation (or breach) of contract. To test this thesis, we ran a Westlaw search using the search term "anticipatory repudiation in the real property practice area," and, since 2008, 30 decisions have been rendered compared with a total of 58 decisions from 1920–2007. This article attempts to deliver the rules of anticipatory repudiation and to discard the myths and mistruths.

This is tricky legal territory. Whether a party has anticipatorily breached the contract is not always easy to determine, and, in some cases, the tables may be turned with the court dismissing a party's allegations of anticipatory breach by the other party to the contract, but finding instead that it was the party's own conduct that constituted a prior anticipatory repudiation of the contract, thereby entitling judgment to be entered in favor of its adversary. The judgment in each case is more often based upon the specific facts of the matter and not solely upon the elements prescribed by law.

Anticipatory Breach Defined

As the New York Court of Appeals has succinctly stated, "[a]n anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for…performance has arrived."[1] Clearly, "an anticipatory breach cannot be committed by a party already in material breach of an executory contract."[2]

As further explained by the First Department, "[i]t is well settled law that a contract is not breached until the time set for performance has expired."[3] Or, as the court has stated another way, "[a]n anticipatory breach of a contract is one that occurs before performance by the breaching party is due."[4]

What Constitutes an Anticipatory Breach

An anticipatory breach of a contract—also known as an anticipatory repudiation—"can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.'"[5]

For an anticipatory repudiation to be deemed to have occurred, "the expression of intent not to perform by the repudiator must be 'positive and unequivocal.'"[6] With even more emphasis, the First Department has stated that "[i]t is clear that there must be a definite and final communication of the intention to forgo perfor-

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mance before the anticipated breach may be the subject of legal action."[7]

As the Court of Appeals has noted, if "the apparently breaching party's actions are equivocal or less certain, then the nonbreaching party…is presented with a dilemma, and must weigh hard choices and serious consequences,"[8] such as:

> If the promisee regards the apparent repudiation as an anticipatory repudiation, terminates his or her own performance and sues for breach, the promisee is placed in jeopardy of being found to have breached if the court determines that the apparent repudiation was not sufficiently clear and unequivocal to constitute an anticipatory repudiation justifying non-performance. If, on the other hand, the promisee continues to perform after perceiving apparent repudiation, and it is subsequently determined that an anticipatory repudiation took place, the promisee may be denied recovery for post-repudiation expenditures because of his or her failure to avoid expenses as part of a reasonable effort to mitigate damages after the repudiation.[9]

Repudiation Found Definite and Final

Courts have found a party's repudiation to be a "positive and unequivocal" and/or a "definite and final" expression of its intent to not perform its contractual obligations in the following circumstances:

- Where a defendant vendor refused to close title, the court held this refusal "constituted an anticipatory breach of the contract obviating a need by the plaintiff to tender performance prior to the commencement of the instant action."[10]
- Where a seller refused to schedule a closing and sent a letter to the purchasers stating that seller was "unable to fulfill its obligations under the contract" due to "irreconcilable differences," the seller's letter constituted an anticipatory breach of the contract.[11]
- Where a purchaser of real estate who, upon learning of a cloud on seller's title, scheduled a Time of the Essence Closing (TOE) law date and demanded return of its down payment, knowing that it was impossible, prior to the TOE closing, for seller to cure the title cloud within the seller's allotted 90-day cure period (the First Department held that the "peremptory denial of the sellers' opportunity to cure constituted an anticipatory repudiation of the contract by the prospective buyer").[12]
- Where a party attempted to terminate a contract pursuant to conditions to the transaction that were not provided for in the contract.[13]
- Where a seller declared a contract void and "stated its intention to entertain offers from other buyers."[14]
- Where a landlord sent to a tenant, who wanted to rent more square feet, correspondence, containing new terms to the lease, including increased annual rent, stating "if these provisions are not acceptable, I suggest we terminate our arrangement."[15]
- Where a party sent a letter stating that, if the other party did not grant an extension on the contract's mortgage contingency clause, the party would deem the contract cancelled.[16]
- Where a tenant sued for wrongful eviction, after closing its restaurant business, ceasing all operations, and being locked out by the landlord.[17]

Repudiation Not Definite and Final

There are also cases where the courts hold that what at first glance may appear to be an anticipatory breach is not a repudiation at all.

The Unclear Holding in *Princess Point*

In *Princess Point*, the latest decision by the Court of Appeals on anticipatory breaches, the court addressed the question of whether "the commencement of an action, particularly one seeking rescission, is itself an anticipatory breach."[18] The court held that "where the amended complaint seeks, among other things, reformation of the amendments to the contract and specific performance of the original agreement, there was no positive and unequivocal repudiation."[19] In so holding, the court likened an action for rescission, which seeks to nullify the terms of the contract, to a declaratory judgment action which "would produce a ruling as to the rights of the parties under the terms of the contract."[20] The court reasoned that "[a]t bottom, both actions seek a judicial determination as to the terms of the contract, and the mere act of asking for judicial approval to avoid a performance obligation is not the same as establishing that one will not perform that obligation absent such approval."[21]

While it is true, as the court opined, that both forms of action "seek a judicial determination as to the terms of the contract," it is difficult to conceive of a more unequivocal, positive, definite, and final expression of a party's intention to repudiate a contract than by seeking to rescind the contract.[22]

Nevertheless, in finding no contract repudiation in *Princess Point*, the similarities the Court of Appeals perceived in actions for declaratory judgment and rescission, may ultimately be limited to the "context" of the facts in *Princes Point*, where, as the court itself *twice* noted, the "context" included the plaintiff's amended complaint which sought, among other things, *reformation*

of the amendments to the contract and specific performance of the original agreement—remedies that, in and of themselves, did not bespeak the plaintiff's intention to rescind and terminate the entire contract. Whether courts in future cases will distinguish *Princess Point* on this ground or follow the literal holding of the case without regard to this significant factor remains to be seen.

A somewhat similar situation occurred in *Coney Island Exhaust v. Mobil Oil Corp.*, where Coney Island Exhaust, a tenant of one part of landlord's premises, had sued to enjoin landlord form excavating the other part of its property to construct a gas station.[23] The parties entered into a stipulation which required the landlord to install a concrete barrier or tire stop across the premises. The stipulation was subject to approval by the company that was to supply the gasoline.

The tenant who was to operate the gas station contended that the stipulation was a unilateral modification of its lease and that it constituted an anticipatory repudiation of the lease. The court held that the stipulation did not constitute an anticipatory repudiation of the lease because "the stipulation depended upon the consent of…the proposed oil supplier before it became operative," and, therefore, "the stipulation was not an unequivocal, definite, and final repudiation of the lease agreement."[24]

In addition, "mere expression of difficulty in tendering the required performance, for example, is not tantamount to a renunciation of the contract."[25] In *Children of America*, prior to the commencement of the lease, tenant sent an email to the landlord advising that tenant was experiencing financial difficulties and offered certain options for modifying the terms of the lease. The landlord stopped the construction it was performing at the premises pursuant to the lease, and ultimately terminated the lease.

The tenant commenced an action for the landlord's breach of the lease, and the landlord counterclaimed, to recover damages arising from the tenant's alleged anticipatory repudiation of the lease. The court held that the email "did not constitute an anticipatory repudiation because it was not an unequivocal, definite, and final expression of the tenant's intention not to perform its obligations under the lease."[26]

Retracting Without Liability

A party who has repudiated its obligations under the contract may nevertheless retract its repudiation until the other party has elected to terminate the contract or has materially changed its position in reliance on the repudiation.[27]

In *Dembeck v. Hassler*, the seller had wrongfully repudiated the contract based upon the buyer's failure to obtain a mortgage commitment, but upon learning that the buyer had subsequently obtained its mortgage commitment, the seller retracted its repudiation of the contract.[28] The court held that the seller had "effectively retracted" its repudiation, explaining that, "[t]he effect of the seller's wrongful repudiation was an anticipatory breach that did not put the contract out of existence but merely relieved the buyer of her future obligation to perform, and entitled her to a remedy if her position materially changed before the retraction had been issued."[29] The court noted that there was no issue of fact as to whether the buyer's position had changed, and unanimously upheld summary judgment dismissing the buyer's complaint.

However, in order to be effective, the retraction of the repudiation must be found to be both timely and bona fide.[30]

Election of Remedies

In *Princess Point*, the Court of Appeals noted that it has previously "taught that the party harmed by the repudiation must make a choice either to pursue damages for the breach or to proceed as if the contract is valid," and that "a wrongful repudiation of the contract by one party before the time for performance entitles the non-repudiating party to immediately claim damages for a total breach."[31]

As further explained by the Second Department, in *AG Properties of Kingston v. Bestcorp-Empire Development*:

> When confronted with this attempted [repudiation], the [non-repudiating party] had to choose between two options. It could either (1) treat the termination as an anticipatory breach, consider the agreement at an end and seek damages, or (2) ignore the anticipatory breach, continue to perform the agreement, wait to see if the [repudiating party] would perform when required by the terms of the agreement and, if it did not do so, then bring suit on the subsequent breach. *** In determining which election the non-breaching party has made, "the operative factor…is whether the non-breaching party has taken an action (or failed to take an action) that indicated to the breaching party that [it] had made an election."[32]

Nevertheless, "[t]here is no particular time within which the non-breaching party must make the election,…He may refuse, for a time, to acquiesce in the repudiation, and urge the repudiator to perform without waiving any of his rights," [and] "[t]he repudiator may retract his repudiation until the other party has elected to terminate the contract or has materially changed his position in reliance on the repudiation."[33]

As further explained in *AG Properties,*

> Where a non-repudiating party affords the repudiating party an opportunity to repent, but [the repudiating party] does not do so, the non-repudiating party's subsequent failure to perform is not a breach….The injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his repudiation or to retract his repudiation. (Internal quotations and citations omitted).[34]

However, as the First Department, in *Rachmani Corp.*, has also noted:

> Once a party has indicated an unequivocal intent to forego performance of his obligations under a contract, there is little to be gained by requiring the party who will be injured to await the actual breach before commencing suit, with the attendant risk of faded memories and unavailable witnesses.[35]

Conclusion

As noted at the beginning of this article, cases involving claims of anticipatory breach or repudiation of contract obligations are varied in nature and often involve complex analytical application of straightforward legal principles to convoluted facts, particularly in real estate transactions. Practitioners therefore need to be very careful in how they plead their clients' causes, whether as plaintiff or defendant, to avoid the pitfalls latent in the facts of all such cases.

Endnotes

1. *Princes Point LLC v. Muss Dev. LLC*, 30 N.Y.3d 127, 133, 65 N.Y.S.3d 89, 92 (2017) (quoting 13 Williston on Contracts § 39:37 (4th ed.))
2. *See, e.g.*, *Kaplan v. Madison Park Group Owners, LLC,* 94 A.D.3d 616, 618, 942 N.Y.S.2d 522, 524 (1st Dep't 2012).
3. *Rachmani Corp. v. 9 East 96th Street Apartment Corp.*, 211 A.D.2d 262, 265, 629 N.Y.S.2d 382, 384 (1st Dep't 1995).
4. *Kaplan*, 94 A.D.3d at 618, 942 N.Y.S.2d at 524.
5. *Princes Point*, 30 N.Y.3d at 133, 65 N.Y.S.3d at 92 (quoting *Norcon Power Partners v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463 (1998)).
6. *Id.* (quoting *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 150 (1978)).
7. *Rachmani Corp.*, 211 A.D.2d at 266, 629 N.Y.S.2d at 385. *See also, e.g.*, *Children of Am. (Cortlandt Manor) v. Pike Plaza Assocs. LLC*, 113 A.D.3d 583, 584, 978 N.Y.S.2d 323, 324 (2d Dept. 2014); *Coney Island Exhaust, Inc. v. Mobil Oil Corp.*, 304 A.D.2d 706, 758 N.Y.S.2d 389 (2d Dep't 2003).
8. *Norcon Power Partners,* 92 N.Y.2d at 463.
9. *Id.* (quoting Gregory S. Crespi, *The Adequate Assurances Doctrine after U.C.C. § 2-609: A Test of the Efficiency of the Common Law*, 38 Vill. L. Rev. 179, 183 (1993)).
10. *Yitzhaki v. Sztaberek*, 38 A.D.3d 535, 536-37, 831 N.Y.S.2d 267, 269 (2d Dep't 2007).
11. *Coizza v. 164-50 Crossbay Realty Corp.*, 73 A.D.3d 678, 680, 900 N.Y.S.2d 416, 419 (2d Dep't 2010).
12. *Brum Realty, Inc. v. Takeda*, 205 A.D.2d 365, 367, 613 N.Y.S.2d 372, 374 (1st Dep't 1994).
13. *See Kain Development, LLC v. Krause Properties, LLC*, 130 A.D.3d 1229, 1233, 14 N.Y.S.3d 520, 524-25 (3d Dep't 2015).
14. *See Highbridge Dev. BR, LLC v. Diamond Dev., LLC*, 67 A.D.3d 1112, 1115, 888 N.Y.S.2d 654, 656 (3d Dep't 2009).
15. *See Sunshine Steak, Salad & Seafood, Inc. v. W.I.M. Realty, Inc.*, 135 A.D.2d 891, 892, 522 N.Y.S.2d 292, 293 (3d Dep't 1987).
16. *See Smith v. Tenshore Realty, Ltd.*, 31 A.D.3d 741, 741-42, 820 N.Y.S.2d 292, 293 (2d Dep't 2006).
17. *Pitcher v. Benderson-Wainberg Assocs. II, Ltd. P'ship*, 277 A.D.2d 586, 588, 715 N.Y.S.2d 104, 106 (3d Dep't 2000) (holding that the tenant's conduct "indicated an 'unequivocal intent to forego performance of [its] obligations under [the] contract'").
18. *Princes Point*, 30 N.Y.3d at 133, 65 N.Y.S.3d at 93.
19. *Id.* at 134, 65 N.Y.S.3d at 93.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Coney Island Exhaust*, 304 A.D.2d at 707, 758 N.Y.S.2d at 390-1.
24. *Id.* at 707, 758 N.Y.S.2d at 391.
25. *Children of Am.*, 113 A.D.3d at 584, 978 N.Y.S.2d at 324 (quoting *Rachmani*, 211 A.D.2d at 267).
26. *Children of Am.*, 113 A.D.3d at 584.
27. *See, e.g.*, *In re Randall's Island Golf Centers, Inc.*, 261 B.R. 96, 102, 37 Bankr. Ct. Dec. (CRR) 204 (Bankr. S.D.N.Y. 2001), *decision aff'd*, 272 B.R. 521 (S.D.N.Y. 2002).
28. *Dembeck v. Hassler*, 248 A.D.2d 148, 149, 669 N.Y.S.2d 571, 572 (1st Dep't 1998).
29. *Id.*
30. *See Bykowsky v. Eskenazi*, 2 A.D.3d 115, 769 N.Y.S.2d 216, 217–18 (1st Dep't 2003); *see also Beinstein v. Navani*, 14 N.Y.S.3d 362, 367 (1st Dep't 2015).
31. *Princes Point LLC*, 30 N.Y.3d at 133; *see also Norcon*, 92 N.Y.2d at 462-63.
32. *AG Properties of Kingston v. Bestcorp-Empire Dev.*, 14 A.D.3d 971, 788 N.Y.S.2d 694, 697 (2d Dep't 2005).
33. *Randall's Island*, *supra* note 27 at 101-02. *See also Dembeck, supra* note 28.
34. *AG Properties*, 14 A.D.3d at 974 (*see generally DeForest Radio Tel. & Tel. Co. v. Triangle Radio Supply Co.*, 243 N.Y. 283, 292-293 (1926); *see also* Restatement [Second] Contracts § 257).
35. *Rachmani*, 211 A.D.2d at 266-67.

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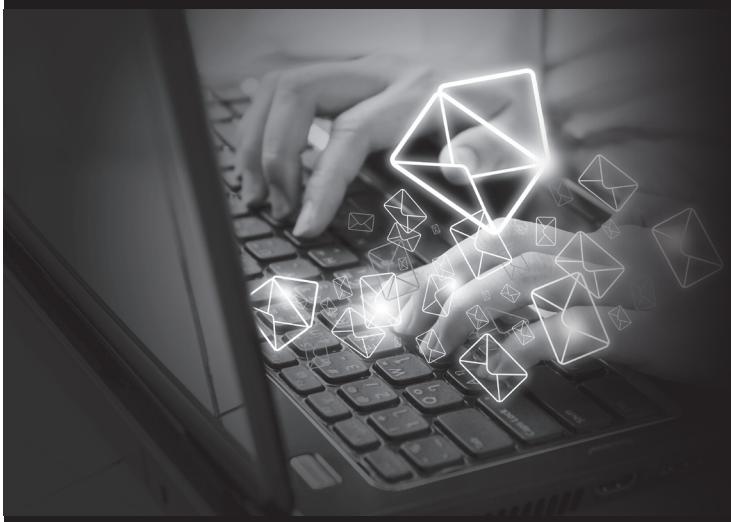

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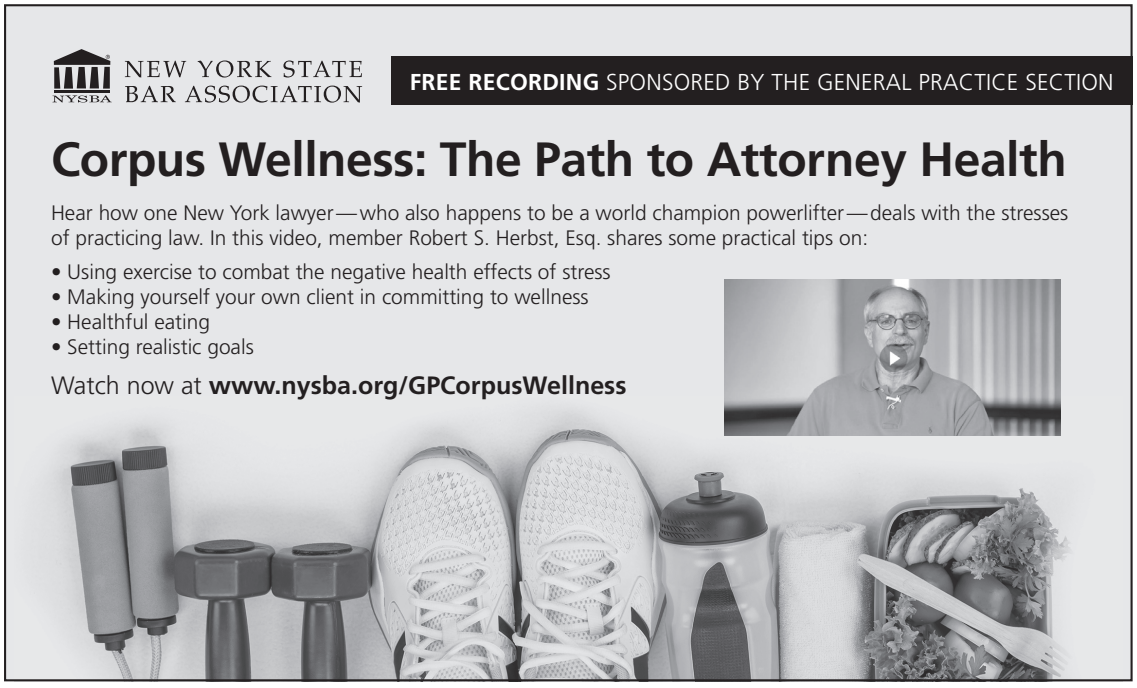

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