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Queens Bar Bulletin

Queens County Bar Association | 90-35 One Hundred Forty Eighth Street, Jamaica, NY 11435 | (718) 291-4500

April 2016 | Vol. 80 No. 4

CPLR Update 2016: Part 2

by David H. Rosen, Esq.

Disclosure

Pegasus Aviation I, Inc. v Varig Logistica S.A., ___ NY3d ___, ___ NYS3d ___, 2015 NY Slip Op 09187 [2015]

The Court of Appeals here endorsed the holding of the First Department in VOOM HD Holdings LLC v EchoStar Satellite L.L.C., concerning imposition of sanctions for spoliation of evidence.[16] Imposition of a sanction for spoliation requires proof of three elements: (1) control over the evidence and an obligation to preserve it; (2) that the party destroyed or lost the evidence with a "culpable state of mind"; and (3) that the evidence was relevant to the claim or defense. "Culpable state of mind" includes ordinary negligence. Relevance is established where the evidence is lost intentionally or willfully, so as to amount to gross negligence; but where the loss is merely negligent relevance must be shown by the proponent of sanctions. Gross negligence, such as to support a finding of relevance, may be shown by serious failings such as not issuing a written litigation hold to employees, failing to identify "key players" and ensure that their documents are preserved, or continuing to delete emails. The distinction between simple and gross negligence thus becomes highly important.

Here, the dispute centered primarily on just that distinction: whether the defendant Varig Logistica ("VarigLog") had failed to preserve electronically stored information ("ESI") due to ordinary negligence or gross negligence.

VarigLog had failed to preserve emails, had not instituted any sort of litigation "hold" to ensure that materials were preserved, did not even have a centralized storage system for emails but stored them on the computers of individual employees, and that such as it did have on a central system had been lost in a series of computer crashes. Supreme Court held that the failure to establish a litigation hold established gross negligence, struck VarigLog's answer, and imposed a trial sanction of an adverse inference upon certain other defendants. The Appellate Division was divided on the issue, but the majority rejected the finding that the failure to establish a litigation hold amounted to gross negligence per se, and reviewing the facts found only simple negligence. The majority held that the plaintiff had failed to show that the missing information was relevant, and struck the trial adverse inference sanction. The majority also noted its view that the adverse inference charge was so strong as to amount to summary judgment.

Continued on page 8

Legislative Update
New York State Senate Passes a Tax Cap

by Geoffrey Mazel, Esq.

As we all are aware, real estate taxes in New York City are rising at an alarming rate. The New York Senate has been proactive in trying to find relief for the residents of New York City in the form of a tax cap from the steep rises in real estate taxes.

In New York City the real estate tax levy is increasing at rapid rate and the City is flush with money. According to an Op-Ed in the New York Post on January 31, 2016 the New York City property tax levy was $8.8 billion in 2002. At present the New York City property tax levy is approximately $22.6 billion and it is expected to rise to $27.7 billion

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Stated Meeting - February 22, 2016

Richard Lazarus-Moderator, Paul Kerson-President, Peter Thomas-Speaker and Ira Hochhauser-Sponsor

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The Docket

Being the official notice of the meetings and programs listed below, which, unless otherwise noted, will be held at the Bar Association Building, 90-35 148th Street, Jamaica, NY. Due to unforeseen events, please note that dates listed in this schedule are subject to change. More information and changes will be made available to members via written notice and brochures. Questions? Please call 718-291-4500.

CLE Seminar & Event Listing

April 2016

Monday, April 11	Judiciary, Past Presidents and Golden Jubilarian Night
Wednesday, April 20	Equitable Distribution Update

May 2016

Thursday, May 5	Annual Dinner & Installation of Officers
Tuesday, May 24	CPLR & Evidence Update 2016
Monday, May 30	Memorial Day – Office Closed

June 2016

Thursday, June 2	Lawyers Assistance Committee Seminar – Tentative

September 2016

Monday, September 5	Labor Day – Office Closed
Monday September 12	Golf & Tennis Outing – Garden City Country Club

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Okeano Noel Ansel Bell	Gardner B. Miller
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Daria M. Frost	MD Golam Mostofa
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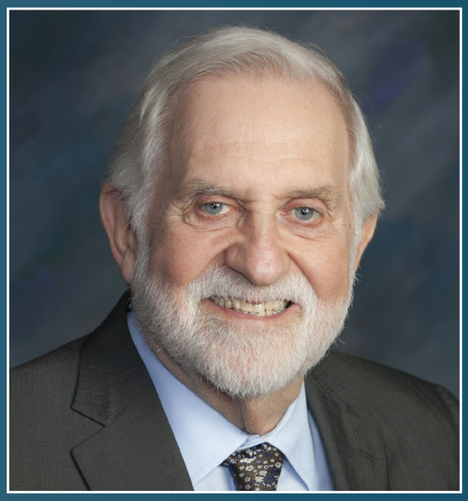

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Former Justice of the Supreme Court, Queens

Hon. Jeffrey D. Lebowitz
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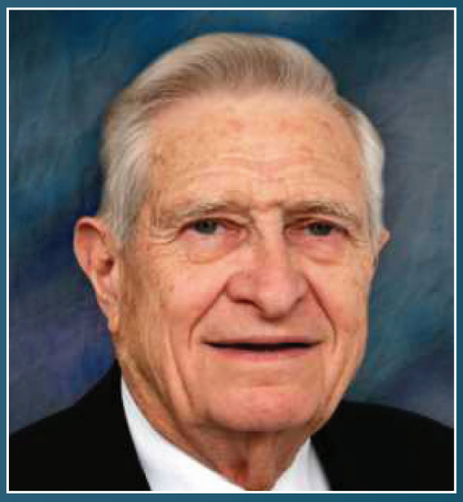

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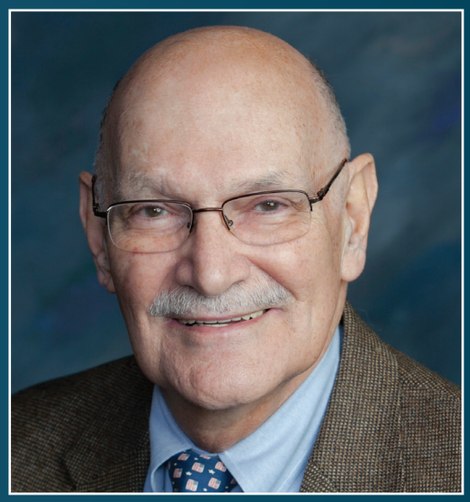

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Editor's Note

Holding Wrongdoers to Account and Welcoming New Writers and Articles

by Charles A. Giudice

Accountability is a concept that has been occupying my mind lately. As lawyers, our role, a few rungs below the loftier concept of "justice" is to hold people to account, both in the criminal and civil arenas.

While the concepts are different, justice is not possible if people and companies are not held to account for their misdeeds.

In theory, that is. In practice, we know that the guilty can walk free, that the wrongdoing party may face no liability or may escape liability even when a judgment against them is handed down.

Even among the lawyers, deadlines are ignored as a matter of routine, myriad adjournments are granted when the other side is unprepared and compromises that leave neither side satisfied are inaccurately held up as an ideal.

Outside of the legal arena, peccadilloes abound. Has there been one political candidate of any stripe, for any office local up to national that has not been found to have misstated or stretched the truth? Do we yet have the full stories on the white collar chicanery (a word I use because crimes have mostly not been charged) that collapsed the economy? Has anybody bothered to offer a plausible explanation of why tuition at colleges and graduate schools continue to rise even as jobs for graduates in their fields of study remain scarce?

This is the opposite of the promise of the "information age" we are supposed to be enjoying. With the advent of the internet and instantaneous communication, public figures could be held accountable for previous statements, and would no longer be able to say one thing before one audience and then the complete opposite before a different group. Performance bonuses would be withheld from executives that preside over massive losses and layoffs.

Instead, stretching the truth has become even more shameless than in past. Profiting from the hardship of others remains unchecked and even celebrated in some company.

As lawyers, we can correct none of this anytime soon. We can and should strive to hold wrongdoers, especially those in positions of power and authority, to account.

Too often, as Shakespeare wrote, "The usurer hangs the cozener." This quote is explained as "the big cheat hangs the little cheat." In my opinion, nobody needs to be held accountable more than the big cheat.

As lawyers, whatever type of practice we pursue, let us strive to, as journalists once did, comfort the afflicted and, where necessary, afflict the comfortable. In doing so, we can do good by doing well.

* * *

I am pleased to be able to say that I have been receiving a steady stream of inquiries from members seeking to write articles. I encourage all members interested in writing on any legal topic to submit articles. All submissions are considered. Articles from panelists in recent CLE classes are especially encouraged, as are accompanying photographs. When submitting articles, please include a headshot and a brief author biography, as well as contact information in case questions arise. When submitting an accompanying photograph, please indicate who took the picture and identify everyone appearing in the photo.

Our association can look forward to hearing from new and diverse voices on various areas of law in the near future. This is a great testament to our continued strength and vitality.

QUEENS COUNTY BAR ASSOCIATION SCHOLARSHIP FUND

Dear Member:

The Queens County Bar Association's Scholarship Fund was created in 2005 to offer financial assistance to law students who are residents of Queens County or who attend law school in Queens County.

The recipients of the QCBA Scholarship are carefully chosen based on academic achievement, community service and/or service to the Bar and financial need and is awarded at the Annual Dinner in May.

I know that times are hard, but I would hope that you could donate to this worthwhile purpose and your tax deductible donation (of any amount) will help to support and recognize a deserving law student(s). The assistance we provide to the future lawyers, many of whom are struggling with enormous debt, also enhances the good name of our Association.

As President of the Queens County Bar Association, I thank you for your support of this valuable community-based program.

Sincerely,
Paul E. Kerson
President

Please make check payable to:

Queens County Bar Association Fund

(all donations are tax detuctible.)

NY, US Lose Sovereignty to Google, Microsoft

In High School, College and Law School we all learned that only the State Legislature and the Governor can change or amend our state laws, and that only the Congress and the President can change or amend our federal laws.

Certainly this basic fact of American life cannot be subject to radical change. Or could it? And certainly any change in this basic structure of government would have to be approved by our state and federal governments. Wouldn't it?

At our eye-opening Stated Meeting this past Feb. 22, 2016, we learned that everything we thought we knew about amendments to statutes has been turned Upside Down.

Consider Article 31 of the NY Civil Practice Law and Rules (CPLR), so familiar to every one of us who regularly appears in the Queens County Supreme Court, Civil Court, Family Court and Surrogate's Court. CPLR Article 31 sets forth the rules for "Disclosure" in civil cases of all types.

Also consider the Federal Rules of Civil Procedure, Title V – Disclosures and Discovery (Rules 26 through 37). Documentary exchange, depositions, interrogatories, physical and mental examinations and discovery motions are the substance of our lives in Federal District Courts, just as they are in State Courts.

Or are they? Enter the invention of Search Engines, led by Google and Microsoft.

This past Feb. 22, Chief Referee and QCBA Treasurer Richard Lazarus and Peter Thomas, Esq. opened our collective eyes to the most basic fact that modern day computer search engines have effectively radically amended CPLR Article 31 and the Federal Rules of Civil Procedure, Title V.

Their message was straightforward: In the technological environment of 2016, the lawyer's job has become a great deal more difficult. Now, it is incumbent upon you to use whatever search engines you can find to "google" every witness, party, juror, attorney, and judicial officer on any case. This effectively adds dozens of hours to the 50 to 60 hour weeks we are already working. This means more employees are required in every law office and law firm, but only if you want to win your cases or achieve better settlements for your clients.

The Governor and State Legislature did not amend CPLR Article 31 to impose this requirement on us. The President and Congress did not amend the Federal Rules of Civil Procedure, Title V.

Google, Microsoft and every other search engine out there passed these Amendments to CPLR Article 31 and Federal Rules of Civil Procedure Title V when we weren't paying close attention. What started out as a children's toy has now taken over our lives.

And worse, there are no statutes governing this completely revised Discovery landscape. Fortunately, Richard and Peter gathered some Guidance for us from NY Pattern Jury Instructions (PJI) and Bar Association formal written Opinions. In their written materials, they provide an article by Justice Cheryl E. Chambers published in Robert L. Haig's masterpiece, Commercial Litigation in NY State Courts, 2015 discussing the Bar Association formal written Opinions.

PJI 1:11 prohibits jurors from using search engines to augment evidence during a trial. Consider the younger juror, who was raised from early childhood with an electronic device in his or her hands 24/7. What is the likelihood that our State and Federal Rules of Evidence have any meaning any more?

NY County Lawyers Assn. Ethics Committee Formal Opinion 743 (2011) states that a lawyer may "google" prospective jurors both during voir dire and trial.

However, NY State Bar Assn. Ethics Opinion 2012-2, 2012 WL 2304271, provides that THE JUROR IS NOT ALLOWED TO KNOW THE ATTORNEY IS DOING SO. If the juror finds out the attorney "googled" the juror, THIS IS AN ETHICS VIOLATION.

So, now we are charged with knowing, IN THE CLICK OF A MOUSE'S SECOND, which web sites notify the juror when "googling" them and which do not.

Practical advice: Don't have your computer in front of you during voir dire. The potential jurors will then know you are googling them. This must be done off site by someone who knows which web sites notify the juror that they have been searched, and to stay away from these sites.

This means we can no longer try cases alone. Another lawyer or paralegal is required, offsite, to "google" the prospective jurors. The entire jury trial process has now been made much more expensive for both sides. Possible solution: Stipulate on the record with your adversary and the judge that neither side will "google" jurors during voir dire, and further stipulate that this is a Court Order.

Peter gave some incredible examples about how these fundamental changes in the laws of discovery change the outcome of cases:

1. In "googling" a juror, Peter found out the juror was a big-time hockey fan. His summation thus contained all kinds of analogies to professional hockey. He won that case.

2. In "googling" the insurance carrier's "expert" witness in a personal injury case, Peter found prior unrelated deposition transcripts that showed beyond doubt that the "expert" REGULARLY misunderstood and misapplied the medical definition of "range of motion." Peter won that case too.

Richard and Peter's Feb. 22 program was digitally recorded by our loyal QCBA staff. We have approved 1.5 Continuing Legal Education (CLE) credits for it. You should not miss this program. It is entitled "Digging up Dirt on Your Adversary's Witness and Other Cool Stuff You Never Thought you Could Uncover." You can get the digital recording and written materials from the QCBA office.

This program is a must-see, as the integrity of the judicial system as we knew it has been thoroughly amended in Silicon Valley, California to the complete exclusion of the Governments we thought we had in Albany, NY and Washington, DC.

-Paul E. Kerson
President

Legislative Update continued from pg.1...

by 2020.

A great deal of this money is coming from homeowners of Cooperative and Condominiums, which currently has no tax cap protections, except for buildings of 10 units or less. The financial burden is having a deleterious effect on the budgets for Coops and Condos and is causing maintenance and common charges to rise at an alarming rate. Real estate taxes can make up 35% to 45% of a Coops budget, whereas ten years ago it typically made up about 15% to 20% of these budgets. Obviously, the impact has been devastating.

One reason for these devastating increases in real estate taxes is the valuation system of real property in New York City. Simply put, Coop and Condo owners have do not have the protection of a tax cap. Currently, residential one, two and three family homes are classified as class one properties under New York State law. The big advantage of being classified as class one is that these properties enjoy tax cap protection from real estate tax increases. Section 1802 of the Real Property Tax Law states in pertinent part that "the assessor of any special assessing unit shall not increase the assessment of any individual parcel in class one…by more than six percent and shall not increase such assessment by more than twenty percent in any five year period."

As a result, the New York State Senate passed S3709-A on January 26, 2016, which limits the tax levy by cities having a population of one million or more to 2% annual or by the cost of living, whichever is less. This cap proposal would put New York City in line with the rest of New York State, which has enjoyed this tax cap protection since January 1, 2012. This bill will then be presented to the Assembly, where it has stiff opposition. However, it is still early in the legislative session. Time will tell.

In addition, there are still several other proposed tax cap legislation that may be voted on in this legislative session. These proposals have been around for several years, but there is still great impetus to see them through. As mentioned in my previous article in 2015, one such bill is S893. This bill would simply classify properties held in Cooperative form for assessment purposes as class one-a properties. The result would be that Cooperative's would be afforded the exact same tax cap protections as one, two and three family residential buildings. However, under this proposal Coops would then be assessed according to market value, which is the manner in which one, two and three family properties are currently assessed. Therefore, the valuation of a Coop unit would then be based on sales prices and not be compared to rental properties for valuation purposes. This legislation passed in the State Senate in last year's session, but was not passed in the Assembly.

In addition, another proposal in the New York State legislature bears bill number S5919 in the Senate. This bill would provide tax cap protection for Coops and Condos with an assessed valuation of less than $75,000.00. The cap would be 6% annual and 25% over five years. The manner in valuating Coops would remain the same as the current system, where they are valued as rental properties.

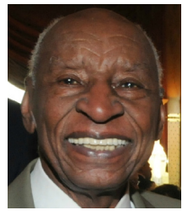
In light of skyrocketing property tax levies by New York City, the pressure to give taxpayers some relief is gaining momentum. The Senate has been proactive and passed legislation this session and in last year's session. It is the hope of the real estate community and the Coop community in particular that the Assembly and Governor can get on Board and pass legislation for a much needed tax cap.

An Ode to (Justice) Joy

By Hon. Cherée A. Buggs

On January 4, 2016, the Queens legal community lost a revered figure in the person of retired Justice of the New York State Supreme Court, the Honorable Daniel W. Joy. A man of small stature, he was nonetheless a "giant" in many respects, not least of which is his place in history as the first – and until this year, only – African-American judge elected in Queens County to have served on an appellate level.

Justice Daniel Webster Joy, born on April 15, 1931 in Middleton, North Carolina, and raised in Glen Cove, New York, received his Bachelor of Arts degree from the State University of New York (Albany) in 1952. After completing a tour of duty in Korea as a member of the United States Army, he decided to study law instead of teaching high school social studies – his original plan. He graduated with an LL.B. degree from Brooklyn Law School in 1957.



After practicing law a short time in Bedford-Stuyvesant, Justice Joy entered government service, where for twenty-five years, he focused on housing matters, beginning with the State Temporary Housing Commission (a predecessor agency to the New York State Homes and Community Renewal), which enforced rent regulation laws and protected rights of tenants, and ending in 1983 with his tenure as Deputy Commissioner of the New York City Department of Rent and Housing Maintenance, a City agency which also had oversight of rent control issues and disputes.

He was elected to the Civil Court of the City of New York, Queens County in 1983, and then to the Supreme Court of the State of New York, Queens County in 1985. Eight years later, Governor Mario Cuomo appointed Justice Joy as an Associate Justice of the Appellate Division, Second Department. His legal erudition, judicial compassion, equanimity and wisdom made it a pleasure for attorneys to try and argue a case before him – and set a strong example for those who would later follow his path to the bench. In fact, because of those very qualities, it was fitting that Governor George Pataki appointed him the New York State Commission on Judicial Conduct in 1998.

Justice Joy retired from judicial service in August 2000 at the age of sixty-nine, but continued to work for the legal community and the community-at-large.

He served with grace and distinction as chair of the New York State Independent Judicial Election Qualification Commission, 11th Judicial District (Queens), from the Commission's inception in 2007, until 2013. He was Chairman Emeritus of the Board of the Macon B. Allen Black Bar Association of Queens County, a member of the Queens County Bar Association, The Judicial Friends and the National Bar Association.

Outside of the legal arena, Justice Joy relished playing tennis and spending time with his wife Ruby, daughter Kathryn, and grandchildren. He was extraordinarily active in the Lutheran church on the local, regional and national levels. Locally, he was chairman of the Stewardship Committee, and was secretary of the Men's Club; he loved to sing, and lent his talents to the church choir. On the national church level, he was involved in myriad boards and groups, including Lutheran Men in Mission. He touched many lives: those who knew him from his church work describe him as "larger than life," "an inspiration," and a "pillar."

Justice Joy was a charter member and Vice President of the Kiwanis Club of Rosedale-Laurelton, a member of the boards of Jamaica Service Program for Older Adults and the Queens Federation of Churches, and a member of the Mayor's Committee on City Marshals, and the Sigma Pi Phi Fraternity. Quite consistent with his life philosophy of giving back to others, Justice Joy, who was raised in a foster home, also served at one point as Chairman of the Board of the Edwin Gould Foundation, an organization with historical ties to an agency with foster care and adoption central to its mission.

With all of his accomplishments, the first adjective that most who knew him well would use to describe him is "gentleman." He was always gracious, approachable and willing to help anyone when he could. For this writer, it was an honor to have known him; I will always feel appreciative and humbled that Justice Joy took time to administer the oath at my ceremonial induction to Civil Court in 2007.

While Justice Joy's passing leaves a void, he leaves a tremendous legacy with the work he did – both in and outside of the legal realm – and with the many lives he influenced. Unquestionably, Justice Daniel Webster Joy will always have a place in Queens County's history; however, he will also be remembered well for his graciousness and magnanimity.

CPLR continued from p.1...

The Court of Appeals held that the record supported the Appellate Division conclusion of simple negligence. Rejecting the idea that the failure to institute a litigation hold, or some other factor, would lead to a per se finding of gross negligence, the Court agreed with the Appellate Division majority that all of the facts led to a determination of simple negligence. It did not, however, agree with the Appellate Division as to the sanction. It found that the majority had ignored the plaintiff's arguments as to relevance. The Court remitted the matter to Supreme Court for further findings as to relevance.

There was a two-judge dissent, which would have found gross negligence. The dissent noted that the Court's opinion fails to define "gross negligence," and would have adopted the standard of the failure to exercise even slight care.

Limitations

Article 78 Proceedings

Matter of Banos v Rhea, 25 N.Y.3d 266, 11 N.Y.S.3d 515 [2015]

The issue was when the four-month limitations period begins to run on a tenant's challenge to the termination of Section 8 benefits by the New York City Housing Authority (NYCHA). It is settled that the time begins when the agency's determination becomes "final and binding." In this context, and given the terms of a federal consent judgment, the Court held that this occurs when the tenant receives a so-called "T-3 letter," whether or not there is proof that the other notices have been sent.[17]

Extension for Prior Action

Malay v City of Syracuse, 25 N.Y.3d 323, 12 N.Y.S.3d 1 [2015]

CPLR 205(a) allows a litigant a six-month extension of the limitations period in which to re-commence an action when suit was in fact timely commenced, but terminated for a reason other than a final judgment on the merits (there are a few other exclusions, not relevant here). In calculating the end point of the extension, it is of course essential to fix the date the first action terminated. The question presented to the Court of Appeals here was where to fix the termination date where the order of dismissal was appealed as of right, but the appeal was dismissed for failure to perfect.

Plaintiff originally sued in federal court, combining federal civil rights claims and state negligence claims. The federal claims were dismissed on September 30, 2011, and the District Court declined to retain jurisdiction over the state-law claims. Plaintiff appealed as of right to the Second Circuit, but failed to perfect her appeal. The Second Circuit dismissed the appeal effective July 10, 2012. The failure to perfect was intentional, the plaintiff having decided that she could proceed to trial in the state courts more quickly than she could prosecute her appeal in the Second Circuit. She commenced her action in Supreme Court, Onondaga County, on June 25, 2012. That is to say, her state court action was untimely if the federal action terminated with the District Court's dismissal order, but timely if it terminated with the dismissal of the appeal.

The Court of Appeals held that the termination date, for purposes of CPLR 205 (a), was the dismissal of the appeal, and the state court action had therefore been commenced within the extension period.

In so holding, the Court followed its earlier precedents, primarily in Lehman Brothers, Inc. v. Hughes Hubbard & Reed, L.L.P.[18] There, the initial action had been in Texas District Court, but had been dismissed on jurisdictional grounds, for lack of minimum Texas contacts, on December 16, 1992. Plaintiff appealed as of right to the Texas intermediate appellate court, the Texas State Court of Appeals, which affirmed the dismissal on June 1, 1995. Plaintiff continued to seek further appellate review in Texas through 1996, but requests to the Court of Appeals for rehearing, to the Texas Supreme Court for discretionary review, and to the Supreme Court for rehearing were all denied. The plaintiff sought a writ of certiorari from the United States Supreme Court, which was denied on June 10, 1996. The plaintiff then sued on the same claims in the New York Supreme Court on July 11, 1996.

Defendant of course moved to dismiss based upon the statute of limitations, and the plaintiff claimed the benefit of the six-month extension of CPLR 205(a). The Court of Appeals held that the six-month extension period does not begin where a party pursues an appeal as of right, or where discretionary review is granted on the merits, since a final determination of the prior action has not occurred. A party cannot, however, defer the commencement of the six-month extension indefinitely by seeking successive discretionary appeals. The six-month extension period in Lehman Brothers therefore commenced on June 1, 1995, when the sole nondiscretionary appeal was concluded, and the New York action was time-barred.

Lehman Brothers and similar cases all involved final appellate determinations on the merits, and Malay involved an appellate dismissal for failure to perfect the appeal. The Court held that the distinction did not require a different result. The appeal, taken as of right, would be held to have terminated when the appeal was over, whether that ending came by way of a determination on the merits or a dismissal of the appeal, for whatever reason. The Court found this approach to be consistent with the remedial nature of CPLR 205 (a), allowing plaintiffs who have timely commenced an action, thereby putting the defendants on notice of the claim, to avoid limitations issues and obtain a determination on the merits. The Court acknowledged the possibility that a nondiscretionary appeal might be taken without any genuine intent to pursue it, merely to prolong the extension period, but found the possibility not significant enough to warrant a contrary result. Rather, the Court noted that the eventual dismissal of the appeal would end the process. The alternative to the Court's ruling would be to require the plaintiff to commence a second action while the appeal of the first was still pending, which would be a waste of both the litigants' and the court's time and resources.

Two additional comments should be made. First, the Court expressly did not rule on whether the dismissal of the plaintiff's appeal could be considered either a "voluntary discontinuance" or a dismissal for "neglect to prosecute," either of which would rule out the six-month extension, since these issues were not preserved for review. Where the dismissal is for neglect to prosecute an action, the 2008 amendment to CPLR 205 (a) requires the dismissing court to specify the conduct leading to the dismissal, which must demonstrate a "general pattern of delay." Whether this applies to the appellate dismissal for failure to perfect is an open question.

Second is a phenomenon related to the possibility of a discretionary appeal. If the initial action is dismissed on the merits, and the intermediate nondiscretionary appeal leads to an affirmance on the merits, the six-month extension begins as of the affirmance, as held in Lehman Brothers. If, some months later, a discretionary appeal is allowed, the extension period will be reset, as the action has still not been finally determined.

Medical Malpractice – Foreign Objects

Walton v Strong Mem. Hospital, 25 N.Y.3d 554, 14 N.Y.S.3d 757 [2015]

The Court of Appeals here reviewed its major precedents concerning the foreign-object rule in medical malpractice cases, arriving at the factors determining when a given object may qualify for the discovery rule codified in CPLR 214-a.

Recall that where a medical malpractice action is based on the discovery of a foreign object in the patient's body, the statute allows for an extension of the limitations period, for a year after the discovery. Excepted from consideration as "foreign objects" are chemical compounds, fixation devices, and prosthetic aids or devices. The cases considered here all involve the interplay between the terms "fixation devices" and "foreign objects."

The plaintiff underwent heart surgery in 1986, when he was three years old. Among the various lines and tubes inserted in his body was a catheter inserted in the left atrium of his heart to measure local pressure. The lines remained in his

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body until three days after the surgery, when they were removed. A nursing note indicated that a portion of the left atrial catheter had broken off and remained in the patient. No indication was given as to why no corrective action was taken at that time.

The fragment of catheter was not found until 2008, when the source of a transient ischemic attack was investigated. The action was commenced within a year of the discovery against the physicians and hospital involved in the 1986 surgery, claiming that the negligent failure to remove the entire catheter caused the plaintiff to suffer a stroke and several transient ischemic attacks.

The defendants moved for summary judgment on limitations grounds. They argued, in part, that the foreign object rule did not apply, since in their view the catheter qualified as a "fixation device," and was not a "foreign object" in that it had been intentionally placed in the plaintiff's body for medical purposes. The plaintiff's view was that the catheter was not part of treatment in and of itself, but was merely the conduit for information to devices outside the plaintiff's body. It could not, in the plaintiff's view, be a fixation device since it neither secured tissues to each other nor provided support for tissues, either temporarily or permanently.

Supreme Court rejected the notion that the catheter had been a "fixation device," but still held that the fragment left behind had not been a foreign object, since it had originally been placed in the plaintiff's body for a medical purpose. The Appellate Division considered that the catheter was in fact a fixation device, within the meaning of the Court of Appeals' precedent in Rockefeller v Moront, in that it was placed in the patient's body to serve a continuing treatment purpose.[19] The essence of a "foreign object," on the other hand, is that it is negligently left behind, without any treatment purpose.[20]

The Court of Appeals reversed, holding that the logic of its precedents made for a narrower definition of fixation device, which did not include the catheter. The Court discerned from its precedents five general principles:

> "tangible items (clamps, scalpels, sponges, etc.) introduced into a patient's body solely to carry out or facilitate a surgical procedure are foreign objects if left behind; (2) the alleged failure to timely remove a fixation device does not transform it into a foreign object; (3) nor does a fixation device become a foreign object if inserted in the wrong place in the body; (4) failure to timely remove a fixation device is generally akin to misdiagnosis, and improper placement of a fixation device is most readily characterized as negligent medical treatment; and (5) the Legislature, in enacting CPLR 214-a, directed the courts not to exploit the rationale supporting Flanagan to expand the discovery exception for foreign objects beyond the rare Flanagan fact pattern, and explicitly commanded that chemical compounds, fixation devices and prosthetic aids or devices are never to be classified as foreign objects." (citation omitted)

The reference to Flanagan is to the seminal case of Flanagan v Mount Eden Gen. Hosp., which involved the classic scenario of a surgical clamp negligently left in the patient's body.[21]

The Court also explained that the term "fixation device" cannot be broadly interpreted to include every item placed in a patient's body for treatment purposes, thus excluding them from consideration as "foreign objects." Sutures, as in Rockefeller, and stents, as in LaBarbera, are "fixation devices" because they serve the purposes of securing and supporting bodily tissues, respectively, and are placed in the body for those treatment purposes. The converse does not necessarily follow: Everything placed in the body for a treatment purpose is not therefore a "fixation device."

Applying these principles here, the catheter was introduced as part of the surgery, but neither secured nor supported bodily tissues. Hence, it was not a "fixation device" and not excluded from consideration as a "foreign object." While not quite matching the classic scenario of Flanagan (the catheter was not removed for three days, and its removal was "botched" instead of forgotten) the facts were sufficiently similar to justify the application of the "foreign object" extension.

The Court therefore reversed the Appellate Division, and the motion to dismiss was denied.

Real Property – Forged Instruments
Faison v Lewis, 25 N.Y.3d 220, 10 N.Y.S.3d 185 [2015]

In a 4-3 decision, the Court of Appeals held here that claims challenging conveyances or encumbrances based on a forged deed are not subject to statutes

of limitations.

The claim here was that the interest of plaintiff's decedent, her father Percy Lee Gogins, had been purportedly conveyed to his sister and niece, the defendants Dorothy and Tonya Lewis, by means of a forged deed, recorded in 2001. Plaintiff clearly knew of the claimed forgery as early as 2002, when she commenced an action to set aside the deed. That first action was dismissed for lack of capacity, since plaintiff was not at that time the administrator of Gogins' estate. In 2009, the defendant Tonya Lewis over $269,000 from Bank of America, secured by a mortgage against the property. By August of 2010, plaintiff had been made administrator of Gogins' estate, and commenced this action against Dorothy Lewis, Tonya Lewis, Bank of America and others, to declare both the deed and mortgage null and void as based on a forged deed. The defendants raised limitations defenses, and moved to dismiss. The plaintiff cross-moved to strike the defenses.

A forged deed is void ab initio, that is, void in its inception, it is a legal nullity and conveys no interest at all in the property it purports to transfer. It follows that the holder of such a document has no interest in that property, and a mortgage granted to that holder also conveys no interest in the property. So much is settled law.[22]

The nullity of a forged deed must be distinguished from the status of a deed which was obtained by fraud. A deed obtained by fraud in the inducement is voidable and not void, and unless and until it is set aside it does transfer title to the fraudulent grantee, who may in turn convey an interest to a purchaser in good faith.[23]

The majority held that the nullity of the void deed led to the conclusion that no limitations period applied. The forged deed being void, its "legal status cannot be changed, regardless of how long it may take for the forgery to be uncovered."[24] Specifically, a forged deed cannot be regarded as simply a fraud, governed by CPLR 213 (8), even though that contains an extension for delayed discovery of the fraud. The Court analogized the situation of a forged deed with that of an illegal contract, also void in its inception, which carries no limitations period. The mere passage of time, or the expiration of a limitations period,[25] cannot have the effect of validating what the law has expressly rejected.

The dissent would have held that the discovery provisions of CPLR 213(8)

Continued on p. 16

Pro-Bono Corner

CLARO-Queens Celebrates Eighth Anniversary

By Mark Weliky, Esq.*

In the years before the financial collapse of 2007-2008 banks were eager to offer credit card accounts to everybody and anybody (remember all of those offers in the mail every week?). Of course, when the economy tanked many of those accounts became delinquent.

Many of those lenders were not interested in having huge collections departments, so they sold many portfolios containing tens of thousands of these accounts to debt collection companies and charged off the debt. These accounts were sold at pennies on the dollar and did not include the documentation necessary to collect legally on the debts in court.

This proved to be no problem for third party debt buyers. They filed millions of collection actions in courts throughout the country. The sheer volume of cases overwhelmed the court systems, which were already facing budget cuts and staffing shortages. This resulted in cases being rubber-stamped by the courts – Plaintiffs didn't have the evidence to sustain a decision in their favor but weren't being required to prove their cases.

A well-documented issue of this era is "sewer service," the practice of process servers not actually effectuating service, but filing false affidavits swearing they did. The defendants, not knowing that they have been sued, lose by default when they fail to appear. Wage garnishments and bank restraints from enforcement of these judgments left many low-income people unable to pay for rent or other basic necessities.

In response to the crisis caused by these practices and the multitude of defendants in these cases who could not afford legal representation the Civil Legal Advice and Resource Office (CLARO) consumer debt clinic concept was born. The Honorable April Newbauer who was then the Attorney-in Charge of the Queens Civil Division of the Legal Aid Society was the person responsible for creating CLARO. At that time as Chair of the City Bar Association's Civil Court Committee she helped form the first CLARO clinic in Kings County. That clinic was a collaboration of the Brooklyn Bar Association Volunteer Lawyers Project and Brooklyn Law School and continues today in its tenth year.

In January, 2008 the CLARO-Queens Consumer Debt Clinic was initiated. CLARO-Queens is a partnership between the Queens Volunteer Lawyers Project (QVLP) and the St. John's University School of Law. Legal information and advice is provided at the clinic by volunteer lawyers, QVLP staff attorneys and with the assistance of volunteer law students. CLARO-Queens recently celebrated eight years of providing free legal assistance to pro-se defendants in consumer debt cases. Over that time the clinic has provided nearly four-hundred clinic sessions providing eight-thousand consultations. CLARO clinics now operate in all five boroughs of the city, in Westchester and in Erie County (Buffalo).

The CLARO-Queens clinic is provided every Friday afternoon beginning at 1:30 at Queens Civil Court, 89-17 Sutphin Boulevard, Room 116 in Jamaica. CLARO-Queens can assist pro-se defendants (persons being sued who cannot afford to hire an attorney) for cases involving credit cards, medical debts, student loans and breach of lease cases which are brought in Queens Civil Court. Consultations are free and no appointment is needed. Clinic visitors will be assisted on a first come first served basis. For more information about CLARO-Queens contact Mark Weliky, MWeliky@QCBA.org, (718) 291-4500 ext. 225.

*Weliky is the executive director of the Queens Volunteer Lawyers Project.

Remembering Fred A. Brue

Born March 6, 1923 in New York City, he was a son of the late August and Helen Brue.

Fred was a World War II U. S. Army veteran, having served his country in the South Pacific.

Fred graduated from Brooklyn Law School and served as Director of the Queens County Bar Association until his retirement in 1986. As a member of the Knights of Columbus, he volunteered for many years with the Food Pantry. He was an avid reader and talented self-taught musician and entertained family and friends playing the piano, guitar, accordion and harmonica. He loved wintering in Puerto Rico with Grace, family and friends, sharing his music and jokes with all.

In addition to his beloved wife, Grace, he is survived by four children: Lorraine Brue and husband Michael Fairhurst of Foxborough, MA, Lawrence Brue and Jeffrey Brue of Flushing, and Glenn Brue and wife Robyn of North Bellmore.

Fred is also survived by seven loving grandchildren: Alexander Fairhurst, John Fairhurst, Lauren Brue, Larry Brue, Jesse Brue, Michael Brue and James Brue.
Fred became the Executive Assistant for the Queens County Bar Association in 1967 and served in that capacity until 1971 when our first Executive Secretary retired. Fred served as Executive Director from 1971 - 1986 when he retired.

Court of Claims Judge, Alexander Del Giorno said the following when Fred became Executive Assistant, "Mr. Brue has an excellent sense of humor, a positive attitude in life, makes friends very easily and acquires the respect of each person he meets."

All qualities we should all strive to emulate.

Arthur N. Terranova

MID-YEAR ABA MEETING

By Joseph F. DeFelice*

The House of Delegates met at a mid-year meeting for the American Bar Association on February 8, 2016 in San Diego, California. A long discussion and debate evolved around Resolution 105 which was opposed by the New York delegation and several other State Bar Associations. This resolution dealt with regulations which a State might choose to develop concerning non-traditional legal service providers. It was thought by many that this might eventually lead to ownership interests in law firms by non-lawyers or corporations. In fact, allowing non-lawyers to provide legal services could result in a suspended or disbarred lawyer being able to provide legal services under the guise of "non-traditional legal service provider". This could render grievance procedures "toothless" in their ability to protect the public. Nevertheless, after a civilized but heated discussion, Resolution 105 was passed by a vote of 237 to 189.

Other matters resolved at the meeting were less controversial. For instance, a Resolution 10A proposed by the NY County Lawyers Association which called for the ABA to urge the Department of Justice and FBI to amend their policies with respect to monitoring emails between attorneys and their incarcerated clients so that they might be able to communicate confidentially via email and thereby maintain the attorney-client privilege was passed. This resolution was the result of policy initiated by the U.S. Attorney's Office when it was headed by Loretta Lynch as a result of her decision to allow monitoring of emails between attorneys and their clients. It is hoped that through some lobbying efforts by the ABA this policy can be reversed and that the attorney-client privilege honored.

The delegates also approved a Resolution proposed by the New Jersey State Bar Association calling for the ABA to lobby for passage of an equal rights amendment.

Other Resolutions which were passed urged the ABA to lobby for expansion of alternate dispute resolution (ADR) processes to resolve health care disputes with an exception dealing with malpractice cases and a resolution calling for all State legislatures to review all statutes criminalizing consensual noncommercial sexual conduct, in private between persons who have the legal capacity to consent and to repeal or amend such statutes to criminalize only sexual acts that are nonconsensual, commercial, public or that involve individuals who lack the legal capacity to consent. That it is believed this would be consistent with the reasoning of the U.S. Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), a landmark decision that struck down the sodomy laws in Texas and 13 other States.

The ABA also went on record to support legislation which would permit foreign in-house lawyers who do not meet the ABA's definition of foreign lawyer because they cannot be members of the bar to be able to practice as in-house lawyers in the United States and to be so registered. A provision proposed by the Law Student Division of the ABA urging bar admission authorities in each State to adopt the Uniform Bar Examination in their respective jurisdictions was also approved.

*Joseph F. DeFelice is a Past President of the Queens County Bar Association with offices in Kew Gardens, New York.

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Scott Kaufman with Daniel and Peter Thomas

Richard Lazarus, Moderator for the meeting
introducing speaker Peter Thomas

Scott Kaufman, Joe Risi, Steve Hans and Alan Kestenbaum

Atendees of Seminar

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Pictures by Walter Karling

Hilary Gingold, Karina Alomar and Mona Haas

Peter Thomas, Speaker for the evening

Paul Kerson-President-making some introductory comments.

Kristen Dubowski Barba, Lisa Mevorach, Hilary Gingold and Mark Weliky

Madison Porzio, ESQ., LL.M., Joins Trusts & Estates Practice at Vishnick McGovern Milizio LLP

Madison Porzio, Esq., LL.M., a resident of Rockaway Park, NY, has joined Lake Success-based Vishnick McGovern Milizio LLP (VMM) in the firm's Trusts and Estates Practice Group. Ms. Porzio concentrates in the areas of Trust and Estate Administration, Trust and Estate Litigation and Estate Tax Planning.

Ms. Porzio's legal experience in estate administration and Surrogate's Court litigation has included court appearances, depositions, settlements, motion practice, accountings, discovery compliance and general case management, among other responsibilities; she also has assisted in guardianships and Supreme Court litigation and has served as Guardian Ad Litem across New York State.

She is admitted to practice law in New York State and is a member of the New York State, Queens County and Nassau County Bar Associations; the Queens County Women's Bar Association; and the Nassau and Queens chapters of the Columbian Lawyers Association. Ms. Porzio earned a Masters of Law (LL.M.) degree in Taxation with a concentration in Estate Planning in 2014 and a Juris Doctor degree in 2012, both from New York Law School. She received a Bachelor of Arts degree in 2009 from California State University, where she majored in Political Science and minored in Pre-Law.

Ms. Porzio's earlier positions included judicial intern to the Honorable Barry P. Sarkisian in Jersey City (2010); mayoral intern to New York City Mayor Michael R. Bloomberg (2010); research assistant to William P. LaPiana at New York Law School (2011-2012); judicial intern to the Honorable Peter J. Kelly, Queens County Surrogate (2010-2011); and law clerk/associate at Laurino Laurino & Sconzo in Garden City, NY (2011-2014). Most recently, she held the position of associate at the Brooklyn, NY law firm Grimaldi & Yeung, LLP from March 2014 until leaving for Vishnick McGovern Milizio LLP.

Founded in 1969, Vishnick McGovern Milizio LLP (VMM) is a full service law firm with offices in Lake Success, New York City and New Jersey. The firm maintains a diverse legal practice with many relationships spanning 40 years or more. VMM clients include businesses, individuals and families, professionals, entrepreneurs, not-for-profits and others who rely on the collaboration among the firm's senior and junior attorneys and highly-skilled staff. Practicing in the areas of Trusts and Estates Planning, Administration and Accounting, Trusts and Estates Litigation, Guardianships, Charitable Bequest Management, Elder Law, Commercial Litigation, Alternated Dispute Resolution, Business and Transactional Law, Exit Planning for Business Owners, Employment Law, Matrimonial and Family Law, Real Estate Law and LGBT Representation, VMM attorneys hold prominent positions on boards of directors and in civic, charitable and professional organizations.

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The Queens County Bar Association (QCBA) provides free confidential assistance to attorneys, judges, law students and their families struggling with alcohol and substance abuse, depression, stress, burnout, career concerns and other issues that affect quality of life, personally and/or professionally.

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Cuomo Fills Second Dep't Vacancies; Brathwaite Nelson Elevated

Governor Andrew M. Cuomo today announced ten appointments to fill vacancies in the Appellate Division of the Supreme Court in all four of New York's Judicial Departments. The justices selected today are a dynamic collection of talent and experience from the trial courts and reflect the excellence and diversity of the judicial system throughout New York State.

"Each of these individuals brings a wealth of knowledge and experience to the state's Appellate Division," said Governor Cuomo. "These justices are each tremendously qualified and have shown a remarkable commitment to justice, and I am proud to appoint them to their new roles. Their service on the bench will benefit New Yorkers for years to come."

The Governor appointed Supreme Court Justices Francesca E. Connelly and Valerie Brathwaite Nelson to fill two vacancies on the Appellate Division-Second Department. The Second Department comprises a ten-county downstate region that includes Kings, Queens, Richmond counties, Long Island and the lower Hudson Valley.

Honorable Francesca E. Connolly

Justice Connolly was elected to the New York Supreme Court for the Ninth Judicial District in 2009. Since her election she has received various judicial assignments including to, the Compliance Conference Part, the Environmental Claims Part, as a Supervising Judge of the Matrimonial Part, and in 2014, she was appointed by Chief Administrative Judge A. Gail Prudenti to the Appellate Term for the Ninth and Tenth Judicial Districts. Justice Connolly also has been elected or appointed to serve as a Town and Village Justice in Ossining and an Acting City Court Judge in Mt Vernon and Yonkers. Prior to her career as a jurist, Justice Connolly was in private practice for nearly 25 years, first as an Associate with MacCartney, MacCartney, Kerrigan & MacCartney, then as Trial Counsel with Gallina & Connolly and finally as a Member of the law firm of Malapero & Prisco LLP. She has also served as an Assistant General Counsel with the New York City Department of Probation and as a Law Assistant to the Deputy Administrative Family Court Judge in Queens County. In addition, Justice Connolly has served as a Deputy Town Supervisor and Town Council Member in the Town of Ossining. She received her B.A. in Social Studies Education/Sociology from the State University of New York at Albany in 1979 and her J.D. from Pace University Law School in 1982.

Honorable Valerie Brathwaite Nelson

Justice Brathwaite Nelson was elected to the New York State Supreme Court for the Eleventh Judicial District in 2004. Prior to her election as a Supreme Court Justice, she also served for two years as a Queens County Civil Court Judge. Before becoming a jurist, Justice Brathwaite Nelson served in a variety of public and private legal capacities, beginning as a Law Clerk with U.S. Congresswoman Shirley Chisholm. Other public sector roles included, as a Law Clerk for the Occupational Safety and Health Review Commission, an Attorney with the National Labor Relations Board, Deputy Counsel with the New York State Department of Labor, an Attorney for New York State Senator Alton R. Waldon, Jr., and as an Attorney with the United State Postal Service. Justice Brathwaite Nelson was also a Senior Associate with Vladeck, Waldman, Elias & Engelhard, P.C. before establishing her own private practice from 1989 to 1999. She has been an active participant and leader in various professional and community organizations, including a former Vice President of the National Bar Association's Labor Law Section and the York College, City University of New York Community Advisory Council. Justice Brathwaite Nelson received her B.A. in Political Science from Syracuse University in 1975 and her J.D. from the George Washington University National Law Center in 1978.

CPLR continued from p.9...

provide a sufficiently long period in which to discover and challenge a forged deed as well as a merely fraudulent one, and that the interests of protecting interests in property against stale claims mandated its applicability here.

Residential Rent Overcharges

Conason v Megan Holding, LLC, 25 N.Y.3d 1, 6 N.Y.S.3d 206 [2015]

The four-year limitations period in CPLR 213-a means that where there is proof of fraud, claims for periods of residential rent overcharges extending beyond the four years preceding the institution of the action are restricted to the four-year period, but are not barred. The Court rejected the defendant's argument that the claim for the overcharge was barred after the renter had paid it for more than four years.

The ruling is apparently limited to cases where there is a colorable claim of fraud against the landlord. The Court cited with approval cases such as Mozes v Shanaman, 21 A.D.3d 854, 804 N.Y.S.2d 3 [1 Dept., 2005], holding generally that overcharge claims accrue with the first overcharge and are barred after four years.[26]

Parties

Standing - Foreclosure Cases

Aurora Loan Servs., LLC v Taylor, 25 N.Y.3d 355, 12 N.Y.S.3d 612 [2015]

The issue in this foreclosure action was whether the plaintiff had adequately proven its standing.

At the inception of the loan, the bank, First National Bank of Arizona, had taken the note, while the mortgage had been given to Mortgage Electronic Recording Systems (MERS) as nominee. MERS did not take the note. The loan was made part of a residential mortgage-backed securitization trust. The allonge attached to the note shows that it was transferred from First National Bank of Arizona to First National Bank of Nevada, to Residential Funding, LLC, and finally to Deutsche Bank, as trustee. The plaintiff, Aurora Loan Services, was given the right to act in Deutsche's name in foreclosure. Aurora claims to have taken physical custody of the note on May 20, 2010, and to commenced the foreclosure action on May 24, 2010. While the mortgage had been assigned to Aurora, in 2009, it is not clear whether or not it took physical possession of the mortgage.

Defendant moved for summary judgment claiming the plaintiff lacked standing. The plaintiff cross-moved for summary judgment. Supreme Court denied the defendant's summary judgment motion and granted the plaintiff's. The Appellate Division affirmed that part of Supreme Court's order.[27]

The Court of Appeals noted that where the defendants in a foreclosure action have contested the issue of standing, the plaintiff must demonstrate that it is the holder of the note at the time of commencement of the action. The physical delivery of the note to the plaintiff will ordinarily be sufficient to confer standing. Physical possession of the mortgage is not required.[28]

"[T]o have standing, it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law. In the current case, the note was transferred to [plaintiff] before the commencement of the foreclosure action — that is what matters." (25 NY3d at 361)

While it is true that possession of the mortgage but not the note does not confer standing, that does not mean that possession of the note but not the mortgage also does not confer standing. To the contrary, a transfer of the note also transfers the mortgage, unless the parties to the transfer agree otherwise.

The Court then addressed the crux of the case: whether the plaintiff had adequately proven that it had the note at the time of commencement of the action. The plaintiff's "legal liaison" had stated in an affidavit that she had reviewed the note, the mortgage and other records kept in the course of the plaintiff's business. She stated positively that the plaintiff had been in possession of the note and the allonge since prior to commencement of the action, and it had not been transferred to any other person or entity. The affidavit was supported by a copy of the note and the allonge.

In the Court of Appeals the defendant argued that the plaintiff should have been required to produce the original of the note, instead of a copy. The problem with this argument is that the defendants never demanded production of the original. The best evidence rule does not apply here. The legal liaison stated that she had personally examined the note, and the chain of ownership of the note through Deutsche Bank had been established. While a fuller description of how plaintiff came into possession of the note would have been "better practice," it was still not error for the court to grant summary judgment to the plaintiff.

16. VOOM HD Holdings LLC v EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S.2d 321 [1stDept., 2012],

17. The consent judgment was in Williams v NYCHA, (USDC SDNY, 81 Civ 1801, Ward, J., 1984); See, Williams v New York City Hous. Auth., 975 F Supp 317 [SDNY, 1997]. The relevant terms may be summarized as:

"First, after a preliminary determination that there exists a basis for termination, NYCHA must send the participant a warning letter specifically stating the basis for the termination and, if appropriate, seeking the participant's compliance. Thereafter, if the conditions which led to the preliminary determination have not been remedied within a reasonable time, NYCHA must send a second written notice, the Notice of Termination [called a T-1 letter], by certified and regular mail, stating the specific grounds for termination and informing the participant that he or she may request a hearing (and an optional pre-hearing conference). If the participant does not respond to the Notice of Termination or T-1 letter, NYCHA is required to mail a Notice of Default [called a T-3 letter] advising the participant that the rent subsidy will be terminated and the grounds therefor and affording the participant another opportunity to request a hearing. If the participant takes no action after the Notice of Default or T-3 letter, the rent subsidy will be terminated on the 45th calendar day following the date of mailing of the Notice of Default. If, however, a participant requests a hearing after the 45-day period, the participant's default may be reopened 'upon a showing of good cause.'"

Matter of Banos v Rhea, 25 NY3d at 274, quoting Matter of Fair v Finkel, 284 AD2d 126, 127-128 [1st Dept 2001] [footnotes omitted]

18. Lehman Brothers, Inc. v. Hughes Hubbard & Reed, L.L.P., 92 NY2d 1014, 684 NYS2d 478 [1998].

19. Rockefeller v Moront, 81 N.Y.2d 560 [1993]

20. LaBarbera v New York Eye & Ear Infirmary, 91 N.Y.2d 207 [1998]

21. Flanagan v Mount Eden Gen. Hosp., 24 N.Y.2d 427 [1969]

22. Marden v Dorthy, 160 N.Y. 39 [1899]

23. Marden v Dorthy, 160 N.Y. at 50

24. Faison v Lewis, 25 N.Y.3d at 226

25. Riverside Syndicate, Inc. v. Munroe, 10 N.Y.3d 18 [2008]

26 Mozes v Shanaman, 21 A.D.3d 854, 804 N.Y.S.2d 3 [1 Dept., 2005]. Curiously, in Nur Ashki Jerrahi Community v. New York City Loft Bd., 80 A.D.3d 323, 911 N.Y.S.2d 356 [1st Dept., 2010], the First Department held that Mozes was "essentially rejected" by its later decision in Matter of Hicks v. New York State Div. of Hous. & Community Renewal, 75 A.D.3d 127, 901 N.Y.S.2d 186 [1st Dept., 2010]. The holding of Hicks was that the four-year limitations period does not apply to rent-controlled leases, but only to rent-stabilized ones. It would seem that the general holding of Mozes remains valid, if not it's specific application.

27 There was a second issue before the Appellate Division, concerning whether Supreme Court should have granted a judgment of foreclosure and sale without holding a hearing on the amount due. Supreme Court had done so, and the Appellate Division reversed that order. This issue was not before the Court of Appeals.

28 "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident." U.S. Bank, N.A. v Collymore, 68 AD3d 752, 754 [2d Dept 2009]

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