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Queens Bar Bulletin

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

FEB 2016 | Vol. 80 No. 3

CPLR Update 2016: Part 1

by David H. Rosen, Esq.

Appellate Practice

Mootness

Matter of Veronica P. v Radcliff A., 24 N.Y.3d 668, 3 N.Y.S.3d 288 [2015]

The Court of Appeals holds here that an order of protection from the Family Court, based on a finding of a family offense, is not rendered moot and unappealable solely because it has expired. The continuing consequences to the respondent, both in legal proceedings and to his reputation, require the availability of appellate review. Even though the terms of the order do not contain an explicit finding of guilt, the issuance of the order itself implies a finding of a family offense, which may work against him in future proceedings. The underlying oral decision, containing the explicit finding, is likely to come to light and have adverse consequences. The order remains in police databases, and increases the likelihood of his being arrested in the future. Moreover, the order carries with it the stigma of a family offender, and adversely affects the respondent both socially and in the job market.

Therefore, the Court reversed the order of the Appellate Division dismissing the appeal for mootness, and remitted for a consideration of the merits.

The Court noted that it was stopping short of a blanket holding that appeals from all expired orders of protection are not moot.

Article 78

Respondent's Answer

Matter of Kickertz v New York Univ., 25 N.Y.3d 942, 6 N.Y.S.3d 546 [2015]

In an Article 78 proceeding, if the respondent raises objections in point of law by pre-answer motion, and the motion is denied, "the court shall permit the respondent to answer."[1] Despite the mandatory language there is an exception, recognized in Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County, which allows the answer to be bypassed where the facts are so fully developed in the parties' presentations as to be undisputed, and where there will be no prejudice from taking the shortcut.[2] In BOCES, for example, the objection in point of law had been to standing, and while the papers developed the facts they did not clearly rule out

Continued on page 8

Holiday Party 2015

Pictured left to right, Paul E. Kerson– President, QCBA, Hon. Maureen A. Healy–Qns Chapter President, St. John's School of Law Alumni Assn, Karina E. Alomar–President, Latino Lawyers Assn of Qns County, Jay M. Abrahams–Past President, Brandeis Assn, Lourdes M. Ventura–President, Qns County Women's Bar Assn, Michael J. Hartofilis– President, Hellenic Lawyers Assn, Jawan N. Finley –Vice President, Macon B. Allen Black Bar Assn. See additional pictures from party on page 12 & 13.

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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

March 2016

Friday, March 25	Good Friday – Office Closed
Wednesday, March 30	Judicial Relations Committee Seminar

April 2016

Thursday, April 7	Sports & Entertainment Law Committee Meet & Greet
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
Monday, May 30	Memorial Day - Office Closed

New Members

Eric L. Brown	Jennifer Lundgren
Jonelle Casey	Michael Mascetti
Brandon S. Clark	Marina Virginia Moreno
Leor Oved Edo	Enrique A. Ochoa
Jason Eisenfeld	Anthony J. Perrotto
Eviana Englert	Jessica Seminario
Sarah Filcher	Rachel R. Shamalov
Sha-Quia Francis	Carolyn Shields
Dale Frederick	Ruben Stepanian
Michael J. Golia	Marta Trojanowska
Joseph F. Keenan	Vitaliy Usten
David Ko	Feng Xia
Barbara Lucas	Wa Lucia Yang

REPORT OF THE NOMINATING COMMITTEE

The Nominating Committee of the Queens County Bar Association, after due and timely notice, in accordance with the provisions of the By-Laws of the Queens County Bar Association, have nominated the following list of members for the positions to be filed at the coming election at the Annual Meeting of the Association on March 4, 2016.

TO THE QUEENS COUNTY BAR ASSOCIATION:
We, the undersigned, members of the Nominating Committee do hereby respectfully report that pursuant to the provisions of Article VI, Section 3, of the By-Laws of the Queens County Bar Association, we have nominated for the respective offices the following named members:

OFFICERS 2016-2017
For President GREGORY J. BROWN
For President-Elect GREGORY J. NEWMAN
For Vice President HILARY GINGOLD
For Secretary MARIE-ELEANA FIRST
For Treasurer RICHARD H. LAZARUS

FOR FOUR MEMBERS OF THE BOARD OF MANAGERS FOR A TERM OF THREE YEARS (expiring May 31, 2019)

MICHAEL D. ABNERI
FRANK BRUNO, JR.
KRISTEN DUBOWSKI
CHARLES A. GIUDICE

FOR ONE MEMBER OF THE BOARD OF MANAGERS FOR A TERM OF THREE YEARS AS IMMEDIATE PAST PRESIDENT (expiring May 31, 2019)

PAUL E. KERSON

NOMINATING COMMITTEE

David N. Adler	Seymour W. James, Jr.	Richard M. Gutierrez
George J. Nashak, Jr.	Chanwoo Lee	Gary F. Miret
Guy R. Vitacco, Jr.	Paul Pavlides	James R. Pieret

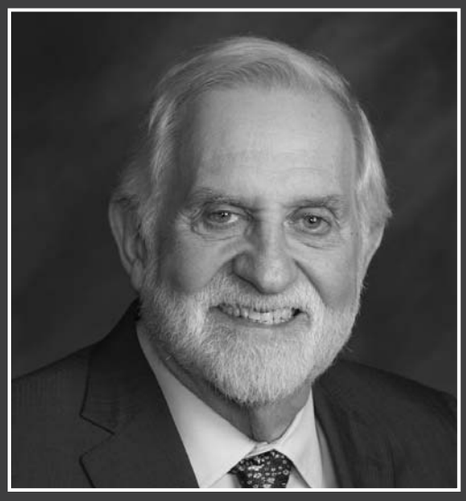
The following members have been designated by petition, pursuant to the By-Laws of the Association, as candidates for election to the office of members of the Nominating Committee to serve for a period of three years (expiring May 31, 2019)

DAVID L. COHEN JOSEPH J. RISI ELISABETH A. VREEBURG

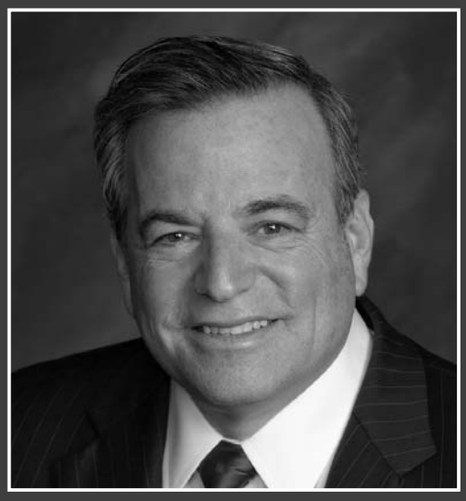
THE ANNUAL MEETING of the Queens County Bar Association will be held in the Bar Headquarters Building, 90-35 148th Street, Jamaica, New York on FRIDAY, MARCH 4, 2016, at 4:00 P.M. The election of officers will take place at that time, together with such other business as may regularly come before the meeting. SINCE NO INDEPENDENT NOMINATIONS HAVE BEEN FILED WITHIN THE TIME LIMITED BY THE BY-LAWS, THE ELECTION WILL BE PRO FORMA.

Dated: Jamaica, N.Y. | February 10, 2016

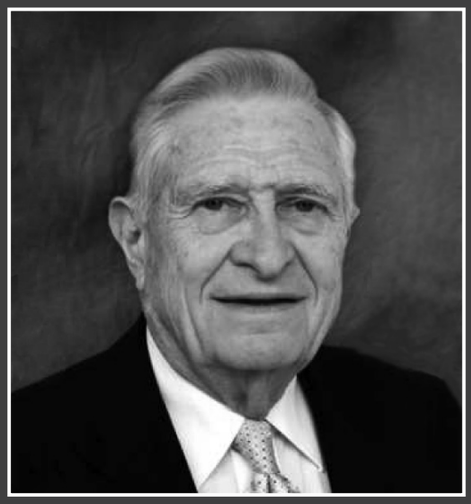
Supreme Confidence.



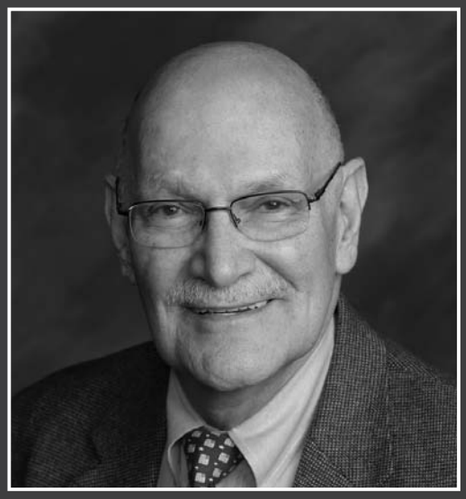
Hon. Sidney F. Strauss
Former Justice of the
Supreme Court, Queens



Hon. Jeffrey D. Lebowitz
Former Justice of the
Supreme Court, Queens



Hon. James P. Dollard
Former Justice of the
Supreme Court, Queens



Hon. Roger N. Rosengarten
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Supreme Court, Queens

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Editor's Note

We need content! Send us your articles and court decisions!

by Charles A. Giudice

I recently had business in Kings County Supreme Court, so I made sure when I was done to pick up a copy of The Brooklyn Eagle.

This is not the original Eagle – not the one dating to the mid-19th century; not the one that was edited by Walt Whitman. That paper folded in the 1950s. This new paper changed its name when the Eagle name fell into the public domain.
Still, it has been publishing for 20 years – having begun under its original name in 1996 according to Wikipedia – and has more than 20 full-time editorial staff. In this day and age, that is significant. The paper must be doing local coverage right if it has survived.

One feature immediately stood out. The back page was devoted not to sports, but to doings in the courts and local bar association. An entire article with picture was written about a recent CLE seminar held by the Brooklyn Bar Association.
This may have been because I was looking at the special courthouse edition (another jaw dropping moment for me), but I was still impressed. The article contained quotes from the committee chairman about why he thought the topic for the seminar was relevant and tied it in to developments in the Brooklyn community at large. It also provided information about the Brooklyn Bar's upcoming CLE schedule.

Until someone with the money and guts to lose a lot of it starts up a daily newspaper devoted entirely to Queens, it is unlikely that any daily newspaper will pay the local legal community that kind of attention.

Queens has many weekly newspapers (including the Queens Ledger, with whom we share a publisher), but these local sheets simply lack the resources to delve that deeply into one niche area. I say this with knowledge from having worked at a local weekly newspaper upstate some years ago.

This is the raison d'etre for the Queens Bar Bulletin. As a paper that comes out once a month for some of the year (if that), we are not likely to feature breaking news. We exist to delve deeper into topics that are most likely to interest only lawyers. It probably won't be news that a law has changed, for example, but it will be of interest to see how the change is being applied and analyzed locally.

That is why this edition of the Bar Bulletin features two decisions from the referees in the foreclosure settlement part. It's a window into an area of law that has seen some recent developments. It also highlights the work of the Queens Volunteer Lawyers Project, which has been working to prevent foreclosures here since 2008. We are well aware that there are many other important and interesting areas of law. That is why we are officially soliciting decisions from practitioners and court personnel. This is the same method, by the way, that the New York Law Journal uses in publishing its decisions.

The main idea is that these decisions be of significance outside of the particular case. If, as a lawyer, you believe the decision you received will be of benefit to others litigating in that area, send it in. If it is a routine decision, done with a court's form, then that is not what we are looking for, however beneficial it may be to your client.

If you are a judge or court attorney, and you believe the Court has authored a decision whose significance may not have been grasped, please send that to us as well.

All contributions should be full and complete copies, in PDF form, with the signature of the judge and the court stamp visible. Please also tell us who the attorneys on both sides were, along with their affiliations, and a few sentences as to why you believe this decision is significant and worthy of publication.

This is not only another way to promote yourself as an authority in your area of practice. It is a service to the bar association, and the wider profession.
It also has the benefit of helping us to fill these pages.

The last issue of the Queens Bar Bulletin featured articles from both newcomers and stalwarts. It was an impressive amount of law, in a variety of practice areas. I am thankful to the membership for responding to our initial call for articles. I hope, though, that this was not the extent of that response. We need articles every month in order to publish on a regular schedule.

If you are still thinking about writing an article for us, please give it a try. The subject matter does not have to be from your primary area of practice. Footnotes are welcome and encouraged, but not required depending on the subject matter of the piece. As always, I remain available to discuss potential topics with writers. I can be reached by email at cgiudice@qcba.org.

Finally, now that the holidays have passed, the CLE calendar will begin to fill up again. I urge committee chairs and attendees to consider writing pieces about these programs. Why did the committee choose to present on that particular topic? Does it relate to current events in Queens outside of the legal sphere? Why did the committee select the panelists? Do you consider the program to have been a success? Does the committee plan any other events this year?

This paper is our historical record. If we want this history preserved correctly, as it has been throughout the history of our association, we must do it ourselves.
I look forward to reading articles from many new writers in 2016.

President's Message

The Best Judicial Opinion

As your President, I have the privilege to be invited to dozens of Bar-related dinners around the metropolitan region to represent the good will of our Association.

I have represented our Bar Association at the Brooklyn Bar Association, the New York County Lawyers Association, the Catholic Lawyers Guild of Queens County, the Brandeis Association, the Columbian Lawyers Association, the Latino Lawyers Association, the Queens County Women's Bar Association, the Nassau County Bar Association, the Suffolk County Bar Association, the Flushing Lawyers Club, the Long Island City Lawyers Club and the Network of Bar Leaders.

But the most meaningful dinner of all was the 90th Birthday Celebration of retired Queens County Supreme Court Justice John Milano.

In my judgment, Justice Milano was the author of the best judicial opinion I have ever read, People v. Partap Singh, 135 Misc. 2d 701, 516 N.Y.S. 2d 412 (New York City Criminal Court, Queens County 1987). I was not the prosecutor or defense counsel. But this case was the talk of the courthouse in 1987.

The facts were these: On Jan. 16, 1986, Transit Police Officer Anthony Grimaldi issued a summons to Sikh Priest Partap Singh in the Main Street subway station in Flushing. Mr. Singh was carrying a sword, called a kirpan, a symbol of the Sikh faith.

However, carrying an exposed sword or blade or knife outside one's clothing in a public place is a violation of New York City Administrative Code Section 10-133(c), punishable by a $300 fine and/or 15 days imprisonment.

Justice Milano opened his written opinion this way: "When does an individual's First Amendment right to freedom of religion yield to the State's duty to protect its citizens?"

Having succinctly framed the question, Justice Milano went on to explain the details of the Sikh religion and the New York City Council's legislative findings in enacting Administrative Code Section 10-133(c). Sikhs do not cut their hair, but wear it proudly in a turban.

He then summarized the findings of other courts that have considered this question with reference to the religious practices of several different religions. He found, as a matter of law, that "This court must therefore use a delicate balancing test to determine the propriety of this prosecution."

Justice Milano went on to explain the international nature of the Queens County population. He found that "it therefore becomes incumbent upon this court to effectuate a fair and rational balance between religious freedoms and the enforcement of criminal statutes designed to protect, among others, the very citizens and residents who now assert their religious right to observe certain customs and traditions inherent in their faith."

Then, in what may be the most creative use of judicial power I have ever seen, Justice Milano held: "Perhaps a solution to the problem can be advanced by this court: A 'symbolic kirpan' encased in a solid protective element such as plastic or lucite would remove it from the category of knife or weapon, thereby relieving the wearer from the liabilities inherent in Administrative Code Section 10-133…"

While finding that the District Attorney had the right to bring these charges, Justice Milano concluded "that the continuance of this prosecution would not be in the furtherance of justice and that dismissal is required as a matter of judicial discretion." And this was done sua sponte, on the Court's own initiative.

In the 1990s, I had occasion to discuss People v. Partap Singh with Justice Milano. He told me that the Queens County Sikh Community was more than pleased with his decision, and that he had become a hero among Sikhs.

Particularly instructive for our cyber-age of fast-paced change, in 1987 Justice Milano showed us how to integrate the 18th century idea of the First Amendment with the 20th century technology of the subway train. Certainly no one in 18th century New York could have imagined the massive underground and elevated railroad that came to define the greatly expanded five-county City in the 20th century.

Justice Milano's creative idea of using plastic or lucite non-removable casing to cause a sword to not be a sword is the kind of thinking that will allow this century's judges to integrate cyber-space with the principles of the First, Fourth, Fifth and Sixth Amendments.

Reading between the lines, Justice Milano's opinion in People v. Partap Singh says to the world: New York City will welcome you and accommodate you, no matter how culturally diverse your practices. Your diversity is our greatest strength. This is why the most energetic and creative people in the world want to live and work in our City and country.

So it came to pass, 28 years after he wrote his opinion in People v. Partap Singh, that Justice Milano, long retired from the bench, but still practicing law, was given a 90th birthday party by his law firm. As your President, I was invited to attend.

I approached Justice Milano, and gave him our Association's good wishes on his 90th birthday. I told him I vividly remembered his 1987 opinion in People v. Partap Singh. I told him it was my favorite judicial opinion of all the thousands I had read over the years, because of his creativity in crafting a wise judicial solution involving conflicting values – public safety and religious freedom.

Justice Milano became emotional. He said that was the nicest thing anyone ever said to him.

This was a real high point in serving as your President this year.

-Paul E. Kerson

Spencer L. Reames and Two Others Elected as Fellows of NY Bar Foundation

Farrell Fritz is pleased to announce that Hillary A. Frommer, Jordan S. Linn and Spencer L. Reames were recently elected Fellows of The New York Bar Foundation.

Fellows are nominated by peers and recognized for outstanding professional achievement, dedication to the legal profession, commitment to the organized bar and service to the public. Fellows represent one percent of the New York State Bar Association membership. As Foundation ambassadors, Fellows exemplify the spirit of caring and sharing by demonstrating their belief that the practice of law is a helping profession. For more information regarding the Fellows and The New York Bar Foundation, click here.

Hillary Frommer, counsel, is a litigator concentrating in estate litigation. She is a contributor to the firm's New York Trusts & Estates Litigation blog. Hillary earned her J.D. from the Chicago-Kent College of Law and her B.A. from Cornell University. She is a New York City resident.

Jordan Linn is counsel in the firm's trusts & estates and tax departments. He earned his LL.M. from the University of Alabama School of Law; his J.D. from Hofstra University School of Law; and his B.A. from SUNY Binghamton. Jordan resides in Merrick.

Spencer Reames is counsel in the firm's estate litigation department. He also contributes to the firm's New York Trusts & Estates Litigation blog. Spencer earned his J.D. from St. John's University School of Law and two B.A. degrees from St. John's University. He is a Forest Hills resident.

ABOUT FARRELL FRITZ

Farrell Fritz is a full service law firm of more than 85 attorneys that has earned a strong reputation in the New York business community. The firm handles legal matters in the areas of bankruptcy & restructuring; commercial litigation; condemnation & eminent domain; construction; corporate & finance; distressed assets; eDiscovery; emerging companies & venture capital; environmental law; estate litigation; health law; labor & employment; land use, municipal & zoning; real estate; tax planning & controversy; tax certiorari and trusts & estates for corporations, not-for-profit organizations and individuals. For more information, please visit our website, as well as our social media sites: Facebook, Google+, LinkedIn and Twitter.

Moe L. Tandler - A Life Well Lived

By Dominic A. Villoni

The morning in Criminal Court droned with the routine of daily arraignments. I was the ADA on the calendar when the attorney on the next case came before the Court. In a booming voice he peppered the Judge with the virtues of his client, a person who, without doubt, should be released on his own recognizance.

That day, the courtroom was awoken by his presence, and that was my introduction to Moe Tandler.

As time went on I came to know him when many times he came into court. I learned that he and his partner Morton Friedman, a law school classmate, had an office in St. Albans, Queens. It was no accident that he and Morty had located in a minority community; they were so dedicated to the very-ideal of social justice.

Moe came from a humble background and his life exemplified the American dream. His father owned a candy store in Brooklyn and at an early age he worked in the family business. It was the depression and times were hard. It was, though, no time for self pity. For Moe and his family, it was a time to forge ahead and trust in a better future.

Then came World War Two. Moe, like many of that "greatest generation," was called to serve and serve he did without hesitation or complaint.

The war ended and Moe, upon returning home married his sweetheart, Helen, whom he cherished for a lifetime. They had two children, Sandy and Mitchel; Sandy growing to be an attorney-businessman and Mitchel becoming a special education teacher.

Throughout his lifetime Moe never wavered from his pursuit of justice for all. He was most active in the civil rights movement of the 1960's. As a member of the NAACP, he gave valuable legal assistance to the cause and had the attention and appreciation of the Reverend Martin Luther King, Jr.

Moe served his family, his country, his profession and his community. He was a dreamer who dared to dream .We will all miss him.

Rest in peace dear friend.

Editor's Note: Moe was an especially active and valued Member of our Association. He was Chair of the Bar Panels Committee and a member of the Judiciary Committee for many years.

QVLP Wins Tolling Motion Victories for Clients

PRO-BONO Corner | By Kristen Dubowski Barba

Representing low-income clients attempting to stave off foreclosure actions is not easy. Bad faith on the part of the foreclosing Plaintiff makes the process even more difficult and time consuming.

In two recent cases, Queens Volunteer Lawyers Project (QVLP) attorneys have successfully obtained rulings tolling the interest claimed by the Plaintiff lenders during the period of time the Plaintiff's failed to demonstrate "good faith" in accordance with CPLR 3408 (f).

By way of background, when a foreclosure action is filed in New York State, CPLR Rule 3408 requires attendance at mandatory settlement conferences, in which homeowners may seek modifications of their mortgages or alternatives to foreclosure if a modification is not possible given the homeowner's financial situation.

There is a requirement that both parties act in good faith during those settlement negotiations. CPLR 3408(f) states "Both the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."

The relief requested by the defendant was the tolling of interest on the loan starting from the time which the plaintiff was no longer acting in good faith. Tolling the interest reduces the amount of arrears owed by the defendant homeowner. This can make modification of the mortgage possible and more affordable, thereby allowing homeowners to remain in their homes.

CitiMortgage Inc. v. Mercedes Alva, et al,
Eric Malinowski, a volunteer attorney of counsel to QVLP, successfully argued that plaintiff failed to negotiate in good faith. His client was granted tolling of interest from March 3, 2014 until December 11, 2015, 21 months. This tolling will significantly reduce the amount of arrears owed by the defendant.

Pro Borner Corner Continued...

Malinowski requested a good faith hearing when CitiMortgage said that Malinowski's client was not eligible for the Home Affordable Modification Program (HAMP) after years of requests for documentation by the plaintiff. The documents requested by the Plaintiff were for a HAMP modification review.

Prior to the final conference, CitiMortgage issued a HAMP denial letter as a result of investor restrictions. Defendant appealed the decision and requested that CitiMortgage seek a waiver of the investor restriction. CitiMortgage issued a second denial letter which simply mirrored the prior denial letter. Malinowski concluded that this was bad faith on the part of the Plaintiff and moved for tolling of interest over the course of the delay caused by Plaintiff's bad faith.

Malinowski said that at the hearing, CitiMortgage presented testimony from a mediation representative who had been assigned to the loan just two weeks prior to the hearing. The representative, Malinowski said, relied on a 2012 letter from the investor Washington Federal Savings & Loan Association, which prohibited CitiMortgage from contractually modifying loans through HAMP. She acknowledged that CitiMortgage had sent a March 3, 2014, HAMP application letter, but insisted it was a standard letter and not a waiver of investor restrictions. She also testified that even though the defendant was not eligible for the HAMP program the plaintiff reviewed her under HAMP and found that she would not have qualified.

Malinowski produced an additional letter from CitiMortgage that instructed the defendant to comply with the document request in which the defendant would be reviewed for HAMP. Malinowski said that the CitiMortgage mediation representative conceded that despite receiving a letter from defendant requesting waiver of investor restrictions, CitiMortgage did not do so. She also acknowledged that while CitiMortgage has been aware of the investor restriction on HAMP modifications since 2012, it continues to send out letters requesting that homeowners submit for HAMP, Malinowski said.

Malinowski emphasized the dedication by his client. She "missed time from work to attend every mandatory conference and responded to numerous missing documents requests such as 2013 tax returns, pay stubs from her daughter, proof of rental income and more."

Malinowski concluded with that the fact that "CitiMortgage would send out a HAMP application and request documents from the defendant to evaluate her under HAMP, despite knowing that they would not evaluate her under HAMP, is failure to negotiate under good faith. "

Referee Tracy Catapano-Fox agreed and determined that "based on the totality of the circumstances, I find that plaintiff failed to provide that it acted in good faith in refusing to review defendant for a HAMP loan modification ... Accordingly, it is determined that plaintiff violated CPLR 3408 (f), and interest is tolled from March 3, 2014 until December 11, 2015." A full copy of the decision can be found at the end of this article.

"I'm glad that interest was tolled in this action, as CitiMortgage clearly has failed to negotiate in good-faith. However, whether CitiMortgage will now attempt to resolve this issue remains to be seen," Malinowski said.

JP Morgan Chase Bank v. Moniza Bhuiyan, et al,

Kristen Dubowski Barba, one of the QVLP foreclosure prevention staff attorneys, successfully argued that plaintiff failed to negotiate in good faith. Her client was granted tolling of interest from December 4, 2013 to October 30, 2015. This tolling of interest will make an unaffordable loan now affordable for her client.

Continued on p. 15

CPLR Update continued...

triable issues. An answer was therefore required before the merits could be ruled on.

Here, both Supreme Court and the Appellate Division majority found the facts sufficiently developed to allow decisions on the merits without an answer. They then reached opposite conclusions on those merits. The Court of Appeals found the facts sufficiently in doubt as to disallow the procedural shortcut, vacated the judgment and directed the service of an answer by the respondent.

Petitioner was a student at NYU's College of Dentistry. The underlying dispute was whether NYU had complied with its own procedures in finding that the petitioner had falsified records in a required dental clinic, in order to generate enough Practice Model Values (PMV) credits to graduate. The penalty imposed was dismissal from the College, without the possibility of reinstatement. It bears noting that NYU had not notified the petitioner that there was any problem with her status until the night before graduation, and that she was only made aware of the specific shortfall in her PMV credits some 15 minutes before graduation. To get to that point she had spent seven years and several hundreds of thousands of dollars. The falsification of records which brought her to this pass was in response to this predicament, and was a single, isolated incident. Her petition sought reinstatement, a direction to the College to grant her degree, and attorney's fees.

The precise objection in point of law was unspecified in the opinions of the trial court, Appellate Division or Court of Appeals, but appears to have been simply that the petitioner had no valid claim. There were issues as to which of two codes of ethics applied, whether NYU had complied with its own procedures under the applicable code, and whether the penalty of dismissal from the college without the possibility of reinstatement was shocking to the conscience.

In any event, Supreme Court addressed the merits, granted NYU's motion and dismissed the petition. Supreme Court found that NYU had chosen the applicable code of ethics, had substantially complied with its own procedures, and that while the resulting penalty was "indeed quite awful," it was not so awful as to shock the conscience.

The Appellate Division majority also addressed[3] the merits, reversed Supreme Court, denied the motion and granted the petition. The Appellate Division majority found that NYU had failed to comply with its own procedures under either code, and that the penalty was so disproportionate to the offense as to be shocking to the conscience. The majority opinion recognized the rule requiring an answer, but held that the facts were so completely developed that there was no need for an answer. There was a two-judge dissent, which also would have reversed, but would have limited appellate relief to a remand to allow the respondent to answer.

The issue in the Court of Appeals was whether the Appellate Division had erred in considering the merits after denying the motion to dismiss. The Court of Appeals held that it had, finding triable issues as to whether NYU had complied with its own procedures. That was sufficient to rule out the procedural shortcut and to allow NYU to serve an answer. The matter was therefore remitted to Supreme Court.

Attorney and Client Attorney's Pre-Litigation Statements

Front, Inc. v Khalil, 24 N.Y.3d 713, 28 N.E.3d 15, 4 N.Y.S.3d 581 [2015]

An attorney's statements during litigation are absolutely privileged - the attorney cannot be sued for defamation. (With a caveat - see below) What about statements made during the run-up to actual litigation? Specifically, what about accusations made in a cease-and-desist letter? Are these privileged as well? And, if so, is the privilege absolute or qualified? This is, strictly speaking, not a procedural issue, yet it relates so closely to the preliminary stages of many lawsuits that it is worth discussion here.

The Court of Appeals held here that comments made by attorneys to prospective adversaries in anticipation of good-faith litigation are entitled to a qualified privilege. The privilege is lost where the statements were not made in good faith, and "does not protect attorneys who are seeking to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or by asserting wholly unmeritorious claims, unsupported in law and fact, in violation of counsel's ethical obligations." So here, where a defendant made a third-party defamation claim against the plaintiff's attorney based on good-faith statements in a cease-and-desist letter, the statements were privileged and the third-party complaint was dismissed.

The underlying claim in this action was that the defendant Khalil had, shortly after notifying his employer that he intended to resign, wrongfully downloaded many computer files containing projects, client information and other proprietary belonging to his then-employer, the plaintiff Front. It was alleged that Khalil had done so in order to aid his soon-to-be employer Eckersley O'Callaghan Structural Design, one of Front's competitors.

Front retained counsel, Meister Seelig & Fein, LLP. One of their attorneys, the defendant Kimmel, sent a cease-and-desist letter to Khalil, accusing him of stealing Front's proprietary information, stealing Front's business, and other improprieties. The letter also stated that Khalil had violated the Economic Espionage Act, and that he had violated his immigration status. It concluded with a demand to cease-and-desist from using the stolen information, return the information and not contact Front's clients.

Kimmel then wrote to Eckersley O'Callaghan, accusing it of conspiring with Khalil in his improper acts, and making the same demands to cease-and-desist. A copy of the letter to Khalil was enclosed.

Of course, Khalil and Eckersley O'Callaghan neither ceased nor desisted, and Front sued them for misappropriation of trade secrets, unfair competition, conspiracy and other wrongful conduct. Khalil instituted a third-party action against Kimmel and Meister Seelig for defamation based upon the letter, also making claims of business torts. There were mutual motions to dismiss, but the motion that concerns us was the one by Kimmel and Meister Seelig to dismiss Khalil's third-party action, for failure to state a cause of action.

Supreme Court found the letter to have been "absolutely privileged," as it related to the lawsuit begun by Front shortly thereafter, and since the statements in the letter were substantially identical to those made in Front's complaint. The Appellate Division agreed that the letter was absolutely privileged, as having been made in connection with prospective litigation.

The Court of Appeals found that the letter was indeed privileged, but that the privilege was not absolute, drawing a distinction between statements made during pending litigation and those made while the litigation is only in prospect.

Absolute privilege attaches to statements made by attorneys in the course of litigation where the statements are "material and pertinent to the questions involved."[4] The privilege is said to be absolute, yet it can fail when the statements are so defamatory as to allow the inference of malice. The basis of the privilege is that permitting defamation claims against attorneys acting in good faith impedes the search for the truth which is at the heart of litigation, and holding them privileged allows attorneys to represent their clients without reprisal. The privilege applies, regardless of the attorney's motive.

Whether a similar privilege applies to pre-litigation statements was an open question in the Court of Appeals. The Court held that extending pre-litigation statements some form of privilege served the same ends as the privilege for statements during litigation. It noted that attorneys commonly communicate with their clients' potential adversaries in an attempt to avoid litigation, and such efforts are to be encouraged, not "chilled" by the potential for generating defamation claims against counsel. The Court was reluctant, however, to extend a full and absolute privilege, finding it unnecessary to achieve the goal of open communication, and also finding it inadvisable to protect possibly abusive, harassing, baseless or non-meritorious statements or threats of litigation. A qualified privilege, subject only to the requirement that the statements be pertinent to good-faith anticipated litigation, was held sufficient.

The claims and threats of litigation made by Kummel in the cease-and-desist letters here having been in good faith, the qualified privilege applied. Even though the courts below had erred in applying an absolute privilege, the third-party

CPLR Update continued...

defamation action was properly dismissed.

Non-Resident Attorneys

Schoenefeld v State of New York, 25 N.Y.3d 22, 29 N.E.3d 230, 6 N.Y.S.3d 221 [2015]

The Court of Appeals has construed Judiciary Law § 470 as indeed meaning what it says: a non-resident attorney, admitted to the Bar of New York and in compliance with all other requirements, may practice before the courts of the state only if she maintains a physical office for the transaction of business in New York. In so holding, the Court almost certainly paved the way for the US Court of Appeals for the Second Circuit to invalidate the statute under the Privileges and Immunities Clause of the US Constitution.

The statute reads:

> *"A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state."*

The Court responded to a certified question from the Second Circuit.[5] Plaintiff Ekaterina Schoenefeld is a resident of New Jersey and a member of the New Jersey bar, whose only office is in Princeton. She has also been admitted to the bars of New York and California. She alleges in her complaint that she has in fact passed up the opportunity to represent clients in New York courts to avoid violating the Judiciary Law provision.

She sued in federal court, claiming that the requirement for the maintenance of an office in New York places a burden upon her and other non-resident attorneys, not placed upon residents. The District Court found that the statute violates the Privileges and Immunities Clause, in that the added burden infringed upon the right of non-residents to practice law, without justification by a corresponding substantial state interest.

The Second Circuit noted that a resident attorney need not maintain a separate business office at all, and "may set up her 'office' on the kitchen table in her studio apartment and not run afoul of New York law."[6] A non-resident must go to the additional expense of setting up a physical office in New York, in addition to whatever facilities she maintains in her home state.

The Second Circuit noted several Appellate Division cases where the requirement has been enforced, although we should note also that the consequences of non-compliance have varied. In Kinder Morgan Energy Partners, LP v. Ace American Ins. Co., the First Department held that an action filed by a non-compliant attorney had to be dismissed, without prejudice.[7] The rationale was that the attorney's improper action rendered the very commencement of the action a nullity.[8] The harshness of the result can be seen if we consider that the limitations period might have expired before the dismissal. A purported action which is in fact a nullity is not entitled to the extension period of CPLR 205(a),[9] and so the cause could be lost entirely. On the other hand, in Elm Management Corp. v. Sprung, the court held that the violation did not invalidate any of the actions taken by the non-resident attorney.[10] The plaintiff in Elm Management had found New York counsel, so the only consequences were to the non-resident attorney. In Application of Tang, a New Jersey resident without a bona fide New York residence or office was denied admission to the New York bar.[11] Whether Ms. Schoenefeld had a New York residence at the time of her admission is not stated in any of the opinions in this case.

The State argued that the Judiciary Law could be interpreted as imposing nothing more than the obligation to maintain a physical presence within the state for the receipt of service. A post office box would do, or even the designation of an agent. Such an interpretation would avoid the Constitutional issue. It would not, however, be supported by the existing appellate authority. The State also argued that the imposition on non-resident attorneys was merely incidental, and served the substantial State interest of service of legal papers and resolution of service-related disputes.

Resolution of the issue turned, therefore, on whether the Judiciary Law actually meant what it said. The Second Circuit certified the question to the New York Court of Appeals, of what the minimum requirements to satisfy the statute actually are.

Our Court of Appeals rejected the interpretation that a post office box or letter drop would suffice. While the interpretation might have avoided the Constitutional question, it conflicted with the actual language of the statute, as well as its historical development. The statute is specific: the office has to be

for the "transaction of law business" and not merely for the receipt of service of papers. That means a physical office. The Court declined to rewrite the statute to preserve its constitutionality. The level of staffing or of office equipment necessary to constitute a "physical office" was not discussed, but seems immaterial. The burden of maintaining even an empty room with a name on the door and a mail slot would seem to be sufficient to create the constitutional problem.

The Court noted that CPLR 2103 (b) allows several different methods of service of interlocutory papers on attorneys, including mail, overnight delivery service, fax (where consented to) and e-mail (where permitted). Indeed, of the various methods for service, only one is dependent on the recipient attorney's physical presence in the state: delivery to a person of suitable age and discretion at the attorney's residence within the state (CPLR 2103 [b][4]). That method is certainly the least useful.

It should also be noted that the definition of "mailing" in CPLR 2103 (f) (1) specifies that the mailing must be made within the state. In M Entertainment v Leydier, the Court of Appeals held that the mailing of a notice of appeal from a mailbox outside the state was a defect, but curable under CPLR 5520 (a), which specifically concerns notices of appeal.[12] The Appellate Division had held more generally that the defect under CPLR 2103 (f) could not be deemed a mere irregularity pursuant to CPLR 2001. Whether any part of that general holding survives the more limited holding in the Court of Appeals remains an open question. These issues, however, concern service of papers by the non-resident attorney, not service upon her.

The Court noted, finally, that its own rules provide that an applicant for admission to the bar, who is a non-resident and is not employed full-time in New York, must designate the clerk of the Appellate Division as her agent for the service of process in actions or proceedings against her relating to legal services provided by her in the state.[13]

This rule is clearly intended to facilitate service of process on non-resident attorneys. It does not provide a basis for the assertion of general jurisdiction, being limited to actions and proceedings growing out of specific legal services.[14] It would seem to fall short of its full purpose, however, since its applicability depends on the applicant's circumstances at the time of admission. If, after admission, the attorney

Continued on p. 16

DISCOUNTED CASH FLOW METHOD AND ITS RAMPANT ABUSE IN MARITAL DISSOLUTION SETTINGS

By Joshua S. Sechter*

The Discounted Cash Flow Method

The Discounted Cash Flow Method ("DCF") is our profession's more common alternative income approach to the simpler Capitalized Cash Flow Method ("CCF") heavily used in the business valuation industry.[1] While this method is the subject of much abuse and hopes of good fortune one should be very careful in exercising its use as it is easily open to attack. At the same time, a well-built DCF model with all the right support can be just what you need to bring the opposing side to the negotiating table.

One of the main differences between the DCF and CCF is that the CCF method capitalizes a single period of cash flows into perpetuity. A DCF capitalizes several periods of cash flows over a set time period into the future and may or may not be followed by a capitalization of terminal cash flows into perpetuity thereafter. A common reason for using a DCF is that the user wants to capture the Company's impact on its cash flows over the next five, ten, fifteen, twenty years, etc.

There may be a manufacturing plant expansion which will become operational in a few years which could have a significant impact on the value of the Company today. A new service may be offered by your company which may generate additional levels of cash flow subsequent to your date of value. A significant natural disaster may have occurred around your date of value for which the effects are still yet unknown. Any time you have uncertainty in your cash flows and you can project them with definitive level of accuracy a DCF can be designed to capture such effects and could be utilized. However, my experience is that DCFs are not always applied with intelligent forethought.

Wide-spread and Rampant Abuse of the DCF

It is mind-boggling to me that I have assisted in the rebuttal for the use of DCF's by out-spouse valuation experts who have created their own projections based on historical observations without any reliance on a forecast or projection or management's opinion. In one example I have seen flat revenues, no reason to expect significant growth, industry reports estimate three percent growth over the next five years and yet a DCF projection is created calling for five percent growth plus one additional growth percentage point each period for the next five years followed by four percent on the terminal period into perpetuity. "Some analysts will use a growth rate into perpetuity that exceeds the nominal growth rate for the GDP of the United States. If that assumption is made, at some point in time in the future…the Company's value will be greater than the GDP of the United States."[2] While every case has its own facts we should not be blatantly misusing valuation models to create a false reality just to feed client expectations. I am sounding the alarm bell, please stop, you are doing a dis-service to your clients, the courts and more importantly, our profession.

How radical is your DCF?

GROWTH

Anything higher than six percent growth in your terminal calculation is paramount to raw speculation in most circumstances. "The growth rate is … intended to reflect a long-term average growth rate. This long-term growth rate is also intended to be the average growth rate into perpetuity. Over the past 80 years or so, inflation and gross domestic product have each grown on average approximately 2.5 to 3.0 percent and 3.0 to 3.5 percent, respectively."[3] So please use exercise and caution when applying your growth rate in your DCF model.

PROJECTIONS

Usually, unless the appraiser has expertise in a specific industry, projections are prepared by management of the subject company or a third-party industry expert is hired to prepare such projections. When you are the out-spouse expert and you prepare your own projections for the subject company without speaking to management or considering the contents of the preceding sentence you are creating an imaginative fantasy of illusion. In other words, you are eating your own words. When using wildly optimistic projections prepared by management one should consider the use of a third party industry expert to tame them back to reality. However, most of the time this doesn't happen or isn't cost-feasible which warrants more discussion.

REVENUES AS A KEY VARIABLE

When preparing a DCF the expert is making future assumptions about various key variables of the subject company such as revenues. All other things being equal, when one has become aware that revenues over a historical five year period are flat and/or declining this should not be an indication that revenues will increase by millions of dollars each year into the future without substantive support to the contrary. While projections prepared by management can be very useful one must be cognizant of the historical events which have taken place. At a minimum you must consider these key factors when projecting increased revenues over your discrete periods and in your terminal calculation.

a. The increased workforce necessary to support the growth in revenues;
b. The increased rent, facility, and other fixed costs to facilitate that growth in revenues;
c. The increased working capital requirements to facilitate the growth in revenues;
d. The likelihood that the increased levels of revenues will be achieved.

Truth versus Reality

While our profession requires the pervasive use of subjectivity at its core, one should not abuse it to the point of blatant fallacy. At the same time, at first glance a DCF may appear drastic until you discover the underlying details which support it. The point is, make sure you support your model with as much facts as possible and document your assumptions in detail. If you don't heed this advice you may stray farther and farther from the truth without realizing it, leaving yourself wildly open to attack.

**Editor's Note: Joshua S. Sechter, CPA/ABV, CFE, Klein, Liebman & Gresen, LLC, 6800 Jericho Turnpike, Suite 206E, Syosset, New York, 11791, (516) 364-3232, josh@goklg.com.*

1. Each of these methods attempt to determine the value of a Company by measuring the economic benefits of a future cash flow stream.
2. Hitchner, James R., (2011). Financial Valuation - Applications and Models. Page 1252: John Wiley & Sons, Inc.
3. Hitchner, James R., (2011). Financial Valuation - Applications and Models. Page 141: John Wiley & Sons, Inc.

Holiday Party 12-10-15 | Photos by Walter Karling

Megan Stokols, Justin Auslaender and Brandy Beltas

Mark Weliky, Hon. Darrell Gavrin, Heidi Henle and Ray Rodriguez

Lisel Gonzalez, Kristen and Michael Barba and Rose Marie Dubowski

Lisa Mevorach, Steve Gordon, Laura Outeda and Brandy Beltas

James Pagano, Hon. William Viscovich and Michael Mongelli

Ilene Fern, Caren Samplin, Maureen Heitner, Hon. Len Livote and Brian Heitner

Hon. Darrell Gavrin and Alla Ageyeva

Hilary Gingold, Wendy Pelle-Beer and David Adler

Abby Goldstein, Ed Schachter, Hilary Gingold, Karina Alomar, Caren Samplin, Mona Haas and Hon. Maureen Healy

Paul and Paula Pavlides, Lisa Pigeon and Michele Rach

Members of band 45RPM

Hilary Gingold, Hon. Lee Mayersohn, Helmut Borchert and EJ Thorsen

Having a good time at the Holiday Party

Donation of toys for Forestdale, Inc., foster care agency.

David Adler, Lourdes Ventura and Arthur Terranova

Chanwoo Lee, Richard and Yvette Gutierrez

Carol and Greg Brown and Jim Pieret

Alex Rosado, Karina Alomar and Richard Apat

Alava Decision

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

CITIMORTGAGE, INC.,

Plaintiff,

-against-

MERCEDES M. ALAVA; JOSE A. POUSO; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; "JOHN DOE #1" through "JOHN DOE #10" inclusive, the names of the ten last name defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenants or persons in possession of portions of the mortgaged premises described in the Complaint,

Defendants.

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Index No. 700611/2015

REFEREE REPORT

BY: TRACY CATAPANO-FOX
COURT ATTORNEY
REFEREE

DATED: DECEMBER 7, 2015

Pursuant to the authority afforded by Administrative Judge Jeremy S. Weinstein, Uniform Court Rules § 202.44, and on consent of the parties, this matter was referred to the undersigned to hear and report on whether plaintiff complied with the "good faith" requirements of CPLR §3408(f). I hereby make the following findings of relevant fact which I deem established by the evidence and reach the following conclusions of law.

Plaintiff commenced this action on January 23, 2015, seeking to foreclose on real property located at 153-10 Bayside Avenue, Flushing, New York. The parties appeared before this referee on October 30, 2015, to determine whether plaintiff violated CPLR §3408(f). A hearing was held on that date, after which the parties declined to submit additional paperwork and relied on the

transcript and evidence. Therefore, based upon my review of the transcript of the hearing, I render the following report.

Findings of Fact

This foreclosure action stems from a mortgage executed between the parties on October 5, 2005, with a note in the amount of $536,000, and secured by a mortgage on the residential property located at 153-10 Bayside Avenue, Flushing, New York. It is alleged that defendant defaulted on this mortgage on February 1, 2013, and plaintiff filed a Summons and Complaint seeking a judgment of foreclosure. Pursuant to CPLR §3408, the parties appeared at mandatory settlement conferences on April 3, 2015, May 29, 2015, June 26, 2015, and August 21, 2015, during which they attempted to negotiate a loan modification. However, after these conferences during which plaintiff requested further documentation supplied by defendant to support her loan modification request, plaintiff informed defendant that she was not entitled to a HAMP loan modification review due to investor restrictions. Defendant disputed this, and the parties differed as to whether defendant should be reviewed for a HAMP loan modification. Defendant requested a hearing pursuant to CPLR §3408(f), arguing that plaintiff's refusal to review defendant for a HAMP loan modification violated the "good faith negotiation" requirement of the statute. The parties then appeared on October 30, 2015, for the hearing and presented their arguments and evidence.

Plaintiff opposes defendant's motion for tolling, arguing that it has acted in good faith pursuant to CPLR §3408(f). Plaintiff presented testimony from Shannon Sesti, plaintiff's business operations analyst. Ms. Sesti testified that she has been the mediation representative assigned to this loan for two weeks, and that she reviewed plaintiff's files before testifying in court. She presented

a letter dated June 27, 2012, from investor Washington Federal Savings & Loan Association, which prohibited plaintiff from contractually modifying defendant's loan through the Home Affordable Modification Program (hereinafter referred to as "HAMP"). Plaintiff received this letter on July 10, 2012, but did not seek a waiver from this policy for defendant's loan. Rather, Ms. Sesti stated plaintiff was not obligated to seek individualized waivers to the investor's policy. She presented a denial letter, dated August 4, 2015, informing defendant that plaintiff did not have the contractual authority to modify the loan. She also provided a detailed denial letter, dated August 25, 2015, explaining that an in-house loan modification option was not available to defendant because of her lack of sufficient income. Ms. Sesti acknowledged plaintiff's March 3, 2014 letter to defendant discussing the HAMP loan modification program, but indicated this is merely a standard letter generated anytime plaintiff's accounts are involved and did not constitute a waiver of the investor restrictions. Despite plaintiff's position that the investor prohibits a HAMP modification review, plaintiff reviewed defendant for a HAMP loan modification, and provided the analysis to defendant during the hearing. Based upon the HAMP guidelines, even assuming plaintiff was authorized to offer defendant a HAMP loan modification, defendant would not qualify for a HAMP loan modification due to a lack of sufficient income. Plaintiff argues that it has acted in good faith by reviewing defendant for all possible loss mitigation options, and that defendant was properly denied a loan modification due to unaffordability. Plaintiff further argues that its March 3, 2014, was a misunderstanding and did not constitute bad faith. Based upon the above arguments and supporting documentation provided as exhibits, plaintiff argues that it has complied with the good faith requirements of CPLR §3408, and tolling of interest is not warranted.

Defendant argues that plaintiff violated CPLR §3408 and acted in bad faith by refusing to

consider her for a HAMP loan modification. Defendant did not present any witnesses for trial, but cross-examined plaintiff's witness and presented documentary evidence in support of her argument. Defendant concedes that plaintiff reviewed her for an in-house loan modification, but argues that she was entitled to a HAMP loan modification review. Defendant presented a letter from plaintiff dated March 3, 2014, informing defendant that the time to submit HAMP loan modification documents has been extended until April 8, 2014. This letter was on Citi letterhead and clearly indicated that defendant should immediately submit documentation for a HAMP loan modification review. Based upon this letter, defendant submitted a HAMP loan modification process and continually submitted updated documentation in support of her application. It was only on July 1, 2015 that defendant learned she was denied a HAMP loan modification because the investor does not participate in the HAMP program. Defendant appeared at five conferences, missing work and losing income, in order to participate in the HAMP loan modification process. Defendant argues that if plaintiff knew the investor did not participate in HAMP since 2012, then plaintiff should not have sent the HAMP loan modification solicitation letter. Further, plaintiff did not act in good faith by continually seeking further documentation for the HAMP loan modification and not mentioning during any of the settlement conferences that defendant was not eligible for a HAMP loan modification. Based on the above, plaintiff's refusal to review and follow the HAMP guidelines violates the "good faith negotiation" requirement of CPLR §3408. For this reason, defendant seeks tolling of interest from February 2014, when defendant first submitted a HAMP loan modification application, to the next settlement conference.

Conclusions of Law

CPLR §3408 requires the parties in a residential foreclosure action to appear at a mandatory settlement conference at which they must 'negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.' (*CPLR §3408[ff]*; *One West Bank, FSB v. Colace*, 130 AD3d 994 [2nd Dept. 7/29/2015].) While the statute is remedial in nature and seeks an aspirational goal of reaching a mutually agreeable resolution to help the homeowner avoid losing his or her home, the statute only requires the parties enter into and conduct negotiations in good faith. (*See U.S. Bank v. Sarmiento*, 121 AD3d 187, 200 [2nd Dept. 2014].) In determining whether the plaintiff acted in good faith within the meaning of CPLR §3408(f), the court must consider the totality of the circumstances to decide if they demonstrate that plaintiff's conduct did not constitute a meaningful effort at reaching a resolution. (*See id.*) In doing so, however, the court's role is limited to interpreting and enforcing the terms agreed to by the parties, and the court may not rewrite the loan agreement, impose additional terms not previously agreed to, or compel the parties to create a new contract. (*See id; see also Flagstar Bank, FSB v. Walker*, 112 AD3d 885 [2nd Dept. 2013].)

In this action, it is undisputed that plaintiff initially refused to review and consider defendant for a HAMP loan modification, which can constitute a failure to negotiate in good faith and violate CPLR §3408. (*See Colace, supra.*; *see also U.S. Bank, N.A. v. Smith*, 123 AD3d 914, 917 [2nd Dept. 2014].) Based upon the evidence presented by both parties, the totality of the circumstances demonstrate that plaintiff's failure to consider defendant for a HAMP loan modification violated the "good-faith" negotiation requirement of CPLR §3408(f). Plaintiff concedes that it sent defendant a letter on March 3, 2014, providing an extension to file HAMP loan modification documents. While plaintiff alleges that this a form letter and not a waiver of the investor restriction against

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HAMP loan modifications, it must take responsibility for sending this letter to defendant and leading her to reasonably believe she would be considered for a HAMP loan modification. (*See U.S. Bank N.A. v. Williams*, 121 AD3d 1098 [2nd Dept. 2014].) Plaintiff's claim that this is a misunderstanding does not justify its failure to promptly rectify its request for further documentation by withdrawing its letter. Plaintiff further compounded the situation by continuing to seek documentation in the multiple settlement conferences, without informing defendant that the investor did not participate in HAMP. Although plaintiff ultimately reviewed defendant for a HAMP loan modification review, this review occurred subsequent to the scheduling of this hearing and did not give defendant an opportunity to review and appeal plaintiff's determination.

Therefore, based on the totality of the circumstances, I find that plaintiff failed to prove that it acted in good faith in refusing to review defendant for a HAMP loan modification. (*See Sarmiento*, 121 AD3d at 206). Accordingly, it is determined that plaintiff violated CPLR §3408(f), and interest is tolled from March 3, 2014 until December 11, 2015. It is noted that while defendant sought tolling from February 2014, the undersigned finds that tolling should occur from March 3, 2014, the date of plaintiff's letter to defendant providing an extension to submit HAMP loan modification documentation.

This constitutes the report of the referee.

Dated: December 7, 2015

Tracy Catapano-Fox, Esq.
Court Attorney-Referee

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PRO-BONO Corner Continued...

There were ten settlement conferences held on this case. Defendant made an application for a 3408 (f) hearing based on the fact that over the modification application process the plaintiff issued eight improper denial letters in response to defendant's modification applications.

Dubowski Barba contended that her client was not being properly reviewed and with the passage of time the arrears were building to an exorbitant amount.

The reasons given by Plaintiff for the denials ranged from incomplete loan applications, misclassifying the home as commercial property and misclassifying the property as condemned property. These allegations are all false; the defendant has always resided on the subject property, it was never condemned. The property is not a commercial property.

Plaintiff argued that the defendant did not present any evidence of "bad faith" on behalf of the plaintiff and that the denial letters were not improper. Plaintiff said that it issued the condemned property denial letter because there was no evidence that the defendant lived at the property. Plaintiff additionally argued that the denial for non-residential property was proper because the original note and mortgage categorized the property as commercial.

Referee Catapano-Fox concluded "the plaintiff failed to prove that it negotiated in good faith during the foreclosure settlement conferences … Accordingly, defendant's motion for tolling for interest is granted, and it is ordered that interest should be tolled from December 4, 2013, the date of plaintiff's first denial letter, to October 30, 2015." The full text of the decision can be found at the end of this article.

Dubowski Barba said that after the decision, her client is hopeful that the tolling of interest will make this loan once again affordable.

Queens County has been hard hit by foreclosures. Since 2008, staff and volunteer attorneys at QVLP have assisted hundreds of Queens homeowners in obtaining modifications to make their mortgages affordable and keep them in their homes. Attorneys interested in volunteering to protect the rights of Queens homeowners should contact QVLP Executive Director Mark Weliky at mweliky@qcba.org.

*Kristen Dubowski Barba is a foreclosure prevention staff attorney with QVLP.

CPLR Update Continued...

establishes residence or a law office in New York, or obtains full-time employment here, she may revoke the designation. There is no corresponding provision for New York admittees to designate the clerk if they later leave the state. Contrast this with Judiciary Law § 470, which (valid or not) speaks to all admitted attorneys throughout their careers.

The tenor of the opinion is that the Court recognized that Judiciary Law § 470 cannot be sustained under the Privileges and Immunities Clause, and that it was unwilling to rewrite it in order to save it. That the Second Circuit will invalidate it seems a foregone conclusion.

Collateral Estoppel/Res Judicata/Law of the Case

Attorney Disciplinary Proceedings

Matter of Dunn, 24 N.Y.3d 699, 3 N.Y.S.3d 751 [2015]

Matter of Coluzzi, 130 A.D.3d 80, 12 N.Y.S.3d 206 [2d Dept., 2015]

In Matter of Dunn the Court of Appeals resolved any lingering doubts concerning the applicability of estoppel principles to attorney disciplinary proceedings. It is well settled that estoppel applies to criminal convictions, but whether it applies where some lesser transgression is involved, such as frivolous-conduct sanctions, had not been resolved by the Court of Appeals. The answer was "Yes, but not in this case."

Where the attorney has had a full and fair opportunity to contest civil allegations of professional misconduct, including frivolous-conduct sanctions, and the allegations are resolved against him, estoppel can and will be applied. In other words, in such a case the lawyer will not be able to re-litigate the issue of whether there was any misconduct. The only question left will be the form and extent of discipline to be imposed.

The lawyer in Dunn had been sanctioned by a US Magistrate Judge for making certain "knowingly false" statements. The Magistrate Judge imposed the sanction of admonishment. The Second Circuit dismissed the lawyer's appeal, finding the Magistrate Judge's order to be non-final and hence non-reviewable.[15] The Third Department gave the Magistrate Judge's findings collateral estoppel effect, precluding relitigation of the facts. Accepting, therefore, that the lawyer had made a false statement "knowingly and in bad faith," the court imposed the sanction of public censure.

The question before the Court of Appeals was whether the Court would accept that sanctions can ever be given collateral estoppel effect in disciplinary matters.

The Court restated the general proposition that "the doctrine of collateral estoppel has been applied to attorney disciplinary matters in the past and can continue to be applied where the necessary prerequisites have been met — i.e., where the attorney has had a full and fair opportunity to litigate in the prior proceeding." That is, after all, the basis for giving preclusive effect to criminal convictions.

Here, however, the Court found that the sanctions had been imposed after a motion heard on papers only, with no opportunity to cross-examine the movant's witnesses or call witnesses for the attorney. The Court found that the proceeding before the Magistrate Judge had been "cursory," and that the attorney had not had a full and fair opportunity to litigate the issue. The Court rejected the notion, argued by the disciplinary committee, that an inability to utilize estoppel to prove the violation would mean that the disciplinary proceeding would have to be delayed until the underlying action reaches a conclusion. The continued pendency of the action is no bar to independent proof of misconduct. Therefore, the order imposing censure was reversed, and the matter remitted to the Appellate Division.

The attorney, of course, is far from out of the woods. The Committee on Professional Standards can still present its own case that discipline is merited. It simply will not be able to take the collateral estoppel shortcut.

This raises the stakes on a sanctions motion exponentially. The procedural apparatus surrounding such a motion, and the circumstances of a finding adverse to the attorney, matter greatly. If the Magistrate Judge in Dunn had imposed the same sanction after a full hearing, estoppel before the disciplinary committee would have been the result. Much the same may be said of motions to disqualify counsel for conflicts of interest.

In Matter of Coluzzi this principle was applied, with the opposite result. There, the attorney was accused of multiple acts of fraud in two matters involving the purchase and sale of real property. In one of the matters, the attorney had colluded with the purchaser to inflate the purchase price over the listing price, and to pocket a substantial portion of the purchase loan. The defrauded client sued for fraud. After a jury trial, the attorney was found liable for fraud in the inducement, fraud by concealment, and breach of fiduciary duty. Another cause of action, for unjust enrichment, was tried by the court and a verdict rendered against the attorney.

Since the attorney had a full and fair opportunity to litigate these claims, the judgment against him was entitled to preclusive effect in the disciplinary proceeding. He was suspended for three years.

CPLR Update part. 2 will be in the next issue of the QCBA Bulletin.

1. CPLR 7804 [f]
2. Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County, 63 N.Y.2d 100, 480 N.Y.S.2d 190 [1984]
3. Matter of Kickertz v New York Univ., 99 A.D.3d 502, 952 N.Y.S.2d 147 [1st Dept., 2012]
4. Youmans v Smith, 153 NY 214 [1897]
5. Schoenefeld v State of New York, 748 F.3d 464 [2d Circ., 2014]
6. 748 F.3d @ 468
7. Kinder Morgan Energy Partners, LP v. Ace American Ins. Co., 51 A.D.3d 580, 859 N.Y.S.2d 135 [1st Dept., 2008]
8. Neal v Energy Transp. Group, 296 A.D.2d 339, 744 N.Y.S.2d 672 [1st Dept., 2002]; Lichtenstein v Emerson, 171 Misc 2d 933, affd 251 AD2d 64
9. Parker v Mack, 61 NY2d 114 [1984]
10. Elm Management Corp. v. Sprung, 33 A.D.3d 753, 823 N.Y.S.2d 187 [2d Dept., 2006]
11. Application of Tang, 39 A.D.2d 357 [1st Dept., 1972]; but see, Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266 [1979] invalidating such barriers to admission under the Privileges and Immunities Clause
12. M Entertainment v Leydier, 13 N.Y.3d 827, 891 N.Y.S.2d 6 [2009]
13. Rules of the Court of Appeals, 22 NYCRR § 520.13 [a]
14. see, Eastboro Foundation Charitable Trust v. Penzer, 950 F.Supp.2d 648 [S.D.N.Y.,2013]
15. The federal matter remained open and the sanction non-reviewable, as of the date of the Court of Appeals decision.

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Bhuiyan Decision

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
----------X
J.P. MORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

MONIZA BHUIYAN, JP MORGAN CHASE BANK, NATIONAL ASSOCIATION; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; "JOHN DOES" AND "JANE DOES" Said names being fictitious parties intended being possible tenants or occupants of premises, and corporations, other entitles or persons who claim or may claim, a lien against the premises,

Defendants.
----------X

Index No. 15135/2011

REFEREE REPORT

BY: TRACY CATAPANO-FOX
COURT ATTORNEY
REFEREE

DATED: DECEMBER 22, 2015

Pursuant to the authority afforded by Administrative Judge Jeremy S. Weinstein, Uniform Court Rules § 202.44, and on consent of the parties, this matter was referred to the undersigned to hear and report on whether plaintiff complied with the "good faith" requirements of CPLR §3408(f). I hereby make the following findings of relevant fact which I deem established by the evidence and reach the following conclusions of law.

Plaintiff commenced this action on June 24, 2011, seeking to foreclose on real property located at 41-19 39th Street, Sunnyside, NY 11104. The parties appeared before the undersigned on October 30, 2015, to determine whether plaintiff violated CPLR §3408(f). A hearing was held on

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that date, during which both parties presented documentary and testimonial evidence. Therefore, based upon my review of the transcript of the proceedings and the parties' submissions, I render the following report.

Findings of Fact

This foreclosure action stems from a mortgage executed between the parties on October 20, 2004, with a note in the amount of $427,150.00, and secured by a mortgage on the residential property located at 41-19 39th Street, Sunnyside, NY 11104. It is alleged that defendant defaulted on this mortgage on November 1, 2010, and plaintiff filed a Summons and Complaint seeking a Judgment of Foreclosure on June 24, 2011. Pursuant to CPLR §3408, the parties appeared at mandatory settlement conferences on September 3, 2013, December 16, 2013, April 22, 2014, July 14, 2014, October 20, 2014, February 2, 2015, May 11, 2015, July 28, 2015, August 24, 2015, and October 5, 2015, during which the parties attempted to negotiate a loan modification. During the course of the proceedings, the parties could not agree upon a loan modification, and defendant requested a hearing pursuant to CPLR §3408(f), because she argued that plaintiff's actions violated the "good faith negotiation" requirement of the statute. The parties appeared before Referee Lance Evans, who referred them to the undersigned for a hearing pursuant to CPLR §3408(f).

Plaintiff opposes defendant's motion and argues that it has acted in good faith throughout the settlement conferences. Plaintiff presented documentary evidence and testimonial evidence from counsel and Megan Finney, plaintiff's bank representative, in support of its argument. Plaintiff argues that it properly denied defendant for loss mitigation options by sending a letter on August 21, 2015, and following up with a detailed denial letter on September 3, 2015. Plaintiff stated that

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defendant was denied a Home Affordable Modification Program (hereinafter referred to as "HAMP") Tier I loan modification due to excessive forbearance, denied a HAMP Tier II loan modification because the debt-to-income ratio was not within permissible limits, and denied an alternative loan modification because defendant would have a negative disposable income. Plaintiff continued to communicate with defense counsel after the denial was issued and in good faith, is performing a new loan modification review based on differences in the escrow amount.

Plaintiff argues that defendant failed to present any evidence of bad faith by plaintiff or that the denial letters were improper. Plaintiff alleges the denial issued because the property was vacant was proper because there is no evidence that defendant lives at the property. Ms. Finney testified that the value of defendant's property is $1.559 million, and that the property appeared to be vacant, based on six inspections plaintiff performed from October 2014 through May 2015. Plaintiff argues the denial for a non-residential property was proper, because the original note and mortgage showed the property to be commercial. Plaintiff submitted as evidence the August 21st and September 3rd denial letters, and Ms. Finney testified that the Net Present Value calculations do not have to be provided in denials for excessive forbearance. Finally, plaintiff demonstrated good faith by continually communicating with defendant about the denials, and is currently reviewing defendant's financial information to determine if there are any loss mitigation options available. Based on the above, plaintiff did not violate the good faith requirements of CPLR §3408, and therefore defendant's motion should be denied.

Defendant argues that plaintiff violated the good faith requirements of CPLR §3408 because it issued improper denials of defendant's HAMP loan modification application. Defendant stated that plaintiff issued eight improper denials for various reasons, including incomplete loan

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applications, misclassifying the home as a commercial property, and misclassifying the property as condemned property. Defendant argues plaintiff has harassed her since December 2013 when defendant submitted her first HAMP loan modification application, and continued as plaintiff created various improper reasons for denying a loan modification. Ms. Finney testified that Nationstar bought defendant's loan in July 2014, and that it issued nine denials to defendant. The first denial was on November 2014 for an incomplete package, the second denial was on February 2015 for an incomplete package, the third, fourth, fifth and sixth denials were through March 2015, because plaintiff believed defendant's loan was for a commercial property, the seventh denial was issued in May 2015 for an incomplete package, the eighth denial was issued in June 2015 for an ineligible denial and the final denial was in August 2015 after review of a complete package. Defendant argues these denials were improper, as they were in violation of the referee's directives to plaintiff to provide defendant with missing document letters if there was outstanding financial information needed. Ms. Finney stated that she was unaware if the court-ordered missing document letters were sent by plaintiff. She also testified that missing document letters must be manually created by counsel, but that incomplete package denials were automatically generated after a certain date. She was unaware that the referee had directed plaintiff to send a missing documents letter on February 2nd and also on May 11th but instead generated denials for an incomplete package.

Defendant further argues that plaintiff's substantive detailed denial letter was improper, as the Net Present Value calculations were missing. Defendant contends Ms. Kinney had little knowledge of the case, as she had only been involved in defendant's file since August 2015. Defendant also argues that plaintiff improperly denied her loan modification application without providing the Net Present Value or the financial numbers used to calculate whether defendant

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qualified for a HAMP or alternative modification. It is defendant's position that failure to provide those crucial calculations impeded defendant's ability to adequately appeal the denial and is therefore a violation of the good faith requirements of CPLR §3408. Therefore, plaintiff's failure to negotiate in good faith is a violation of CPLR §3408, and defendant seeks tolling of interest and fees from December 4, 2013, the date of plaintiff's first denial letter, to October 30, 2015.

Conclusions of Law

CPLR §3408 requires the parties in a residential foreclosure action to appear at a mandatory settlement conference at which they must 'negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.' (*CPLR §3408[f]*; *One West Bank, FSB v. Colace*, 130 AD3d 994 [2nd Dept. 7/29/2015].) While the statute is remedial in nature and seeks an aspirational goal of reaching a mutually agreeable resolution to help the homeowner avoid losing his or her home, the statute only requires the parties enter into and conduct negotiations in good faith. (*See U.S. Bank v. Sarmiento*, 121 AD3d 187, 200 [2nd Dept. 2014].) In determining whether the plaintiff acted in good faith within the meaning of CPLR §3408(f), the court must consider the totality of the circumstances to decide if they demonstrate that plaintiff's conduct did not constitute a meaningful effort at reaching a resolution. (*See id.*) In doing so, however, the court's role is limited to interpreting and enforcing the terms agreed to by the parties, and the court may not rewrite the loan agreement, impose additional terms not previously agreed to, or compel the parties to create a new contract. (*See id; see also Flagstar Bank, FSB v. Walker*, 112 AD3d 885 [2nd Dept. 2013].)

The evidence presented established that plaintiff violated the good faith negotiation requirement of CPLR §3408(f). Plaintiff failed to present a prima facie case of good faith

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negotiations, as it failed to sufficiently justify the myriad denials it sent to defendant over an almost two year period. While Nationstar was not the original servicer involved in this matter, plaintiff failed to demonstrate that Nationstar negotiated in good faith, when it generated automatic denials of defendant's HAMP loan modification in contradiction of court directives. On at least two occasions, the foreclosure settlement conference referee directed plaintiff to send missing document letters to defendant to address any deficiencies in her loan modification application. Plaintiff failed to demonstrate that it complied with those court directives, as Ms. Finney had no knowledge of whether the missing document letters were sent to defendant. Plaintiff also failed to explain why it mailed automatic denial letters, even though it conceded that these were not in response to defendant's failure to comply with missing document requests.

Further, plaintiff did not provide any objective evidence to support the numerous denials it sent to defendant. Plaintiff's allegation that the original note and mortgage referenced the property as commercial was unsupported by objective proof. Further, plaintiff's denial due to the property being vacated was not supported by sufficient evidence. While Ms. Finney testified that numerous visits were made to the property, she did not explain the circumstances under which plaintiff concluded the property was vacant, such as lack of electrical or gas services or visible signs of no one living in the home. This allegation was contradicted by defendant's statement that the property was classified as mixed use and that she resided in the property. While it is helpful to note that plaintiff is reconsidering the financial calculations used to determine whether defendant qualified for any loan modification options, that does not excuse the numerous denial letters that were sent in contravention of the directives by the referee in the foreclosure settlement conference part. request does not justify plaintiff's failure to remedy this situation and comply with the directives given within the foreclosure settlement conference part. Based on the above, plaintiff failed to prove a prima facie case that it negotiated in good faith and therefore violated CPLR §3408.

Therefore, based on the totality of the circumstances, I find that plaintiff failed to prove that it negotiated in good faith during the foreclosure settlement conferences. (*See Wells Fargo Bank, N.A. v. Meyers*, 108 AD3d 9 [2nd Dept. 2013].) Accordingly, defendant's motion for tolling of interest is granted, and it is ordered that interest should be tolled from December 4, 2013, the date of plaintiff's first denial letter, to October 30, 2015. The parties are directed to appear at the Foreclosure Settlement Conference Part on January 29, 2016 at 9:30am.

This constitutes the report of the referee.

Dated: December 22, 2015

Tracy Catapano-Fox, Esq.

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