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John G. Hall, a former Chair of the Real Property Law Section, shown here with his family, was the recipient of the Section's Professionalism Award at the Annual Meeting in January. The Award was presented in recognition of John's outstanding legal career, which exemplifies the highest standards of ethical and professional conduct.

Inside

A Message from the Section Chair

This article relates in part to pending legislation. Further developments may occur between the date this article was submitted for publication and the date this *Journal* was distributed. The reader is cautioned to check for updates.

New York's Limited Liability Company Law Takes A Big Step In The Wrong Direction

New York imposes a burden on new businesses that almost no other state does. Amazingly, New York's legislators are hard at work increasing that burden rather than decreasing it.

In nearly every state except New York, anyone can form a limited liability company[1] (an "LLC") by just filing a piece of paper with a state official and paying a small fee. Only New York and a tiny handful of other states[2] require LLCs to take a further step: they must publish in a newspaper an official notice of formation.[3] Publication of LLC notices in New York costs $1,000 to $2,000 per LLC, plus legal, paralegal, or service company fees—significant for anyone starting a small business. These costs also become meaningful for commercial transactions with many new LLCs. Even if a transaction requires only one new LLC, publication creates an annoyance and an opportunity for error.

The entire exercise serves no purpose, though. If anyone wanted to find out about an LLC, why would they ever dig through legal notices in newspapers? They can already find out about any LLC 24 hours a day through the Secretary of State's website.[4]

Against that backdrop, and given New York's supposed desire to make it easier to do business here,[5] one would expect New York to seize any opportunity to eliminate requirements that are antiquated, unnecessary, expensive, and nearly "unique to New York." But one would be wrong. Instead, New York has taken a big step backwards by increasing rather than decreasing its publication requirements for LLCs. Even worse,

a State Senate leader has just introduced legislation that would take a further step in the same wrong direction.

Effective June 1, 2006, Chapter 767 of New York's Laws of 2005[6] makes these changes in New York's publication requirements for LLCs[7]:

- *Fewer Weeks.* An LLC must publish its notice of formation for four weeks, not six (an improvement, but keep reading).[8]
- *Quasijudicial Publication.* The notice must be published as if it related to a judicial proceeding[9]—which limits the number of newspapers where the notice may appear, hence should drive up the cost of compliance.
- *Top Ten Disclosure.* An LLC must disclose in its published notice the ten persons who are "actively engaged in [its] business and affairs" and hold the "most valuable" interests in the LLC.[10]
- *Hedge Funds.* The "top ten" disclosure requirements do not apply to investment advisers, commodity pool operators, commodity trading advisors, or funds they operate.[11]
- *Suspension of Authority.* If an LLC does not complete publication within 120 days after formation, its authority to do business will be suspended. The LLC can reinstate its authority by accomplishing the required publication.[12]
- *Fee Doubling.* Once an LLC complies with the publication process, it will now pay twice as much to file a certificate of compliance.[13]

None of this serves any useful purpose that the author can identify.[14]

At the time of writing, additional legislation had been introduced—and was rumored to be on the fast track to passage—to further worsen New York's LLC publication requirements. By the time this column appears in print, that legislation, Senate Bill 6831,[15] may have passed, changed, died, or remained pending with no action at all.[16]

Senate Bill 6831 would cut back some of the more egregious requirements of Chapter 767[17] and undo the one improvement it makes.[18] But Senate Bill 6831 would add an astounding new provision of its own:

> [I]f [an LLC] formed after [June 1, 2006] fails to comply with the publication and filing requirements of [LLC Law § 206(a) as modified] within [120 days,] each member of such [LLC] shall be personally and fully liable, jointly and severally with such [LLC] and with each other member, if any, of such [LLC], for all debts, obligations and liabilities of such [LLC] incurred or arising at any time before or after such failure. However, if [an LLC later complies with the publication requirements], this paragraph shall not apply to such [LLC] or to

> the member or members of such [LLC], and the member or members of such [LLC] shall have no liability by reason of this paragraph for the debts, obligations and liabilities of such [LLC].[19]

This language would thus impose a punishment—personal liability—that should cause great concern for anyone who might use an LLC in New York. Even if members could terminate personal liability by making sure their LLC writes the necessary checks to the newspaper industry, the mere possibility of personal liability seems entirely excessive under the circumstances. It would take New York's almost-unique LLC publication requirements from the ridiculous to the absurd.

Aside from serving no purpose[20] and imposing a burden almost no other state imposes, the personal liability proposed in Senate Bill 6831 would raise legal issues and practical concerns from A to Z, starting with these:

- *Automatic Stay.* If the members become personally liable because the LLC failed to publish, what happens if a creditor files bankruptcy before the failure to publish has been cured? Would the automatic stay protect the creditor from losing its claims against personally liable members?
- *Constitutional Law.* If Wyoming says the members of a Wyoming LLC have no personal liability, does New York have the authority to decide they do have personal liability? This new statute could drag the United States Supreme Court into its interpretation and application—an amazing feat for a trivial but bloated statute on business entity formation.
- *Debtor-Creditor Issues.* If a member of an LLC becomes personally liable for some huge amount of LLC indebtedness, would the member become "insolvent" for purposes of debtor-creditor and other laws? What consequences would follow?
- *Estoppel.* What if an LLC's creditor relied on a member's personal liability, and the member knew of such reliance? Would the member be estopped from disclaiming personal liability?
- *Judgments.* If a creditor obtains a judgment against a personally liable member before the company cures its failure to publish, can the creditor still enforce the judgment against the member after the LLC solves the problem?
- *Layering.* Cautious investors (e.g., pension fund trustees) may establish extra Delaware LLCs just to insulate themselves from potential personal liability in case something goes wrong under New York's publication statute. These new entity layers would add complexity, extra work, and extra opportunity for error.[21]
- *Nonrecourse Carveouts.* Nonrecourse borrowers should ask their lenders to waive any claims for personal liability resulting from failure to publish properly. The same goes for landlords negotiating leases with tenants. But is an LLC member's "statutory liability" waivable?
- *Opinions.* What new assumptions and verbiage would we need to add to routine opinions for loan closings? What about nonconsolidation opinions for securitized loans? How much time would we need to spend negotiating those ridiculous new assumptions and verbiage?
- *Service Provider Liability.* If an LLC fails to comply with the publication requirements and any of the risks suggested here befall(s) any of the LLC's members, would they have a claim against the LLC's counsel or filing service? For how much? Will this exposure further increase the cost of forming LLCs?
- *Technical Errors.* If an LLC publishes its notices in a slightly wrong newspaper, or omits or misstates some minor technical detail of the required information, do all the LLC members become personally liable? Is there any concept of "substantial compliance"? What would that require?
- *Title Insurance.* If an LLC member sells real property, does the "creditors' rights exclusion" in the buyer's title insurance policy cover problems if the LLC doesn't properly publish and the seller becomes liable for huge LLC obligations and hence insolvent?
- *Who Can Cure?* If the managing member of an LLC fails or refuses to make the required publication, can any member do so? Will the members have all the information they need? What if multiple members try to make the required publication, and some don't do it right? Which publication governs in determining the members' personal liability?

These and other fascinating questions could support a series of law review articles, perhaps an entire symposium issue on the implications and penumbras of New York's LLC publication requirements. The business community may ultimately find it can live with the answers to all these questions. But the mere possibility of any personal liability, even temporary personal liability, should be off limits.

Whether or not the Legislature adopts Senate Bill 6831, New York's nearly unique publication requirements for LLCs are already out of control—an embarrassment. The New York business and legal communities should not only try to persuade the Legislature to repeal Chapter 767 and ignore Senate Bill 6831, but also take the obvious and

appropriate next step: repeal all publication requirements for LLCs.

These requirements serve no purpose beyond imposing needless expense on new businesses[22]; showing that New York is almost uniquely hostile to business formation; running up legal and paralegal fees for doing useless work[23]; promoting use of Delaware entities whenever possible[24]; and helping to drive businesses out of New York.

The author hopes and believes RPLS will work actively with the Business Law Section and anyone else who wants to eliminate all publication requirements for LLCs in New York.

Endnotes

1. Every statement about New York LLCs in this column also applies to limited partnerships, registered limited liability partnerships, and professional service limited liability companies.
2. Limited research found only two other states with publication requirements. Ariz. Rev. Stat. § 29-635; Neb. Rev. Stat § 21-2653. Delaware, the entity formation state of choice, has no such requirements. *See* Del. Code Ann. tit. 6, §§ 18-101 to 18-1109.
3. When a non-New-York LLC qualifies to do business in New York, it faces a similar publication requirement.
4. Visit http://www.dos.state.ny.us. Click on "Search for Corporations or Business Entities," a couple of inches below the photograph of Gov. George Pataki.
5. *See, e.g.*, "New York Ranks Last in Tax Study," N.Y. Sun, Feb. 27, 2006, at 1 (noting "Governor Pataki's claims that the state under his stewardship has made substantial gains in making itself more appealing to businesses and entrepreneurs.")
6. Laws of New York, 2005, Ch. 767 (enacted February 3, 2006) ("Ch. 767"). The same new burdens apply to LLCs, limited partnerships, registered limited liability partnerships, and professional service limited liability companies. The burdens apply to new entities, foreign entities qualifying in New York, and previously formed entities that did not properly publish. The statute repeats in full all requirements for each entity type—once for new entities and again for old ones that didn't properly publish. The miracles of multiplication thus inflate the statute to 36 pages of single-spaced text, a model of incomprehensible legalese. See http://www.nationalcorp.com/pdfs/NY_Chapt_767.pdf. In comparison, the United States Constitution, with all amendments, occupies about 19 pages. See http://www.usconstitution.net/const.txt. Ch. 767 also far exceeds in length the entire LLC laws of most states. In contrast, Arizona uses 74 words (6 lines of text) to express its LLC publication requirements and Nebraska 293 (31 lines).
7. Ch. 767, Sec. 24 (statute effective immediately after the calendar month that includes the date 90 days after enactment). The Secretary of State's office has informally confirmed the June 1 effective date.
8. Although Ch. 767 reduces the number of required publications by a third, other provisions more than outweigh this benefit. *See* Ch. 767, Sec. 3, about 1 inch into the paragraph (modifying LLC Law § 206). Because section 3 consists of a single long paragraph occupying more than two pages of text in Ch. 767, a ruler offers the best way to cite any specific provision in the paragraph.
9. Ch. 767, Sec. 3, about 2 inches into the paragraph (modifying LLC Law § 206).
10. Ch. 767, Sec. 3, about 8 inches into the paragraph (modifying LLC Law § 206(a), clause "5-a"). If the top ten change after publication begins, Ch. 767 requires no republication. Therefore, one can simply use "straw men" for formation, replacing them later. One could also use single purpose Delaware entities to hold the ten "most valuable" interests in the entity. If disclosure of ownership information is so crucially important, one would think the Legislature would require it in an LLC's filed charter documents and on the Secretary of State's website. But the requirement applies only to an LLC's published notices, thus producing no disclosure at all in the only places that matter. If publication of the "top ten" is so important, one would think its absence in 49 of 50 states (and in New York for at least 10 years) would have produced horrible problems. The author is aware of none. The Legislature mentioned none. The sponsor's memo simply referred in the abstract to such matters as "add[ing] another dimension to the historical protections afforded consumers in this state."
11. Ch. 767, Sec. 3, about 4 inches into the paragraph (modifying LLC Law § 206(a)). The exempted entities—hedge funds and so on—had apparently threatened to stop doing business in New York. So the Legislature exempted them. *See* New York State Bar Association Business Law Section, Committee on Corporations and Other Business Entities, BLS Corporations #1-A, Memorandum in Opposition to S. 85-A and A. 1075-A, May 11, 2005 (the "BLS Report"), p. 3 (on file with the author). The Business Law Section actively and persuasively opposed Ch. 767 for reasons this column suggests and others. Ch. 767 was not on the RPLS radar screen, because RPLS focuses on legislation specific to real property. The RPLS website offers a "real-time" bill tracker for such legislation—typically dozens or hundreds of bills, most going nowhere. RPLS members can visit the bill tracker at this address: http://www.nysba.org/statewatch/SBA_RPLS.HTM. The utility of the bill tracker is somewhat impaired by the fact that the Legislature's website often doesn't work. If the Legislature cares about public disclosure of important matters, it might fix its website.
12. Ch. 767, Sec. 3, in the last 4 inches of the paragraph (modifying LLC Law § 206). Ch. 767 does not clearly define what it means for an LLC to be suspended. *See* BLS Report, p. 6. Prior law merely prevented an LLC from initiating a lawsuit if it had not properly published its notice. *See* N.Y. LLC Law § 206(a) (before amendment).
13. Ch. 767, Sec. 6 (modifying LLC Law § 1101(s)). The fee to file the mandatory proof of publication was $25. It now rises to $50. The fee continues in New York's proud tradition of charging fees for the privilege of complying with legal requirements to file forms, such as transfer tax returns. (On its own, this extra filing fee is in the same ballpark as the entire LLC formation fee in many states.)
14. The sponsor's memorandum says Ch. 767 was motivated by concern for consumer protection and disclosure, always a good argument for any new legislation—much like preventing fraud, floods, fire hazards, or terrorism. If in fact consumers are suffering (or New York faces increased risks of fraud, floods, fire hazards, or terrorism) because of inadequate disclosure of information about LLCs, Ch. 767 hardly seems an appropriate response to the crisis. Instead, if the Legislature really cares about any of this, it should require more complete (and updated) disclosure in LLC charter documents and on the Secretary of State's website. The BLS Report discusses in greater depth these issues and other possible rationales for Ch. 767. Whatever problem may drive New York's expanded publication requirements, up to 47 of the 50 states do not seem to have recognized any need to solve that problem.
15. S. 6831 (introduced February 28, 2006). A modification and restatement of Ch. 767, this bill was introduced by the same legislator who sponsored Ch. 767, Senator Dean G. Skelos, a nine-term State Senator and Deputy Majority Leader since 1995. *See* http://latfor.state.ny.us/members/?id=2.

16. To check its status, visit this website: http://public.leginfo.state.ny.us/menuf.cgi. Type in this bill number: S6831. If the Legislature's website isn't working, try again in an hour.

17. S. 6831 would eliminate the need to disclose the top ten owners. *See, e.g.*, S. 6831, Sec. 3, about 10 inches into the paragraph (modifying LLC Law § 206(a)). This change also eliminates the need for the Legislature to exempt hedge funds. Except in New York City, S. 6831 would eliminate the requirement to publish LLC notices as if they related to a judicial proceeding.

18. S. 6831 would undo Ch. 767's truncation of the publication period to four weeks, restoring it to six. *See, e.g.*, S. 6831, Sec. 3, about 1 inch into the paragraph (modifying LLC Law § 206(a)).

19. S. 6831, Sec. 4 (proposing to add LLC Law § 609(c)(1)). Other sections of S. 6831 make the same changes for other limited liability entities, their foreign counterparts, and their previously formed counterparts that failed to comply with previous publication requirements. Personal liability for the LLC's debts would replace Ch. 767's suspension of authority to do business, which itself replaced a mere inability to commence a lawsuit.

20. The sponsor's memo for S. 6831 says its goal is "to make . . . information available to the public in a manner, which reinforces the public's right to know the entities with which they are dealing." Under "justification," the sponsor's memo says S. 6831 will clarify publication requirements, "to the benefit of consumers and other persons who do business in this state." That's all. It is hard to see how legal notices strewn through back issues of newspapers can accomplish any of this, particularly when the Secretary of State's website offers the same information in an organized fashion.

21. Those investors will automatically form their "blocker" entities under Delaware law. They won't need to publish in New York because they probably won't do business here. Instead of worsening New York's publication requirements for LLCs, however, New York should improve the New York LLC Law so investors will automatically want to use New York entities, not Delaware ones.

22. The BLS Report estimates New York's publication requirements for limited liability entities yield $40 million a year in newspaper revenues. BLS Report, p. 2. The BLS Report also estimates that New York's filing requirements cost the state $4.5 million a year in filing fees. Presumably that loss reflects only entities that are formed in, e.g., Delaware, but need not qualify in New York. A Delaware entity that wants to do business in New York must still comply with New York's publication requirements, hence cannot avoid publication costs. To avoid those costs, the entire business—jobs, sales tax revenue, rent payments to New York property owners, etc.—must leave New York and move to one of the 47 states that do not require publication.

23. To the extent that RPLS acts as a "guild" for real estate lawyers, we should enthusiastically support Ch. 767 and S. 6831, and suggest improvements. For example, LLCs should file an opinion of counsel to confirm proper publication of notices. This opinion of counsel should be written by hand with a quill pen or on parchment. Such measures would make as much sense as anything already in Ch. 767 or S. 6831.

24. New York should do the opposite: identify what makes Delaware LLCs so attractive, then adopt the corresponding provisions of Delaware's LLC law.

Joshua Stein

This column expresses the writer's views. The author believes RPLS leadership and committees share these views, but no one has officially said so. This column also does not necessarily represent the views of any other organization with which the author is affiliated. Anyone who would like to help RPLS respond to New York's LLC legislation or other legislation should communicate with any co-chair of the RPLS Legislation Committee. Contact details appear in the last few pages of this issue of the *Journal*. The author and the *Journal* consent to any republication, reprinting, or further circulation of this column.

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The Equitable Mortgage: Its Creation, Enforceability and Lien Priority

By Joel David Sharrow

Most practitioners are familiar with a duly executed and acknowledged recorded mortgage given by an owner to secure repayment of a loan or other obligation; the priority of such a recorded mortgage (usually first in time and, without notice, first in right); and the enforceability of such a mortgage, as a matter of law, under N.Y. Real Property Actions & Proceedings Law Article 13. A lender may perceive problems concerning validity, seniority and/or enforcement when, despite a validly made loan and recordation of the mortgage instrument, the document contains a substantial defect rendering it legally unenforceable. The same concern could arise when a duly executed and delivered mortgage inadvertently is not recorded; purposely is held in escrow; is not signed and delivered; or, when an instrument, which on its face absolutely is a deed conveying title to realty is, in actuality, given only as security. The Second Department, relying on long established case law, recently discoursed on the topic and held that there still is a foreclosable lien *Citibank, N.A. v. Kenney*.[1]

In *Kenney*, the lender, which held a first and second mortgage, inadvertently executed and recorded a discharge of its second mortgage (which had had priority over third and fourth mortgages held by unrelated parties). Importantly, despite discharge of the second mortgage, the lender had not released or received payment of the debt secured by that second mortgage. Therefore, per the Court, the lender's security interest remained extant, albeit as an unrecorded equitable lien. The Court held, too, that when the lender discovered what had happened and thereafter recorded a mortgage to replace its discharged second mortgage, the lender did not waive its then equitable lien of its discharged second mortgage or merge that earlier equitable lien into the legal lien of the replacing mortgage (which waiver or merger arguably would have adversely impacted upon the lender's lien priority *vis-à-vis* both the third and fourth mortgages, both of which were recorded before the lender's replacing mortgage was recorded). Thus, the lien of the equitable, discharged second mortgage, represented by the legal lien of the replacement mortgage, had priority over the third mortgage, which had been given and recorded prior to the replacement mortgage.[2]

An Equitable Mortgage

There are various sources for creation of an equitable mortgage.

First, any deed to realty "which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; . . . ."[3]

Szerdahelyi v. Harris put historical perspective on the issue:

> Concededly, there was no formal mortgage instrument given to secure the loan. But from the earliest days, the English law recognized that an equitable mortgage may be impressed when money is loaned in reliance upon the security of property of the debtor pledged by him in such a way as not to be enforceable as a mortgage at law (*see, e.g.*, YB 9 Edwards IV, 25, 34 [1470], cited in Walsh, Mortgages ch II, Equitable Mortgages, at 34 [1934]). This was and is the law in New York (*Mooney v. Byrne,* 163 NY 86; *Chase v. Peck,* 21 NY 581; *see*, 38 NY Jur, Mortgages and Deeds of Trust, § 28 *et seq.*).[4]

The case of *Basile v. Erhal Holding Corp.*[5] is illuminating. It arose out of an earlier proceeding where there was evidence that the original mortgage loan was usurious. That proceeding was settled pursuant to an agreement restructuring the debt and providing for the escrowing of an executed and delivered "deed in lieu of foreclosure," not to be recorded until there was a default under the settlement agreement. The Court held that the deed actually was a mortgage because it had been provided as collateral security for payment of the settlement agreement's re-stated debt.

Similarly, in *Gioia v. Gioia*,[6] an escrowed deed was deemed to be only a mortgage. There, the former husband executed and delivered to his former wife an absolute deed, facially conveying his entire interest in the marital residence, as well as a mortgage thereon; both of them were to be held in escrow pending the former husband's performance or, conversely, his default under a stipulation to purchase his former wife's interest in the marital residence. The matrimonial agreement expressly provided that if he defaulted, then the former wife either could: (a) record the deed in lieu of foreclosure; or (b) foreclose the mortgage. Nevertheless, the former husband argued that the former wife could not acquire title simply by recording the deed; instead, he claimed, she had to foreclose. The Court agreed. It ruled that the former husband's escrowed deed in lieu of foreclosure "was intended to serve as security for his obligations under the stipulation and not as an absolute conveyance of the property."[7] The Court held that N.Y. Real Property Law § 320 (RPL) trumped the language of the parties' agreement, precluding the former wife's recording of the deed and thereby acquiring sole title to the marital premises.

The reason for this result stems from common law, e.g., *Leonia Bank v. Kouri*,[8] and rests upon public policy. Thus, long ago, the Supreme Court held, in *Peugh v. Davis*, that:

> It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties.
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> * * *
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> It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. *This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates*. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed (emphasis added).[9]

Courts make a global inquiry. They look not only at the "deed" instrument but also at other documentary or oral evidence to ascertain whether there was intent to deliver the deed and convey title or whether delivery of the deed was done only as security for performance of an obligation. For Example, in *TWA v. NYS Tax Appeals Tribunal*[10] the court examined all documents executed in conjunction with assignment of a lease and oral testimony as to why the transaction was so structured, to conclude that such particular assignment was not a mortgage under RPL § 320. Also, in *Corcillo v. Martut, Inc.*,[11] "to establish that the deed was meant only as a security, [the court found that an] examination may be made not only of the deed and a written agreement executed at the same time, but also to oral testimony bearing on the intent of the parties and to a consideration of the surrounding circumstances and acts of the parties." Finally, in *AL-SAR Realty v. Griffith* [12] the court found that "the applicable law is stated in Powell, Real Property (vol. 3, para. 447, at 37-131): "The deed absolute in form is transformed into a mortgage by a judicial finding that the parties intended it to operate as such. *Such a finding is unavoidable if there is a separate instrument providing that the deed was executed as security for indebtedness."(emphasis in original)*

Because an absolute deed which nevertheless is given as security is, at law, a mortgage, and the mortgagor has the unwaivable right to redeem the property, the creditor-mortgagee may not, upon mortgagor's default, simply record the deed,[13] or deem the transaction to have been a conditional sale "by way of an agreement to reconvey (citation omitted). The holder of a deed given as security must proceed in the same manner as any other mortgagee–by foreclosure and sale–to extinguish the mortgagor's interest (citation omitted)."[14]

Second, courts find and impose an equitable mortgage even in the absence of an enforceable–or, *any*–deed and accompanying security or other similar instrument, so long as the facts of the transaction clearly demonstrate that the parties expressly, or implicitly, intended that identified realty or personalty was, in some fashion, to be pledged as collateral security for any type of obligation. E.g., *James v. Alderton Dock Yards, Ltd.*:[15]

> The basis for [the equitable] lien . . . is dependent upon some agreement express or implied that there shall be a lien upon specific property, or else it is the means adopted for enforcing equities which could not be otherwise established . . . .
>
> The theory of equitable liens has its ultimate foundation in contracts express or implied which either deal with or in some manner relate to specific property, such as a tract of land, particular chattels or security, a certain fund and the like. The agreement must deal with some particular property either by identifying it or by so describing it that it can be identified and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for the obligation. (3 Pomeroy's Eq. Juris. [4th ed.] pp. 2961-2965.) The implied contract is a term used to define those situations and conditions which make it equitable and just in applying the equity powers of the court to establish and declare a lien where otherwise there might be no relief. (*See* Pomeroy, *supra*, p. 2976, § 1238, for illustration.)[16]

In *Allen v. Union Fed'l Mortg. Corp.*,[17] plaintiffs obtained a loan to be secured by a mortgage on their residence. A note and related documents were signed, the loan closed, and the proceeds were used to retire pre-existing secured and other debts owed by plaintiffs. Although there was a document entitled as being a mortgage, its signature and acknowledgment pages were missing. The Court's opinion, rendered after a hearing, did not disclose whether there was any evidence that plaintiffs actually signed the mortgage document or if the signature and acknowledgment pages were missing at the time of the closing.

Absent the execution and notarization pages, the incomplete mortgage document could not be recorded and it was not legally enforceable. Nevertheless, the lender's assignee sought and was awarded summary judgment imposing an equitable mortgage upon the subject premises:

> Under New York law, an equitable mortgage is a transaction that has the intent, but not the form of a mortgage, which a court will enforce in equity to the same extent as a mortgage. *Mailloux v. Spuck*, 87 A.D.2d 736, 737, 449 N.Y.S. 2d 69, 70 (3d Dep't 1982).
>
> A court will impose an equitable mortgage *where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation*. *See Teichman v. Community Hospital of Western Suffolk,* 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 475, 663 N.E.2d 628 (1996); *James v. Alderton Dock Yards,* 256 N.Y. 298, 303, 176 N.E. 401 (1931); *Corcillo v. Martut, Inc.,* 58 A.D.2d 617, 618, 395 N.Y.S.2d 696, 698, *aff'd*, 45 N.Y.2d 878, 410 N.Y.S.2d 811, 383 N.E.2d 113 (1978); *Newcourt Realty Holding Corp. v. Gabel*, 28 A.D.2d 704, 280 N.Y.S.2d 1020, 1021 (2d Dep't 1967).
>
> An equitable mortgage can be imposed where a legal mortgage "fails for the want of some solemnity." *Payne v. Wilson,* 74 N.Y. 348, 351 (1878). Thus, for example, an equitable mortgage may be imposed where money is advanced upon a verbal agreement to secure the debt by a mortgage on real property, but the agreement, for one reason or another, never culminates in a signed writing. *E.g.*, *Federal Deposit Ins. Corp. v. Five Star Mgmt., Inc.,* 258 A.D.2d 15, 21, 692 N.Y.S.2d 69, 73 (1st Dep't 1999), citing, *Sprague v. Cochran,* 144 N.Y. 104, 112-13, 38 N.E. 1000 (1894) (emphasis added).[18]

Thus, the *Allen* case and its authorities disclose two separate, additional bases, not covered by RPL § 320, which a court may use to impose an equitable lien, to wit: either facts showing an agreement to provide identifiable property (of any kind) as security for performance of an obligation, or a substantial defect in a security instrument rendering it unenforceable at law. In either instance, equity will intervene so as to do what is fair, proper and just (and thereby enforce the parties' legally determined intention).

The Recording Tax

RPAPL Article 13 mandates only that the complaint in a foreclosure action state compliance with New York's version of the "One Action Rule."[19] Despite conventional pleading, one vainly searches RPAPL Art. 13 for any requirement that the foreclosure complaint also must allege recording of the mortgage and payment of the applicable recording tax.

The necessity of recording a mortgage and paying the requisite tax is found, instead, in N.Y. Tax Law Article 11, Tax On Mortgages. It states that for purposes of Article 11, "[t]he term 'mortgage' . . . includes every mortgage or deed of trust which imposes a lien on or affects the title to real property . . . "; and, by definition, the term "mortgage" also includes, under certain circumstances, an assignment of rents which is delivered "as security for an indebtedness."[20]

The lien of an unrecorded equitable mortgage nevertheless may affect title to realty–even before the tax is paid–and the holder may bring an action to foreclose it. But a judgment of foreclosure and sale statutorily is prohibited by Tax Law § 258(1), unless the tax imposed by Tax Law § 253 is paid. Thus, sooner or later, the holder of an unrecorded equitable mortgage has to provide proof to the Court of the tax payment, to enable the holder to enter the mortgage into evidence and obtain a foreclosure judgment. *E.g.*, *Commonwealth Land Title Ins. Co. v. Lituchy*.[21] There, assignee-mortgagee held an unrecorded assignment of an unrecorded mortgage as well as the note secured by that mortgage. No recording tax had been paid. The Court held that the note and mortgage were enforceable; but the assignee-mortgage had to pay the requisite recording tax–even if the mortgage and its assignment were not recorded—if it wanted to proceed to a judgment in the action. Upon later payment, summary judgment was granted to the assignee-mortgagee.[22]

The more serious problem of failure to record a mortgage (and pay the requisite recording tax applicable to a transaction deemed to be a deal including delivery of a mortgage) is priority of liens. For this purpose, New York is a "race/notice" jurisdiction. In other words, a party who has given consideration for its voluntarily created lien or encumbrance and is the first to record its security interest, without actual notice of a pre-existing unrecorded encumbrance, has priority over the earlier created, but unrecorded, lien.[23]

In *New York TRW Title Ins. v. Wade's Canadian Inn and Cocktail Lounge, Inc.,*[24] the issue surfaced because the first mortgage loan was given to an individual's corporations while the deed to the realty securing that loan was in the name of the individual. Thus, there was a defect since the loan was "secured" by a security interest on land not owned by the borrower and there was no hypothecation agreement by the land's owner. Thereafter, the individual subdivided the land and obtained three additional mortgages, apparently one per newly-subdivided parcel. Two of those mortgages expressly declared that they were subordinate to the first mortgage. Upon default, the first mortgagee foreclosed—but, only on the two parcels where the junior mortgages acknowledged the exis-

tence of and their subordination to the first mortgage.

The Court said that there was a question whether the first mortgagee had an adequate legal remedy.[25] Therefore, the Court held that despite the defect of the first mortgage and it not being a legally enforceable lien upon realty not owned by the mortgagor, there were enough facts to indicate the possibility of intent to have created a valid legal mortgage. Due to the factual questions, the Court denied cross-motions for summary judgment, recognizing that a factual determination might lead a court to conclude that the defective first mortgage was an equitable one; and, as to the reason why the first mortgagee sought to foreclose upon only two of the three subdivided parcels, the Court stated: "Apparently realizing that the declaration of an equitable mortgage would not take priority over [a bank's subsequent] legal mortgage, inasmuch as [the bank] apparently had no notice of [the equitable lien], [the first mortgagee] did not pursue foreclosure of that part of the [subdivided] property secured by the [bank's second] mortgage."[26]

In that regard, where legally enforceable mortgages mistakenly are discharged or inadvertently satisfied, the lien holder may seek reinstatement of the priority of such mortgages to their original status and priority as a lien provided, however, no harm is caused to anyone who, in the interim, innocently relied upon the validity of the discharge or satisfaction, i.e., there are no *bona fide* encumbrancers intervening between the date of the discharge/satisfaction and the reinstatement.[27] Further, reinstatement usually is effected simply by an order canceling the discharge/satisfaction document.[28]

The *Kenney* Case

The *Kenney* case is notable because it dealt with not only the accidental discharge of a legal mortgage and the resultant equitable lien, but also because it highlighted the difference in priorities between a legal and an equitable mortgage.

Kenney was an action to foreclose the lien of a mortgage recorded in 1987 which thereafter was consolidated with a second mortgage in 1993 and later amended and restated in 1997 (the "Senior Mortgage"). In addition, the lender had obtained and recorded in 1987 another mortgage, which originally covered only a part of the realty encompassed by the Senior Mortgage, but which thereafter was spread to encumber all of the pledged realty (the "Second Mortgage"). Subsequently, in 1993, defendant Kenney received and recorded a mortgage against all of the realty (the "Third Mortgage"); and, later on that year, the Small Business Administration ("SBA") also obtained a mortgage (the "Fourth Mortgage"), but only on part of the subject premises.

In 1994, the lender erroneously discharged the Second Mortgage. That mistake was uncovered in 1996. In 1997, the lender obtained and recorded a new mortgage (the "Replacement Mortgage"), covering all of the realty for the same, but restructured, debt which had been secured by the lien of the since discharged Second Mortgage. In 2001, the SBA's Fourth Mortgage was assigned.

The Senior Mortgage was foreclosed. The issue for distribution of surplus monies was clearly defined: which lien had priority, the lender's 1997 Replacement Mortgage and equitable lien thereof arising out of the accidental discharge of the 1987 Second Mortgage, or defendant Kenney's 1993 Third Mortgage (*see also*, fn.2, *supra,* regarding priority of the assigned Fourth Mortgage). The Court held in favor of the lender.

> *Under the circumstances presented here*, the Supreme Court correctly determined that Citibank's lien had priority over Kenney's. To be sure, when Citibank discovered in 1996 that the [Second M]ortgage had been erroneously discharged, it had the right to seek the reinstatement of the [Second M]ortgage to its former status and priority, as neither Kenney nor the SBA had changed their positions in reliance on the validity of the prior discharge (see *Application of Ditta,* 221 N.Y.S.2d 34, Sup Ct., Kings County, Oct. 11, 1961, Cohn, J.). Contrary to Kenney's contentions, Citibank's decision to enter into the [R]eplacement [M]ortgage in lieu of moving to reinstate the [Second M]ortgage does not compel the conclusion that Citibank waived its seniority under the [Second M]ortgage. The inadvertent discharge of the [Second M]ortgage, without concomitant satisfaction of the underlying debt, did not extinguish Citibank's security interest; rather, it left Citibank with an unrecorded, equitable lien, which Citibank could have enforced by way of foreclosure (see *Federal Deposit Ins. Co. v. Five Star Mgt.,* 258 A.D.2d 15, 21 [1999]; *Sullivan v. Corn Exchange Bank*, 154 App Div 292, 296 [1912]). Moreover, the subsequent creation by Citibank of a duly perfected mortgage (i.e., the [R]eplacement [M]ortgage) encumbering the same premises and securing a restructured version of the same underlying debt did not, **under the circumstances,** operate as a waiver of Citibank's prior equitable lien or as a merger of such lien into the subsequent [R]eplacement [M]ortgage. Accordingly, because Kenney never changed her position in reliance on the inadvertent discharge of the [Second M]ortgage, there was no basis in equity to deny the continued seniority of Citibank's equitable lien over the Kenney [Third M]ortgage (see *Payne v. Wilson*, 74 N.Y.

348, 353-354 [1878]) (bold face emphasis added).[29]

Conclusion

Recognizing, and exercising the opportunity for declaring, the existence of and foreclosing upon an equitable mortgage is more widespread than generally may be presumed. Utilizing such a remedy frequently will enable an obligee to recover on its intended security–at least, in part, if there are no recorded *bona fide* encumbrancers. It is a useful tool whenever defects in the mortgage process have occurred; and, recourse to declaring and foreclosing equitable liens may give some measure of comfort to lenders or other obligees when there are problems in the underlying documents or transactions in which those documents are, or are supposed to be, executed, delivered and/or recorded.

Indeed, if there are concerns about an expiring statute of limitations which could bar foreclosure of a subsequently reinstated earlier mortgage, a promptly commenced action to declare and foreclose the equitable mortgage might be the only viable remedy for a lender who never had or inadvertently lost a legal mortgage.

Endnotes

1. 17 A.D.3d 305, 793 N.Y.S. 84 (2d Dep't 2005), granting reargument of, recalling and vacating, that Court's earlier decision reported at 10 A.D.3d 377 (2d Dep't 2004).
2. The Court, without stating any basis, asserted that the lender "conceded" that the lien of the replacement mortgage did not have seniority over the fourth mortgage which was assigned in 2001, years after the replacement mortgage was recorded. Appellate counsel for the lender opined to this writer that the Appellate Division's conclusion might have arisen out of an apparent procedural snafu at the I.A.S. Court level. But, it might be that the assignee of the fourth mortgage was a *bona fide* purchaser, since the replacement mortgage did not state that it was replacing the inadvertently discharged second mortgage or otherwise seek to legally revive the lien of that earlier mortgage. *See*, 1997 replacement mortgage, recorded at Liber 17926 of Mortgages, Pages 0835-0848, in the Nassau County Clerk's Office on May 12, 1997. Thus, although neither the third nor fourth mortgagees changed their positions between 1994 (when the second mortgage was discharged) and 1997 (when the replacement mortgage was recorded), the fourth mortgagee's 2001 assignee might not have had notice that the lender's 1997 replacement mortgage was not a new one, but, instead, had been given to replace the second mortgage which, prior to its discharge, had had priority over the fourth mortgage.
3. N.Y. Real Property Law § 320.
4. 110 A.D.2d 550, 558, 488 N.Y.S.2d 164, 169 (1st Dep't 1985), *mod. oth. gds.*, 67 N.Y.2d 42, 499 N.Y.S.2d 650 (1986).
5. 148 A.D.2d 484, 538 N.Y.S.2d 831 (1st Dep't), *app. den.* 75 N.Y.2d 701, 551 N.Y.S.2d 905 (1989), cited with approval in *D&L Holdings, LLC v. RCG Goldman Co. LLC*, 287 A.D.2d 65, 70, 734 N.Y.S.2d 25, 29 (1st Dep't 2001), *app. den.* 97 N.Y.2d 611, 742 N.Y.S.2d 604 (2002).
6. 234 A.D.2d 588, 589, 652 N.Y.S.2d 63, 64 (2d Dep't 1996).
7. *Gioia,* at 589.
8. 3 A.D.3d 213, 217, 772 N.Y.S.2d 251, 254 (1st Dep't 2004).
9. 96 U.S. 332, 336-337 (1877), *followed*, *Hammerstein v. Henry Mtn. Corp.*, 11 A.D.3d 836, 838, 784 N.Y.S.2d 657, 659 (3d Dep't 2004) (acknowledging that under the non-waivable right to redeem, mortgagor could sell the pledged realty and pay off the secured loan without lender's prior consent despite express contrary language in the mortgage requiring such consent) (and cases thereat); see also, *Leonia Bank, supra* note 8; and, *Maher v. Alma Realty Co.*, 70 A.D.2d 931, 417 N.Y.S.2d 748 (2d Dep't 1979) (a deed accompanying a mortgage may be given solely for security purposes: "deeds given in security for the payment of a debt are mortgages ([RPL] § 320). The plaintiffs [mortgagors] cannot waive their right of redemption even by a stipulation in open court, since public policy forbids such a waiver [citation omitted]. The equities of the parties may be adjusted in the action [citation omitted].").
10. 209 A.D.2d 906, 908, 619 N.Y.S.2d 190, 192 (3d Dep't 1994).
11. 45 N.Y.2d 878, 879, 410 N.Y.S.2d 811, 811 (1978), *aff'g on op. of App. Div.*, 58 A.D.2d 617, 618, 395 N.Y.S.2d 696 (2d Dep't 1977), *stay den.* 43 N.Y.2d 792, 402 N.Y.S.2d 393, *stay den.* 43 N.Y.2d 835 (1977).
12. 139 Misc.2d 104, 105, 526 N.Y.S.2d 313, 315 (Sup. Ct., Oneida Co. 1987).
13. *See Supra,* note 6.
14. *Thomson v. Daisy's Luncheonette Corp,* 2005 N.Y. Misc. LEXIS 893, 7 Misc.3d 1019A, at ** 4-5 (Sup. Ct., Kings Co. 2005).
15. 256 N.Y. 298, 303 (1931).
16. *See also*, *Security Pacific Mortg. and Real Estate Svcs., Inc. v. Canadian Land Co. of America, N.V.*, 962 F.2d 204, 208-209 (2d Cir. 1992) (agreement must identify or describe the realty, goods, or monies sought to be pledged and clearly show intent to grant a security interest in it).
17. 204 F.Supp. 2d 543, 546, (E.D.N.Y. 2002 - collecting N.Y. cases).
18. *Id.*, at 546.
19. RPAPL § 1301(2).
20. N.Y. Tax Law § 250(2)(a). *See also*, *TWA, Inc. v. NYS Tax Appeals Tribunal, supra* note 10 (there, the facts established that the lease assignment was not a RPL § 320 mortgage, so that no tax had to be paid); *Corcillo v. Martut, Inc., supra* note 11 (affirming so much of the IAS Court's holding that a deed in lieu of foreclosure was a RPL § 320 mortgage "and the mortgage tax must be paid").
21. 161 A.D.2d 517, 517-518, 555 N.Y.S.2d 786, 787 (1st Dep't 1990).
22. 188 A.D.2d 353, 591 N.Y.S.2d 770 (1st Dep't 1992), *app. den.*, 81 N.Y.2d 706, 597 N.Y.S.2d 936 (1993).
23. RPL § 291; see also, 78 NY Jur. 2d § 233. Recently, in *Washington Mutual Bank v. Peak Health Club, Inc.*, __ Misc.3d __, N.Y.L.J., June 28, 2005, p. 19, cols. 3-4 (Sup. Ct., Nassau. Co. 2003), the Court held that a lender that failed to record its mortgage for about five years lost its priority when, in the interim, another lender recorded its own mortgage where there was no evidence that the later lender/mortgagee knew or should have known about the earlier lender/mortgagee.
24. 199 A.D.2d 661, 605 N.Y.S.2d 139 (3rd Dep't 1993).
25. *Id.*, at 663.
26. *Id.*, at 664 and at 663, n. 1.
27. *Application of Ditta,* 221 N.Y.S.2d 34, 35 (Sup. Ct., Kings Co. 1961).
28. *Krause v. Hullar*, 135 Misc. 837, 841, 240 N.Y.S.2d 61 (Sup. Ct., Onondaga Co. 1930); *Lumber Exchange Bank v. Miller*, 18 Misc. 127, 133, 40 N.Y.S. 1073 (Sup. Ct., Erie Co. 1896).
29. 17 A.D.3d 305, 308, 793 N.Y.S.2d 84, 86. It is not clear why, in 1997, the lender chose to replace its inadvertently discharged First Mortgage rather than move for an order canceling the discharge and reinstating the First Mortgage to its original priority. If the lender then had successfully done so, presumably the restored First Mortgage would have had priority over both Kenney's Third Mortgage as well as the SBA's later assigned Fourth Mortgage.

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Will the Courts Render RPTL § 720(1)(b) Unconstitutional?

By Mark D. Lansing

Should a court be precluded from determining the fair market value of a property, merely by the fortuity that a taxpayer's petition sets forth a claimed value that is greater than the property's demonstrated fair market value?

By Real Property Tax Law § 720(1)(b),[1] a taxpayer is restricted to the greater of the proof admitted at trial or the value claimed in its petition. If strictly interpreted and applied, such a restriction may preclude a court from fulfilling its constitutional and statutory mandate to determine the full or fair market value of the real property in a tax certiorari proceeding. That is, if RPTL § 720(1)(b) is interpreted to preclude a court from exercising its discretion to permit the amendment of the petition to conform to the proof at trial, then, the courts may render RPTL § 720(1)(b)'s restriction unconstitutional.

A. Courts Must Determine Fair Market Value to Comply With New York State's Constitution and Statutory Requirements to Find Full Value

The fundamental purpose of a tax certiorari proceeding is to determine the fair market value of the challenged real property. In *Allied Corp. v. Town of Camillus*,[2] the Court of Appeals plainly stated that [t]he ultimate purpose of valuation . . . is ***to arrive at a fair and realistic value*** of the property involved so that ***all property owners contribute equally*** to the public fisc.[3] In fact, a plain reading of the New York State Constitution and RPTL § 305[4] shows that a court must determine the fair market value of the challenged real property. Article XVI, section 2 of the New York State Constitution provides, in pertinent part, that "[t]he legislature shall provide for the supervision, review and equalization of assessments for purposes of taxation. ***Assessments shall in no case exceed full value***."[5] Moreover, RPTL § 305(2) states, in pertinent part, that "[a]ll real property in each assessing unit shall be assessed at a uniform percentage of value (fractional assessment)." "Value," as used in this subsection, means full or fair market value.[6] Simply, the sole purpose of a tax certiorari proceeding is to find a property's fair market value.

"The fundamental purpose of a tax certiorari proceeding is to determine the fair market value of the challenged real property."

B. When Necessary, These Constitutional and Statutory Requirements for Full or Market Value Require That a Petition Be Amended to Conform to the Proof

In the normal course of events at a trial in a tax certiorari proceeding, the parties submit evidence of value from which a court determines the fair market value of the property. All is well, unless the taxpayer, in its petition, claimed a value higher than the fair market value proven at trial. In any other trial, the *ad damnum* clause would be amended to conform to the proof. In fact, Civil Practice Law and Rules ("CPLR") § 3025(c) provides a court expansive discretion to amend a petition or complaint to conform to the proof.[7] Specifically, CPLR 3025(c) provides:

> Amendment to conform to the evidence. The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.

In *Loomis v. Civetta Corinno Construction Corp.*, the Court of Appeals held:

> One of the obvious goals of the CPLR was to liberalize the practice relating to pleadings. . . . We have recently held that motions to conform the pleadings to the evidence, made under CPLR 3025 (subd [c]) before or after judgment, are a matter within "the sound discretion of the court and should be determined in the same manner and by weighing the same considerations as upon a motion to amend pursuant to subdivision (b), except that under (c) the possibly increased effect on orderly prosecution of the trial might be a factor to be taken into account (see 3 Weinstein-Korn-Miller, NY Civ Prac, par 3025.26). Where no prejudice is shown, the amendment may be allowed 'during or even after trial.' . . . ***Thus, in the absence of prejudice to the defendant, a motion to amend the ad damnum clause, whether made before or after the trial, should generally be granted.***
>
> Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, ***there must be some indication that the defendant has been hindered in the preparation of his case***

> ***or has been prevented from taking some measure in support of his position*** (*Wyman v. Morone*, 33 A.D.2d 168, 172 [Cooke, J, dissenting], *supra*). In the present case it is abundantly clear that no such prejudice existed.[8]

Simply, CPLR 3025(c) permits a complaint or petition to be amended to reflect the greater "damages" (*i.e.*, refunds) proven at trial. For purposes of a tax certiorari proceeding, the Court of Appeals previously determined that a municipality suffers no prejudice by such an amendment.[9] The issues that arise are whether RPTL § 720(1)(b) precludes such an amendment and, if so, can it do so and pass constitutional muster.

"In a vacuum, RPTL § 720(1)(b) limits the value to be determined at trial to the higher of the market value or the value claimed in the petition."

C. RPTL § 720(1)(b) Purports to Limit the Reduction of an Assessed Value that a Court May Determine; This Violates New York Constitution and RPTL § 305 if the Court is Precluded from Exercising Its Discretion to Amend the Petition

In a vacuum, RPTL § 720(1)(b) limits the value to be determined at trial to the higher of the market value or the value claimed in the petition. There is no specific provision that precludes an amendment of the petition to conform to the proof. In addition, the legislative history does not show such an intended outcome. In fact, RPTL § 720(1)(b) must be read in conjunction with the New York State Constitution, RPTL § 305 and CPLR 3025(c).[10] The Court has a duty to harmonize these constitutional and statutory provisions, so as to satisfy the purpose of a tax certiorari proceeding.[11]

RPTL § 720(1)(b) provides, in pertinent part:

> If the court determines that the assessment being reviewed is excessive or unequal, it shall order a revised assessment of the real property of the petitioner or the correction of the assessment upon the roll, in whole or in part, in such manner as shall be in accordance with law or as shall make it conform to other assessments upon the same roll and secure equality of assessment, ***provided, however, that except in cities with a population of one million or more an assessment may not be ordered reduced to an amount less than that requested by the petitioner in a petition or any amended petition*** verified pursuant to section seven hundred six of this title (emphasis added).

Based on this language, two recent court decisions determined that if a taxpayer claims a value in its petition (or even an administrative complaint filed with the board of assessment review) that is higher than the fair market value demonstrated at trial or found by the court, the taxpayer's claim must automatically be limited to the value set forth in its petition. That is, if CPLR 3025(c) is pre-empted by RPTL § 720(1)(b), then, a court cannot determine the property's fair market value. The Supreme Court of Rockland County found that RPTL § 720(1)(b) precluded it from exercising its discretion, under CPLR 3025(c), to amend a petition to conform to the proof admitted at trial.[12]

Needless to say, the *Orange & Rockland Utilities, Inc.* decision contravened the long-standing principle governing all tax certiorari proceedings, that all properties must equitably share in the public fisc. The Court of Appeals has held that the only way to achieve such equity is when each parcel of real property is assessed at the same uniform percentage of fair market value. *See* RPTL § 305.[13] To achieve an actual uniform percentage of value for all real property on an assessment roll, the same uniform percentage of value must be applied to each property's fair market value. RPTL § 720(1)(b)'s prescription reverses these fundamental concepts. This attempt to avoid the constitutional and statutory requirement of applying full value is not new. In fact, RPTL § 720(1)(b) was enacted to overrule a court decision that denied such prior attempts. In finding that a limitation on a court's ability to determine fair market value was unconstitutional, the Court of Appeals stated:

> In New York, both by statute (Real Property Tax Law, § 306) and under our Constitution (NY Const, art XVI, § 2), real property ***may not be assessed in excess of its full value. Indeed, it is the very purpose of a tax review proceeding "to arrive at a fair and realistic value of the property involved."*** (*Matter of Great Atlantic & Pacific Tea Co. v Kiernan*, 42 N.Y.2d 236, 242, *supra*; *see, also, Matter of Merrick v. Board of Assessors of Nassau County*, 45 N.Y.2d 538.) Moreover, because the Real Property Tax Law relating to assessment review proceedings is remedial in character, it should be construed in such a way that the taxpayer's right to have his assessment reviewed ***and the appropriate relief granted should not be defeated by a pleading technicality***. *Matter of Great Eastern Mall v. Condon*, 36 N.Y.2d 544; *People ex. rel. New York City Omnibus Corp. v Miller*, 282 NY 5, 9.)
>
> It has long been the rule that the primary purpose of the tax petition is to give notice

to the taxing authority so that it may take such steps as may be advisable to defend the claim. *(Stuyvesant v Weil*, 167 NY 421, 425; *Foley v D'Agostino*, 21 A.D.2d 60, 62-63.) That being the case, where adequate notice has been given, we see no good reason to adhere blindly to a rule which precludes a court from granting the relief justified by the proof. ***Aside from being prevented from collecting a tax which has been found to be excessive, the commissioner has not alleged, let alone proven, any prejudice suffered by the city as a result of the assessments being reduced below the amounts requested in the petitions. It is consistent with the general purpose of these proceedings and with the legislative mandate that property not be assessed in excess of full value that relief not be limited to the reduction claimed in the petition. Thus, we hold that where the evidence establishes a value lower than that alleged in the petition, a court can reform the petition to conform with the proof and order the appropriate reduction*** (emphasis added).[14]

Accordingly, in determining RPTL § 720(1)(b)'s proper interpretation and harmonization with the State's Constitution, the first question is: may a statute contradict the plain language of the New York State Constitution? Of course, the answer is no.[15] Yet, the only case that has attempted to address the constitutionality of RPTL § 720(1)(b) permitted such a contradiction.

In *Orange & Rockland Utilities, Inc.*, the court rejected the taxpayer's motion to amend the petition to conform to the proof, and its argument that RPTL § 720(1)(b) was unconstitutional.[16] The Court found that the taxpayer had not met its "heavy burden" of proof.[17] Effectively, the Court left the proper interpretation and application of RPTL § 720(1)(b) for the appellate courts. Notwithstanding this finding, the review of the constitutionality of RPTL § 720(1)(b) should have been a facial analysis. Petitioner's claims did not require "factual proof," nor the further development of a record. The resolution of the claim simply involved the plain reading of the New York Constitution, RPTL § 305, RPTL § 720(1)(b) and CPLR 3025(c), and harmonizing these statutes to avoid an unconstitutional result. That is, if a statute, facially or by application, contravenes the Constitution, the taxpayer's "heavy burden" is met. By failing to undertake the appropriate analysis, the *Orange & Rockland Utilities, Inc.* decision is not instructive.[18] Until there is meaningful analysis, practitioners are left in the dark.

"By the application of RPTL § 720(1)(b), the taxpayer's property would have been treated quite dissimilarly from other similarly situated property. . ."

An example of the unconscionable impact of RPTL § 720(1)(b) is demonstrated by the very facts of *Orange & Rockland Utilities, Inc*. In challenging the 2000 final assessment rolls, the petition set forth a value of $721,000,000 based on settlement negotiations/agreement at that time. In 1999, the property was purchased for $198,000,000. As the reader can observe, the Petition's assessed value was almost four times the property's fair market value. By RPTL § 720(1)(b) and the Court's holding that it precluded the amendment of the petition, the Court could not determine the fair market value. Instead, the court was limited to a value that was admittedly four times its purchase price.[19] Clearly, by making such an erroneous determination of value, the property could not comply with RPTL § 305. The required value resulting from the application of § 720(1)(b) would be four times (400%) its fair market value. Yet, the remainder of the property comprising the Town of Haverstraw's assessment rolls was assessed at 9.36% of their fair market value in 2000.[20] By the application of RPTL § 720(1)(b), the taxpayer's property would have been treated quite dissimilarly from other similarly situated property (compare 400% to 9.36%).

In any other litigation the claimant has the ability to amend its claim. Interpreting RPTL § 720(b)(1) to preclude such an amendment of the taxpayer's petition leads, inevitably, to the result of a valuation (*i.e.*, assessment) that exceeds the real properties' full value. That is, by limiting the Court to the higher value set forth in the taxpayer's petition, the uniform percentage of value for the municipality is applied to the taxpayer's erroneously claimed higher value. Yet, the remainder of the parcels comprising the municipality's assessment rolls (that did not challenge their assessments) would have a uniform percentage of value applied to their respective market values. Simply, if RPTL § 720(1)(b) precludes a taxpayer from amending its petition, pursuant to CPLR 3025(c), to conform to the proof at trial, it necessarily creates an equal protection violation. That result contravenes the New York State Constitution.[21]

D. If RPTL § 720(1)(b) Precludes the Amendment of the Taxpayer's Petition, the Determined Full Value Cannot Exceed a Municipal Appraiser's Conclusion of Value

To the extent that RPTL § 720(1)(b) precludes the taxpayer from amending its petition and such preclusion is constitutional, the determined full value cannot exceed a municipal appraiser's conclusion of

value. This result is particularly true when the municipality's conclusion of value is less than the equalized full value found on the town's final assessment rolls, or even the claimed value set forth in the taxpayer's petition.[22] Accordingly, even if the petition's claimed value is greater than both the taxpayer's and municipality's appraised value, the municipality's appraised value sets the upper limit, not the petition.[23]

To avoid the harsh interpretation of RPTL § 720(1)(b) by *Orange & Rockland Utilities, Inc.*, the taxpayer must choose a value in its petition under which an appraisal cannot go. This should not encourage a claimed value of "0", as some practitioners have suggested, but rather, a claimed value that represents the extreme lower end of a property's fair market value, so that it will not exceed an appraiser's determined value.

Endnotes

1. N.Y. Real Prop. Tax Law § 720(1)(b).
2. 80 N.Y.2d 590, N.Y.S.2d 417 (1992).
3. *Allied Corp. v. Town of Camillus*, 80 N.Y.2d 351, 356, 590 N.Y.S.2d 417, 419 (1992) (emphasis added).
4. N.Y. Real Prop. Tax Law § 305.
5. N.Y. CONST. art. XVI, § 2 (emphasis added).
6. See *Foss v. City of Rochester*, 65 N.Y.2d 247, 491 N.Y.S.2d 128 (1985).
7. NYCPLR 3025 (2005).
8. 54 N.Y.2d 18, 23, 444 N.Y.S.2d 571, 572 (1981) (emphasis added).
9. *W. T. Co. Grant v. Srogi,* 52 N.Y.2d 513, 438 N.Y.S.2d 761 (1981).
10. As stated in *People of the State of New York v. John Doe*, 169 Misc.2d 29, 36 (Sup. Ct. Nassau Co. 1996):

    > It is a fundamental rule of statutory interpretation that of two constructions which might be placed upon an ambiguous statute one which would cause objectionable consequences is to be avoided." (McKinney's Cons Laws of NY, Book 1, Statutes § 141, at 280-281.) The construction of a statute to be adopted is the one which will not cause an injustice or an absurdity. "The Legislature is presumed to have intended that good will result from its laws, and a bad result suggests a wrong interpretation.

11. McKinney's Cons. Laws of N. Y., Book 1, Statutes, §§ 97, 98; *Levine v. Bornstein*, 4 N.Y.2d 241 (1958) ("elementary rule of interpretation that all parts of an act are to be read and construed together to determine the legislative intent, and that all should be harmonized with one another.")
12. See *Orange & Rockland Utilities, Inc. v. Town of Haverstraw*, Index No. 4133-95, et al. (Sup. Ct. Rockland Co. 2004).
13. In this vein, there is a growing cottage industry of cases attacking the assessment rolls and assessor's methodology. Fundamentally, these cases are based on the assessor not having assessed each property at the same uniform percentage of value. RPTL § 720(1)(b) will only further exacerbate this growing problem. See *Orange & Rockland Utilities, Inc. v. Town of Haverstraw*, Index No. 4133-95, et al. (Sup.Ct. Rockl. Co. 2004), for example.
14. *W. T. Co. Grant v. Srogi,* 52 N.Y.2d at 513.
15. *See, e.g., Greater Poughkeepsie Library District et al. v. Town of Poughkeepsie*, 81 N.Y.2d 574 (1993).
16. 7 Misc. 3d 1017A, 2005 N.Y. Misc. LEXIS 865, 2005 NY Slip Op 50653U (2005).
17. *Id.*
18. The Court's summary of RPTL § 720(1)(b)'s legislative history demonstrated the inherent ambiguity and contradictory nature of that statute. Some supporting memoranda found that RPTL § 720(1)(b) was limited to New York City, while other memoranda claimed the language applied outside New York City. Yet, where ambiguity exists in tax statutes, it must be resolved in favor of the taxpayer. See *Manhattan Cable TV Service v. Freyberg*, 49 N.Y.2d 868, 869, 427 N.Y.S.2d 933, 934 (1980) (statute must be "construed most strongly in favor of the taxpayer and against the government"); *Grumman Corp. v. Board of Assessors of Town of Riverhead*, 2 N.Y.2d 500, 161 N.Y.S.2d 393 (1957); *Quotron Systems v. Irizarry*, 48 N.Y.2d 795, 423 N.Y.S.2d 918 (1979); *Crystal v. City of Syracuse Department of Assessment*, 47 A.D.2d 29, 364 N.Y.S.2d 618 (4th Dep't 1975). Here, this principle was simply ignored.
19. In New York State, the best indicator of value is its purchase price. See *FMC Corp. v. Unmack*, 242 A.D.2d 904, 662 N.Y.S.2d 907 (4th Dep't 1997), *lv. granted,* 91 N.Y.2d 947, 671 N.Y.S.2d 708 (1998), *rev'sd and remanded,* 92 N.Y.2d 179, 189, 677 N.Y.S.2d 269 (1999); *Hellerstein v. Assessor of Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388 (1975).
20. Final equalization rate determined by SORPS for the Town of Haverstraw for the 2000 final assessment rolls. See, http://www:sorps.state.ny.us.
21. RPTL § 720(1)(b); N.Y. CONST. art. XVI, § 2; *W.T. Grant Co. v. Srogi, supra*.
22. See *Orange & Rockland Utilities, Inc. v. Town of Haverstraw, supra* note 12; *Arsenal Housing Associates v. City Assessor of City of Watertown*, 298 A.D.2d 830 (4th Dep't 2002); *South Slope Holding Corp. v. Comstock*, 280 A.D.2d 883 (4th Dep't 2001); *Norton Company v. Assessor of the City of Watervliet*, 3 A.D.3d 760, 762 (3rd Dep't 2004).
23. *See Orange & Rockland Utilities, Inc. v. Town of Haverstraw*, *supra* note 12.

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How to Pay Off a Mortgage in Foreclosure

By Steven J. Baum

While paying off a residential mortgage is a relatively simple task, paying one off that is in foreclosure is a complex process worthy of examination. The concepts and tasks involved are discussed in this article. A recommended checklist for those involved in real estate transactions follows.

Is the Mortgage in Foreclosure?

While an attorney representing either a seller of real property, or an owner seeking to refinance, should expect full disclosure from his or her client, the truth often hides behind a cloak of shame or embarrassment. Few clients will voluntarily announce their home is in foreclosure. Others may not even know an action has been filed and served. Crafty spouses often accept service on behalf of their significant other, and never disclose to them the mortgage has not been paid in months.

It is usually through the public records, when an abstract of title or title insurance is prepared, that a filed mortgage foreclosure action is discovered. If you represent the mortgagor(s), you must immediately take action once knowledge of the foreclosure is obtained.

Determining the Status of the Foreclosure Action

Upon learning the subject mortgage is in foreclosure, steps must be taken to determine where the foreclosure action lies. Contacting counsel for the lender or mortgage servicer is not always an easy task. Due to the rigors of the federal Fair Debt Collection Practices Act (15 U.S.C. § 1692), the attorney for the mortgagee must ensure the person calling them about the defaulted mortgage is an authorized party. 15 U.S.C. § 1692(b) prohibits the debt collector (in this case, the attorney handling the foreclosure) "without the prior consent of the consumer given directly to the debt collector" from communicating, in connection with the debt, "with any person other than the consumer, (or) his attorney. . . ." It is advisable for mortgagor's counsel to send a letter, fax, e-mail, or other written communication to mortgagee's counsel stating they represent the mortgagor and would like the status of the case.

Any real estate agent, broker, mortgage lender, underwriter, processor, title company, title closer, or any relative of the mortgagor who contacts the foreclosing attorney looking for information about the debt, including how much is owed or the status of the action, without the express consent of the mortgagor, is going to hit a brick wall. Lawyers who file foreclosures did not write the law, but they have to follow it.

Once assured the property in question will not go to auction prior to the intended closing date, the attorney for the mortgagor or other authorized party can proceed to order the loan payoff.

Ordering the Pay Off

As previously stated, pay off information will not be given to those not authorized by the mortgagor to receive it. A simple letter, signed by the mortgagor (or their attorney claiming representation) will do the trick.

The pay off should be ordered at least two to three weeks in advance of the intended closing date. To understand this requirement, one must be aware of what goes on behind the scenes. When foreclosure counsel receives a request for a pay off, they must contact the mortgage holder and obtain what is owed. Suffice it to say, a lender who is servicing hundreds of thousands and sometimes millions of loans cannot issue these figures immediately. Loans in foreclosure carry more than just the standard principal and interest due. Late charges, property inspection fees, tax and insurance advances, nonsufficient funds charges, appraisals, brokers' price opinions are but a few of the amounts added to a pay off for foreclosure. If a mortgagor was in bankruptcy, or previously in foreclosure, additional time is necessary to determine proper payment allocation and attorneys fees and costs that may have accrued. If a mortgagor was involved with a payment plan, or the loan was modified, all figures must be examined for accuracy. In some cases, the mortgage itself must be reviewed to see if a prepayment penalty is applicable.

Foreclosing counsel also has some work to do. In addition to determining the appropriate legal fees to be charged, costs must be gathered. For example, process servers may have to be contacted to obtain the amounts due for serving defendants. The same applies to publication costs. For files in litigation or bankruptcy, these fees must be obtained as well.

When all the numbers finally are in one place, they must be given a final "once through" by counsel. Corporate advances are often broken down so the figures are understandable by those who rely on them. In addition to the actual amount due on a certain date, estimates are usually generated for a short period in the future. Foreclosure actions generally do not stop because a pay off has been ordered. Thus, additional fees and costs can be incurred, and are often shown on the pay off as estimated figures.

Reading the Pay Off

Once received, mortgagor's counsel must review the pay off with their client(s). Careful attention must be paid to the requirements of the letter. What is the date the pay off is "good through?" How must funds be tendered (e.g., certified or attorney's check)? Who should the check be made payable to? Following the instructions as they appear will ensure a proper pay off. Deviation from them will almost certainly spell disaster.

Pay offs may contain a myriad of charges. While most charges are understandable, it is not uncommon to see terms that may need defining. Contact foreclosure counsel for further explanation.

Anticipate Possible Expenditures

Most pay off letters state expenses will continue to accrue on the account. This means the lender or mortgage servicer may advance money for items such as real property taxes and homeowner's insurance as necessary. Tax and insurance bills are usually paid by a lender anywhere from one to two weeks prior to their due date. Of course, not all lenders or servicers advance taxes. In some cases, such as where a loan is not escrowed, or is a second mortgage, the lender may advance no money at all. On the other hand, even these entities may advance funds suddenly, in order to avoid a tax foreclosure sale or missing a redemption date and having their lien extinguished.

It is imperative those involved with paying off a mortgage in foreclosure review a tax and water search carefully. Hold money back for taxes that could potentially be advanced by the time the lender receives the pay off funds, or ensure the new lender, if there is one, has cut a check for payment of the same. Always confirm that any unpaid taxes are going to in fact be paid.

Caveat: Confirming at the Closing Table

A common occurrence where there is a new mortgage whose funds are going to pay off the foreclosed mortgage (for example, the mortgaged premises were sold and the purchaser is obtaining financing as part of the purchase price), is for someone to call foreclosure counsel from the closing table to confirm the exact amount due on the pay off.

Trying to confirm the amount due from closing often proves to be futile. One cannot expect foreclosure counsel, while the authorized caller is on "hold," to immediately contact the mortgagee to see if any further advances or other costs were incurred. There are simply too many hoops that must be jumped through in order to provide a pay off, as discussed above. That is why estimates are usually given on pay off letters. The question to be asked is "will the funds arrive at foreclosure counsel's office prior to the expiration date of the pay off letter?" If the answer is "yes," funds should be sent according to the pay off letter, all the while being mindful of the possibility of taxes being advanced as mentioned above. Much like "gap" coverage in title insurance, the "gap" between the time funds are sent and the time they are received must be considered. Remember, ordering a pay off does not stop tax and insurance advances from being made.

Contacting foreclosure counsel in advance of closing, and not at closing, for an updated pay off figure, may be advisable, depending on the circumstances. Expecting an immediate response for an update from the closing table is unreasonable.

Forwarding Funds

Whoever bears the physical responsibility for tendering funds to foreclosure counsel, or in certain cases, to the mortgagee, shoulders quite a bit of responsibility. Are the funds in proper form? If the pay off letter requires certified funds or an attorney's check, it may sound obvious, but sending a *personal check* for any amount, is going to cause problems.

Is the address for the recipient correct? Overnight mail is the preferable form of forwarding funds. Incorrect addresses, zip codes, and use of post office boxes can spell doom. On more than one occasion, the author has seen properties go to foreclosure sale and funds not reach its offices because of an error in the address used on an overnight mail envelope.

Does the responsibility for sending pay off funds end when the envelope is dropped or delivered to the overnight carrier? No. Tracking the receipt of a package over the Internet takes seconds. Not only should the person who mailed the funds confirm receipt (perhaps a title closer), but those who could bear some liability for non-receipt (mortgagor's counsel) must also ensure proper receipt of the pay off money. Failure of any responsible person or entity to not confirm receipt is tantamount to malpractice.

Advise Mortgagee's Counsel of Contact Information

Silly question, but if funds are sent without any indication of who to contact in case there is an issue (common errors are funds received after the pay off letter expires and unsigned checks), delays will occur. That means interest continues to accrue. While most pay off letters contain a form to be filled out with pertinent information, it is imperative that a contact be listed somewhere along with presentment of funds. Use a contact name and number who is accessible, not someone who is normally out of the office who may take a while to get back to the caller.

Resolving Problems

Time is in fact money when it comes to paying off a mortgage loan in foreclosure. Prompt return of phone calls, keeping copies of checks (unfortunately, overnight mail is not yet a perfect service), and accessibility will allow for problems to be resolved. Requesting a manager, supervisor or attorney get involved on foreclosure counsel's end is not an unreasonable request if issues go unresolved. Be mindful that investors of loans want to get what they are owed, and may not be sympathetic to taking a loss when the problem that arose was within the control of the party paying off the mortgage.

Checklist

A checklist is provided below that should assist anyone who is called upon to pay off a residential mortgage loan in foreclosure. Strict adherence to the requirement of the pay off letter and compliance with common sense procedures will ensure a smooth transaction.

Checklist for Paying Off a Mortgage in Foreclosure

- Obtain written authorization from mortgagor to communicate with foreclosure counsel, or if you are counsel, forward letter of representation.
- Determine status of foreclosure action. Ensure pay off will take place prior to estimated or actual foreclosure sale date.
- Request pay off at least two to three weeks in advance of anticipated pay off date.
- Review pay off with mortgagor to avoid any pre- or post-pay off issues.
- Ensure pay off "good through" date extends through date funds will be *received* by lender or foreclosure counsel. Order updated pay off, if necessary.
- On the day funds are to be sent to pay off the loan, determine if real property taxes or water are due:
    - Does the pay off include an estimate for "pending escrow advance?" Determine what this advance will be used for. Not all pay offs show such pending advances.
    - Note the date of the pay off letter. Are taxes due between this date and the time funds are expected to be received by the lender or foreclosure counsel? If the answer is "yes" then hold money back until payment can be confirmed.
    - Is the property "in rem?" It is possible taxes could be advanced by the lender or mortgage servicer to pay these between the date of the pay off letter and the time funds are received by the lender or foreclosure counsel.
- Payment. Confirm the following:
    - All checks being sent total the amount stated in the letter.
    - Payees are proper.
    - Endorsements are properly executed.
    - Form of checks are in accordance with pay off letter (e.g., certified, attorney IOLA checks).
    - Include contact information indicating where any refund should be sent, along with name and phone number of who to contact in case questions arise.
- Forwarding funds. Confirm the following:
    - Funds are being sent to address in pay off letter.
    - Do not use Post Office boxes for overnight mail.
    - Photocopy all checks, front and back.
    - Envelope (traceable mail) has been deposited properly.
    - Confirm receipt of funds via Internet tracking or other method.

Steven J. Baum is the Eighth Judicial District Representative to the Executive Committee of the Real Property Law Section. He is a member of the United States Foreclosure Network (USFN) and the American Legal and Financial Network (AFN). Mr. Baum is also Designated Counsel for both FreddieMac and FannieMae.

Discharging An Old Mortgage

By James M. Pedowitz

Recommended Title Standards

Although most mortgages are discharged in routine fashion by obtaining a pay-off letter and arranging for the payments to the mortgagee from the proceeds of a sale or refinancing, a mortgage is sometimes discovered by a title search that for some reason or inadvertence is still open of record. Such a mortgage is frequently held in the name of an individual or individuals, or in the name of a now defunct corporation or bank. Frequently, the individual mortgagee is dead, and may or may not have had a personal representative of the estate appointed.[1]

In these cases, it is very helpful if proof is available that the mortgage has in fact been paid in full. Frequently, that proof is not available, even though the debt was actually paid. In any event, unless the open mortgage can be disposed of, by its deletion in a title insurance policy, if available, to the new purchaser or lender, it may become necessary to have the mortgage discharged or cancelled of record.

The basic procedures for recording a discharge of mortgage can be found in Real Property Actions and Proceedings Law § 321. When such a discharge of mortgage is unavailable, this short article will provide some guidance as to how to dispose of the mortgage.

Both the New York State Land Title Association and the New York State Bar Association (Real Property Section) have adopted a set of Recommended Title Practices that include four that deal with open mortgages of record.

These Recommended Practices can help an owner avoid the time and expense that would otherwise be required to utilize one of the statutory methods of clearing the mortgage of record. The recommended practices are:

M-5 Mortgage Satisfaction by Affidavit RPAPL Section 1921

A mortgage secured by property improved by a one- to six-family, owner-occupied, residential structure or residential condominium unit may be disregarded without the recording of a Satisfaction of Mortgage provided there has been compliance with RPAPL § 1921.

"[U]nless the open mortgage can be disposed of, by its deletion in a title insurance policy, if available, to the new purchaser or lender, it may become necessary to have the mortgage discharged or cancelled of record."

M-6 Release in Lieu of Satisfaction of Mortgage

When the premises affected by a mortgage lien is released of record instead of the mortgage being satisfied, the mortgage may be omitted as an objection to title.

M-7 Small Ancient Mortgages

A. A mortgage in the face-amount of $25,000 or less which matured more than 12 years ago and which is not recited in the chain of title for 12 years or more, may be disregarded upon an affidavit that there has been no payment or demand for payment of principal or interest for 12 years, provided that the present owner or his or her ancestor was not the mortgagor and there has been one or more transfers of title for value.

B. A mortgage in the face-amount of $25,000 or less which contains no stated maturity date, which has been recorded for more than 30 years, and which is not recited in the chain of title for 12 years or more, may be disregarded upon an affidavit there has been no payment or demand for payment of principal or interest for 12 years, provided that the present owner or his or her ancestor was not the mortgagor and there has been one or more transfers of title for value.

M-8 Unrecorded Mortgage

Recital of an unrecorded mortgage in a deed of record for 20 years or more may be passed on proof that there has been no payment or demand for payment of principal or interest for 12 years, and that the owners have had no knowledge of said unrecorded mortgage. Where such recital is contained in the last deed of record, satisfactory proof will be required to dispose of the objection.

Statutory Remedies

In addition to these standard practices, which can be very helpful, but which are not required to be utilized by every title insurance company, there are the statutory remedies of RPAPL §§ 1921, 1923 which can be utilized in any situation that fits the statutory conditions, and the broad provisions of RPAPL Article 15.

RPAPL § 1921(1) requires that a mortgagee who has been paid in full must execute and acknowledge a satisfaction of the mortgage and arrange for it to be presented to the appropriate recording officer within 45 days (prior to November 7, 2005),

or 30 days after that date, if so requested, to the mortgagor or the mortgagor's designee. Upon the failure or refusal of the mortgagee to comply with the foregoing requirements, the mortgagee becomes liable to the mortgagor in the sum of $500 and if not presented within 60 days, the sum of $1,000; and "any person having an interest in the mortgage, or the debt or obligation secured thereby, or in the mortgaged premises"[2] may apply to the Supreme Court or the County Court or a justice or judge thereof in the county in which the mortgaged premises are situated in whole or in part, by order to show cause why the mortgage should not be discharged of record. Any sums not yet paid may be tendered as part of the proceedings.

RPAPL § 1921(4) provides that in case the mortgaged property is improved by a one- to six-family owner-occupied residential structure, or residential condominium unit, if the mortgagee fails within 90 days to comply with RPAPL § 1921(1), and if the mortgage is not otherwise satisfied, the mortgagee is liable to the owner in the amount of $500 or the economic loss to the owner, whichever is greater.

RPAPL § 1921(5) also provides that in the case of an owner-occupied one- to six-family residential structure or residential condominium unit where the mortgagee has not complied with the requirements of sub-division one within 90 days after receipt of payment, any attorney at law may execute, acknowledge, and file with the recording officer (upon payment of a $50 filing fee), an affidavit which complies with Section 1921: Unless the mortgagee files a verified objection to the filed affidavit within 35 days of being filed, "such affidavit shall be recorded and satisfy the lien of such mortgage on the mortgaged premises." The section, at (5)(b) also sets forth, in detail, what the affidavit must state. It also contains a requirement (5)(b)(v) for the written notice to be sent at least 30 days after the mortgagee received the payment, together with a copy of the proposed affidavit by certified or registered mail. Additional procedural details are set forth in the section and reference should be made to the section. Compliance with the procedure results in the cancellation and discharge of the mortgage.

"Although an un-discharged mortgage of record normally renders title unmarketable, it does not do so where all action with respect thereto is barred by the six-year statute of limitations."

Then there is the procedure to discharge an "ancient mortgage" under RPAPL Section 1931 that was dealt with in my 1996 article:

An "ancient mortgage" can be discharged under RPAPL § 1931 when the facts fit the statutory requirements. These include showing that the last holder of the mortgage either is dead or has ceased to exist for at least five years last past. In addition, it requires an allegation that the mortgage has been paid. Absent the allegation of facts evidencing payment, it may be necessary to rely on a common law presumption of payment after 20 years being past due. In order to obtain the benefit of the statutory presumption of payment, it is essential to establish the maturity date of the mortgage or that it is a demand mortgage, in which event it is deemed to mature simultaneously with its date.

Lastly, and most importantly, although a plenary action, with all that it entails, is RPAPL Article 15. This action, in addition to the requirements of RPAPL § 1515, need only allege and establish that the mortgage can no longer be enforced because of the expiration of the six-year statute of limitations contained in CPLR § 213(4) and that there have been no payments of principal or interest on the debt for more than six years past.[3] Upon adequate proof of the facts, summary judgment should be available directing the County Clerk, or in New York City (except Staten Island), the City Register, to mark the record of the mortgage as cancelled pursuant to the court order.

This procedure can be utilized even after the mortgagee has died or when the mortgagee claims a vendors lien.

Marketability of Title

Although an un-discharged mortgage of record normally renders title unmarketable,[4] it does not do so where all action with respect thereto is barred by the six-year statute of limitations.[5] Notwithstanding the foregoing, most title insurers will not insure a title free from reference to such a mortgage.

Endnotes

1. This Article supplements and supersedes my article, "Ancient and Not so Ancient Mortgages" in the winter 1996 issue, Vol. 24, No. 1.
2. RPAPL § 1921(1).
3. *Corrado v. Petrone*, 139 A.D. 2d 483, 526 N.Y.S. 2d 845, (2nd Dep't, 1988). *See also*, New York Jur. 2d Section 386.
4. *Hinckley v. Smith*, 51 N.Y. 21 (1872).
5. *Lovell v. Jimal Holding Corporation,* 127 A.D.2D 747, 512 N.Y.S.2d 138, (2d Dept. 1987), citing 62 N.Y. JUR. *Vendor and Purchaser* par. at 296, and *In re Bond and Mortg. Guarantee Co.,* Sup. 69 N.Y.S.2d 564.

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The Pushy Paparazzi

By Bob Zinman

In the last issue of this *Journal* (33 N.Y. Real Prop. L. J. 142) our Chair, Joshua Stein, provided us with his "wish list" for New York Property Law. At the Annual Meeting, we asked some members of the Section what their suggestions were for legislation.

"If you were the Real Estate Legislative Tzar, what would be your first priority for the legislature?"

Lloyd I. Roos
"Reduce real estate taxes for homeowners."

Erica Forman
"Eliminate mortgage recording tax on affordable housing projects."

Patrick J. Damanti
"Reduce mortgage recording tax and the NYS transfer tax."

Steve Waldman
"Work towards complete electronic transactions."

Stephen A. Linde
"Change the Lien Law to make it comprehensible and simplify construction lending in New York."

Olga Mahl
"No condemnation without due compensation, due process, notice, opportunity to be heard. Give financial support to fight and tax the beneficiary of the taking."

Olga Mahl
"Change Condo Law to give condo associations a first lien on condo units not paying charges. The lien should have priority over mortgages on the unit."

Anonymous
"Adjourn, sine die."

Elaine D. Papas
"Change the eminent domain laws to protect the private citizen property owner."

Hillary Potashnick
"Simplify the consolidation/merger requirements to reduce/negate the mortgage recording tax on old money."

James M. Pedowitz
"I would enact new legislation that would include a Marketable Title Act similar to the one promulgated by the Commissioners on Uniform State Laws several years ago. New York does not have any marketable act now."

If you would like your picture, please contact Bob Zinman at zinmanr@stjohns.edu

"What You Don't Know Can't Hurt You" Not Necessarily Applicable to Mortgage Lenders

By Paul G. Mackey

While most mortgage lenders generally are aware of competing lien issues (typically mechanics' liens) in a building loan context, many may be less aware of the possible scenarios in which a single advance mortgage loan may be subject to attack by the borrower's other creditors and of what steps can be taken to successfully defend challenges to the priority of the lender's mortgage. A recent decision of the New York State Supreme Court, Kings County, *Vasquez v. Riaz*,[1] brings a number of those issues into focus.

Facts in *Vasquez*

The *Vasquez* case involved a $499,000[2] mortgage loan made in 2002 by Independence Community Bank ("Lender") to a corporate borrower, Skyline Construction & Restoration Corp. ("Borrower") secured by property in Jamaica, New York and guaranteed by Sanwar Riaz, the sole shareholder of Borrower. The loan was advanced as follows: $229,460.90 to Riaz individually, $100,000 to Riaz's spouse and only $129,460.90 to Borrower itself.[3] At the closing of the mortgage loan, counsel for Borrower and Riaz delivered an opinion to Lender which included the statement "[t]o our knowledge, there are no proceedings pending or threatened before any court or other administrative agency, which will adversely affect the financial condition or operations of the Borrower or the Guarantor."[4] The loan documents contained similar representations from the Borrower. In reality there was just such a proceeding then pending against Borrower: previously, in 2000, plaintiffs Wilson and Lynette Vasquez (collectively, "Judgment Creditor") had commenced a suit against Borrower seeking damages for personal injuries they sustained. Ultimately, that resulted in a monetary judgment entered in 2004 in favor of Judgment Creditor against Borrower, two years after the loan closing.

"Section 273 of the Debtor and Creditor Law essentially makes every conveyance by every lawsuit defendant a fraudulent conveyance if the plaintiff ultimately wins and the defendant does not pay the judgment."

Judgment Creditor then commenced the instant suit against Sanwar Riaz and Lender seeking to set aside the grant of the mortgage by Borrower to Lender as a fraudulent conveyance pursuant to Article 10 of New York Debtor and Creditor Law[5] (presumably as a prelude to Judgment Creditor collecting on its judgment by realizing upon the mortgaged property). The legal concept of a "fraudulent conveyance" is most commonly associated with Section 548 of the Federal Bankruptcy Code.[6] The first lesson/reminder to be taken by mortgage lenders from the *Vasquez* decision is that creditor's rights laws are not limited to the Federal Bankruptcy Code. Many states, like New York, have specific creditor's rights laws with provisions that can overlap or supplement the Federal Bankruptcy Code in ways that may provide parties with alternative courses of action or exposure to loss.[7] Under the Uniform Fraudulent Transfer Act enacted in 42 states,[8] the statute of limitations is four years.[9] One notable difference between the Federal Bankruptcy Law Concept of fraudulent conveyance and the New York State law of fraudulent conveyance is that the federal provision addresses only transfers made within one year before the filing of a bankruptcy petition,[10] whereas under New York law, the statute of limitations for fraud is six years.[11] In the *Vasquez* decision there is no indication that Borrower or any defendant was the subject of a proceeding under the Federal Bankruptcy Code, and thus Judgment Creditor relied on N.Y. Debtor and Creditor Law § 278 in seeking to have Lender's mortgage set aside as a fraudulent conveyance by Borrower.[12] Under New York law, a fraudulent conveyance can occur either where there is found to be actual intent to defraud a creditor[13] or where the circumstances surrounding the conveyance are constructively fraudulent, as when a transfer is made rendering a defendant judgment proof in the face of pending litigation.[14]

Section 273 of the Debtor and Creditor Law essentially makes every conveyance by every lawsuit defendant a fraudulent conveyance if the plaintiff ultimately wins and the defendant does not pay the judgment. Unlike a fraudulent conveyance under the Bankruptcy Code which, if established, is subject to challenge by the bankruptcy trustee,[15] a fraudulent conveyance under Section 273-a of the Debtor and Creditor Law is only "fraudulent" as against, and subject to attack by, the plaintiff who ends up with a judgment. While the granting of a mortgage by Borrower during the pendency of a lawsuit against clearly constituted a fraudulent conveyance under Section 273-a as against Judgment Creditor, the court in *Vasquez* went on to note that "The fact that

Skyline, a potential judgment debtor in a personal injury action, encumbered its property with a mortgage and directed that a majority of the proceeds be paid to the personal orders of its sole shareholder and his wife indicates an intent to delay, hinder or defraud plaintiffs, Skyline's future creditors."[16] In giving significance to the fact that the proceeds of the loan were diverted from the Borrower, the Court in *Vasquez* implies that the granting of the mortgage may also have been fraudulent pursuant to the "actual intent" to defraud provisions of Debtor and Creditor Law Section 276.

The Lender in *Vasquez*, in moving for summary judgment to dismiss Judgment Debtor's complaint to the extent it sought to set aside the mortgage as a fraudulent conveyance, had to demonstrate that it, Lender, was "a purchaser for fair consideration without knowledge of the fraud at the time of the purchase."[17] Lender thus argued that (i) Lender had paid fair consideration for the mortgage in advancing the principal of the loan secured by the mortgage and (ii) Lender had no notice that Borrower was involved in litigation and relied on the representations of Borrower and its counsel confirming that there was no such litigation.[18] The court found that there were issues of fact as to both the questions of fair consideration for the mortgage and lack of knowledge as to Judgment Creditor's lawsuit against Borrower and thus denied the Lender's motion to dismiss. Regarding the question of Lender's lack of knowledge, the court noted that reliance on the untruthful representations of Borrower and its counsel was not the same as establishing that Lender had no actual or constructive knowledge of the lawsuit. As to the question of "fair consideration," the court found that this required that Lender act in good faith. Since the majority of the loan proceeds were diverted to the sole shareholder of Borrower and his wife, the court found that there was at least a question of fact as to whether Lender dealt in good faith and thereby met the "fair consideration" hurdle.

Lessons to Be Learned

The *Vasquez* opinion left to trial the determination of whether or not the Lender gave "fair consideration" and acted without knowledge of the litigation against Borrower. It thus remains to be seen if the mortgage in that case will be found to be valid or set aside as a fraudulent conveyance. Nonetheless, mortgage lenders and their counsel can take several important lessons from the *Vasquez* case regardless of its final outcome. The first lesson is the importance of appropriate due diligence on borrowers, particularly an item that may be considered "optional" or not given the attention it deserves: litigation searches. One could argue that the fact that the Lender in the *Vasquez* case may end up being protected by the fact that it apparently did not undertake a litigation search against its Borrower, and it thereby avoided "knowledge of the fraud." However, that is the wrong lesson to take from this case for two reasons. First, because lenders devote much of their time, energy and expertise to making only loans which are likely to be repaid (and avoid those that are not), the results from a lending policy of avoiding information regarding a borrower's ability to repay the loan should be obvious. Second, even if "ignorant lenders" prevail based on the fact that they had no knowledge of the fraud, the satisfaction of prevailing over an adverse claim cannot justify the time and expense involved in a litigation that might have been avoided completely. What a lender doesn't know about its borrower may indeed hurt when the borrower is rendered insolvent by damage claims and the lender must litigate to defend its mortgage against attack as a fraudulent conveyance.

In raising the cost of litigation as a factor, it is important to note that the most common form of lender's title insurance policy currently in use in the United States, the ALTA 1992 form (the only loan policy form permitted to be issued for New York properties) contains a broad creditor's rights exclusion.[19] This means that when a creditor seeks to set aside an insured mortgage as a fraudulent conveyance, this claim is excluded from coverage and the lender must bear the cost of litigating to defend its lien (unlike a number of other types of adverse claims where the title policy includes the obligation of the insurer to defend claims). In many states, title insurance companies are permitted to delete this exclusion by endorsement, which the insurer will typically do (for an additional premium), provided that the structure of the loan does not raise special risks and the credit of the borrower is acceptable. This "deletion of creditor's rights exclusion" endorsement is not available in New York or other states which strictly regulate title insurance endorsement forms. Thus, even if the mortgage lender's ignorance of a pending lawsuit against its borrower allows the mortgage lender to prevail as a "purchaser for fair consideration" without knowledge of the fraud,[20] it is the lender, not a title insurance company, which will have to pay to defend the lien of the mortgage under attack.

The *Vasquez* decision questioned not only Lender's knowledge of the fraud, or lack thereof, it questioned whether the Lender gave "fair consideration" which the court indicated required "good faith" in giving consideration. One can argue that good faith should only enter into the analysis when there is some valuation of consideration other than a fixed amount involved in determining good faith (as in a bartering transaction), but not in a transaction in which a lender gives the borrower $499,000 in exchange for a $499,000 security interest. In *Vasquez*, the court found that the advancing of the majority of the loan proceeds directly to the sole shareholder of the

Borrower and his wife, rather to the Borrower itself, called the Lender's "good faith" into question. Certainly if the Lender's motivation were to help Borrower put assets beyond the reach of creditors, the Lender could be found to be a party to the fraud and thus fail the "without knowledge of the fraud" test, but the *Vasquez* decision questions whether or not the Lender even gave fair consideration because the loan proceeds did not go directly to the Borrower. The question presents itself: would the court have similarly questioned consideration if the entire loan proceeds had been given to the Borrower, which then issued a dividend to its sole shareholder, who, in turn, then gave much of the funds to his wife? In that scenario, it would seem that the dividend to the sole shareholder, as well as the transfer to his wife, might easily be found to be fraudulent conveyances, but the mortgage to the Lender would not. The Lender would be justified in pointing out that Lender merely followed the instructions of Borrower as to where to send the money for convenience and that the Borrower could have effectively gotten the funds to the same place without Lender's assistance and that to punish the Lender elevates the form of the transaction over its substance. While there is no affirmative duty under New York law for a lender to determine how the Borrower actually uses loan proceeds,[21] knowing the purpose of a loan is a fundamental piece of information in underwriting both commercial loans and most personal loans. The *Vasquez* case illustrates the pitfalls of ignoring this inquiry. Since the Lender in the *Vasquez* case did in fact know funds were not going to end up with Borrower, the Lender should have viewed this as a red-flag calling for further inquiry into the Borrower's financial condition and motivation for borrowing. In any event, lenders should be cautioned against advancing loan proceeds to parties other than the borrower unless it is clear that not only has the borrower directed the advance, but that the borrower itself (not its principals or affiliates) derives benefit from that application of funds (i.e, disbursing loan proceeds to pay other creditors of the borrower or closing costs for which the borrower is liable).

"While there is no affirmative duty under New York law for a lender to determine how the Borrower actually uses loan proceeds, knowing the purpose of a loan is a fundamental piece of information in underwriting both commercial loans and most personal loans."

Conclusion

At the root of the facts in the *Vasquez* is a routine commercial mortgage loan of a relatively modest amount in the New York City real estate market, but it offers a number of valuable lessons which mortgage lenders and their counsel would do well to remember in loans both complex and routine, small and large:

1. There is no substitute for doing due diligence on your borrower. Except perhaps when the borrower is a recently formed entity, this should include review of litigation and judgment searches.[22] The assumption that there are no risks to the mortgage lien because the loan title insurance policy takes no exception for any judgment or lawsuit is false. A mortgage, like any conveyance, is potentially subject to be set aside under the New York's Debtor and Creditor Law as a fraudulent conveyance. Furthermore, under the form of title insurance policy currently mandated in New York, the title insurer is not obligated to defend any such claim.
2. In any jurisdiction where the title insurance company is permitted to delete the creditor's rights exclusion of their policy form, lender's counsel should insist that this be done, even in seemingly "plain vanilla" mortgage transactions. In some states, notably Florida, the deletion of the creditors' rights exclusion is not permitted but the use of older forms of policy that do not include the creditor's rights exclusion is permitted. In such jurisdictions, lenders' counsel are urged to consider use of the older form of policy.
3. Lenders should continue to inquire as to borrower's intended use of funds to at least have some comfort that the funds are not being used to benefit someone other than the borrower.
4. Lenders should only advance loan proceeds to persons other than the borrower when the benefit to the borrower (not its principals or affiliates) from such application of funds is clearly established.

Endnotes

1. N.Y.L.J., Sept. 21, 2005 at 19.
2. The uneven amount of the loan serves as a practical reminder for New York City practitioners handling loans of about this size: the aggregate mortgage recording tax rate for mortgages in New York City below $500,000 is 2.05%, but if the mortgage is $500,000 or more, the aggregate mortgage tax rate is 2.80%. N.Y. Tax Law §§ 253 and 253-a (McKinney 1998, as amended by the 2005 Budget Act, S. 3671 (2005)) and New York City Administrative Code § 11-2601(d) (http://public.leginfo.state.ny.us October 4, 2005).
3. The Court's opinion in *Vasquez* does not explain why these three disbursements add up to only $458,921.80.
4. *Riaz,* at 19.
5. N.Y. Debt. & Cred. Law §§ 273–281 (McKinney 2001).
6. 11 U.S.C. § 548.
7. *See, e.g.*, 25 N.J.S. § 25:2–3 *et seq.* (1997) (New Jersey's enactment of the Uniform Fraudulent Transfer Act), 52 Conn. Gen. Stat. 52–552 (a) *et seq.* (2005) (Connecticut's enactment of the Uniform Fraudu-

lent Transfer Act) and 740 ILCS 106/1, par 1 *et seq.* (2005) (Illinois enactment of the Uniform Fraudulent Transfer Act).

8. Uniform Law Commissioners, *A Few Facts About the . . . Uniform Fraudulent Transfer Act*, available at http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-ufta.asp (October 5, 2005). Article 10 of New York's Debtor and Creditor Law enacted in 1925 remains based on the predecessor uniform law, the Uniform Fraudulent Conveyances Act promulgated in 1918. N.Y. Debt. & Cred. Law Art. 10 (McKinney 2001).

9. Uniform Fraudulent Transfer Act § 9, available at http://www.law.upenn.edu/bll/ulc/fnact99/1980s/ufta84.htm (October 6, 2005).

10. 11 U.S.C. § 548. Note that a bankruptcy trustee may also avail itself of the applicable state law provisions to avoid certain transfers. 11 U.S.C. § 544.

11. NY CPLR § 213 (McKinney 2003). The limitations period commences when the claim arises which, in the case of constructive fraud, is at the time of conveyance. NY CPLR § 213(1) (McKinney 2003), *see Wall Street Associates v. Brodsky,* 684 N.Y.S.2d 244 (1st Dep't 1999). In the case of actual fraud, the statute of limitations does not run until the later of (x) six years from the conveyance or (y) two years from the later of "discovery of the fraud or the date plaintiff could with reasonable diligence have discovered it," NY CPLR §§ 203(g) and § 213 (McKinney 2003), *see Wall Street Associates*, 684 N.Y.S.2d at 248.

12. Subsection (1) of § 278 provides:

> "Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,
>
> a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
>
> b. Disregard the conveyance and attach or levy execution upon the property conveyed." N.Y. Debt. & Cred. Law § 278 (McKinney 2001)

13. Section 276, which sets forth the parameters for an intentionally fraudulent conveyance, provides:

> "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." N.Y. Debt. & Cred. Law (McKinney 2001)

14. Section 273-a provides that conveyances by a defendant in a lawsuit seeking damages can constitute a constructive fraud as follows:

> "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment." N.Y. Debt. & Cred. Law § 273-a (McKinney 2001)

15. 11 U.S.C. § 548.

16. *Vasquez*, N.Y.L.J. at 19.

17. N.Y. Debt. & Cred. § 278 (McKinney 1998).

18. *Vasquez*, N.Y. L.J. at 19.

19. The American Land Title Loan Policy (Revised 10/17/92) creditor's rights exclusion is as follows:

> "The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> * * *
>
> Any claim, which arises out of the transaction creating the interest of the mortgagee insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
>
> (a) the transaction creating the interest of the insured mortgagee being deemed a fraudulent conveyance or fraudulent transfer; or
>
> (b) the subordination of the interest of the insured mortgagee as a result of the application of the doctrine of equitable subordination; or
>
> (c) the transaction creating the interest of the insured mortgagee being deemed a preferential transfer except where the preferential transfer results from the failure:
>
> (i) to timely record the instrument of transfer; or
>
> (ii) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor."

20. *See* N.Y. Debt. & Cred. Law § 278 (McKinney 2001).

21. *See, e.g.*, NY Lien Law § 13(3) (McKinney 1993) (with respect to a building loan mortgage "Nothing in this subdivision shall be considered as imposing upon the lender any obligation to see to the proper application of such advances by the owner . . .").

22. With regard to routine residential mortgage loans to individuals, the current practice of reviewing of a credit report is arguably sufficient as independent support for a borrower's "no litigation" representations, when weighing the cost of additional searches against the benefit of occasionally uncovering litigation against an individual which is not related to matters shown on a credit report.

The Second Annual Upstate Affordable Housing Conference

By Rachel M. Hezel, Joshua K. Lawrence, and Patricia C. Sandison

On September 22, 2005, the New York State Bar Association presented the Second Annual Affordable Housing Conference at the Hyatt Regency in downtown Buffalo, NY, which culminated in a cocktail reception. The Conference was co-sponsored by the Affordable Housing Clinic of the University of Buffalo Law School, the NYS Division of Housing & Community Renewal and NYS Association for Affordable Housing. The Annual Upstate Affordable Housing Conferences offer comprehensive education programs which aim to bring together professionals from all disciplines to the fields of affordable housing and community development. The goal is to effectuate construction, rehabilitation and preservation of affordable housing across New York State. The Second Annual Conference, like the first, was attended by attorneys, architects, lenders, syndicators, investors, developers, builders, not for profits, property owners, managing agents, educators, planners, consultants, and government officials actively involved in the field. State and national experts presented and discussed, at this year's Conference, the most up-to-date information and developments in the areas of Fair Housing Compliance, Real Property Tax strategies and Public Housing restructuring. In addition, presentations incorporated detailed case studies of some of the most innovative and successful revitalization projects in Upstate New York. The panels that proved to be of particular interest this year were those conducted by Julia A. Solo on the Brownfield credit and Jean A. Lowe on the Rochester Housing Partnership Model.

Next year's conference will be held on September 21, 2006 at the Albright-Knox Art Gallery, a cultural icon of Buffalo with an internationally renowned art collection.

A. The Brownfield Cleanup Program

One of the conference's panels addressed significant changes regarding eligibility in New York's two-year-old Brownfield Cleanup Program (BCP). The widely-anticipated tax-credit program aimed at remediating and redeveloping brownfield sites, had been lauded at last year's Housing Conference. A new set of site-eligibility guidelines, adopted in March 2005,[1] seek to tighten the definition of a "brownfield," making it potentially more difficult for developers—in affordable housing or otherwise—to take advantage of the BCP's tax and liability incentives for redeveloping contaminated properties. The program's generous combination of tax-credits and protection from future liability offer developers an opportunity not only to offset the costs of both environmental cleanup and subsequent development with tax benefits, but also the incentive work in low-income communities whose growth may be hampered by the presence of brownfield sites.

A component of the state's sweeping and widely-praised 2003 Brownfield/Superfund Act, the Brownfield Cleanup Program was designed to "encourage persons to voluntarily remediate brownfield sites"[2] by addressing "the environmental, legal, and financial barriers that often hinder the redevelopment and reuse of contaminated properties."[3] Originally, a site's eligibility for the program turned mainly on whether it met the Brownfield Act's broad definition of a brownfield, which included "any real property, the development or reuse of which may be complicated by the presence or potential presence of a contaminant."[4] The State Department of Environmental Conservation's original Draft Brownfield Cleanup Program Guide contained a list of specific types of sites that were excluded, but no further guidance on establishing whether a site met the definition.

Julia A. Solo, an attorney specializing in affordable housing finance formerly with Nixon Peabody, LLP in New York City, explained to the conference that the new eligibility criteria were drafted after it became clear that the broad "brownfield" definition was encouraging applications for projects that might have proceeded regardless of environmental cleanup costs, but which could generate substantial development tax credits—far exceeding the amount incurred for cleanup—by participating in the program. New York City provided a number of examples, the most telling of which was the application to build the new 52-story headquarters of the New York Times Company near Times Square through the BCP. Under the tax-credit formula—which gives builders credit for a percentage of the total building costs as well as the environmental cleanup—that project alone could have generated $170 million in tax credits for the developer. The DEC had projected the entire BCP tax-credit system would cost $135 million—over 10 years. Critics coined the DEC's original eligibility criteria the "New York City Rule."[5]

Ms. Solo explained that the new site eligibility criteria interpret the statutory definition of brownfield to depend on presence of two elements: 1) "confirmed contamination on the

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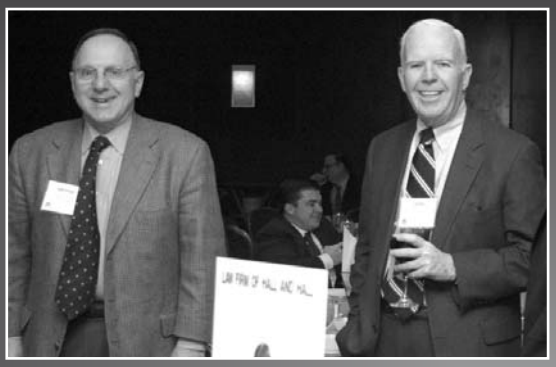

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property or a reasonable basis to believe that contamination is likely to be present on the property, and 2) a reasonable basis to believe that contamination or potential presence of contamination may be complicating the development or re-use of the property."[6] Thus, a site cannot simply be perceived to be contaminated; the new guidelines introduce a "reasonable basis" standard in making the determination. Additionally, a reasonable basis standard now dictates whether the real or potential contamination actually complicates a site's potential redevelopment. In many New York City cases, it would be unlikely valuable real estate as that bordering Times Square would sit idle simply because of remediation costs.

To further guide the eligibility determination, the DEC also developed a list of factors which will guide the agency in establishing whether the two elements of a brownfield are satisfied. The DEC's final Brownfield Cleanup Guide notes that none of the factors will be dispositive and that sites will be reviewed on a case-by-case basis, "following the review of all pertinent facts and considering the totality of the circumstances."[7] The DEC guidelines are not formal regulations; only the new "brownfield" definition—not the new criteria to be used in evaluating it—appears in the current draft regulations for the Brownfield/Superfund Act.[8] However, the agency has said it will continue to use the Cleanup Guide criteria for guidance.

In determining whether a property is "contaminated," the DEC will evaluate the extent and nature of the contamination; whether the contamination exceeds statutory levels; whether the contamination is historic "fill" or the result of actual operations on the site; whether present or past industrial operations may have resulted in contamination; and whether there have any been previous state or federal cleanup or enforcement actions on the site.

The question of whether it is reasonable to believe contamination is actually hampering a site's redevelopment involves a more subjective inquiry under the new guidelines. The DEC will weigh whether the site is currently idled, abandoned, or underutilized; whether the site is unattractive for redevelopment because of real or perceived contamination; whether neighboring properties show signs of economic distress, such as high commercial vacancy and depressed values; and whether the estimated costs of cleanup is likely to be significant in comparison to the value of the site with the proposed development.

This last factor seems clearly aimed at avoiding the type of windfalls presented in New York City. However, critics say the effect of "artificially restricting eligibility" will be to introduce uncertainty and practical hurdles in the application process, not just for applicants in New York City, but deserving projects in upstate cities like Rochester and Buffalo.[9] The concern over awarding tax benefits disproportionate to the costs of cleanup could be addressed more effectively and equitably, critics say, if the State Legislature simply modified the tax-credit formula to allow a greater percentage for environmental cleanup costs and by capping or limiting the credits for redevelopment at a level the state can better afford.

B. Greater Rochester Housing Partnership

Jean A. Lowe, the President of the Greater Rochester Housing Partnership (GRHP), addressed the conference attendees on the Housing Partnership Model in Rochester, a topic of particular interest to those involved in upstate housing.

The partnership model is not new to the housing world. The Housing Partnership Network is a national membership organization of 84 housing partnerships, which lays out six attributes of partnerships. The attributes include a commitment to affordable housing, partnerships that cross public as well as private lines, a regional scope, a spirit of collaboration, and business practices driven by the for-profit world. Following these attributes, the Partnership was born as a result of the business sector and local government seeking a way to increase the availability of affordable housing available in Rochester. The partnership model was particularly attractive because of its entrepreneurial emphasis, and the opportunity that it presented to build affordable housing outside of pure government endeavors.

The funding for the Partnership came from a $4.8 million grant by the City, which charged the Partnership with becoming a financial intermediary for affordable housing. This created an interesting role for the Partnership. It would be independent from—but coordinated with—local government, it would make capital available for investments in affordable housing, it would grow its funds and identify new capital for investing in housing, and it would live off the income generated by investing the capital. In its role as a financial intermediary, the Partnership has lent over $34 million in construction financing for over 700 rental units. It has also provided construction financing for another 600 single-family homes. In addition to its competitive applications for state and federal funding for specific projects, the Partnership has raised $6 million in private capital to provide tax credit equity. The funds have gone to small tax credit projects that may have been otherwise overlooked because of the size of the project, the location, or that it was a first project for the developer. Additionally, the Partnership has raised some funds for predevelopment lending.

In each of these finance ventures, the Partnership underwrites invest-

ments, administers loans, and takes on an important role in monitoring project status and impact. Due in large part to its unique role, the Partnership is able to bring together the various aspects of development, and to assist the developer in pooling resources for a successful project. This has been important in the development of the Partnership and its reputation.

After providing the introduction to the birth and functioning of the Partnership, Ms. Lowe presented two examples of Partnership products that demonstrate the scope and success of the Partnership. The first, the Rochester Equity Fund, was created as a response to fill the gaps anticipated by the decreasing Affordable Housing Program (AHP) funding from the Federal Home Loan Bank of New York. Because many non-profit developers use AHP financing as developer equity to fill important gaps to secure state financing, it was a concern for many developers. This concern was exacerbated by the release of new Davis-Bacon wages, which further increased construction costs. Fueled by these concerns, non-profit developers worked with the Partnership to develop a plan to present to potential investors. After very limited initial success, the Partnership went to the United Way, building on an established good relationship with them from prior cooperation, which agreed to provide a challenge grant. With the support of the United Way, the Partnership went back to the banks, then much more amenable to funding the effort. After having raised $675,000, Ms. Lowe began to work with the investors to set up the rules for the evaluation and funding of projects, which the Partnership now administers, exhibiting yet again the comprehensive approach that the Partnership fosters. More than financial assistance, the investors provided a number of services. The success of the venture is apparent: the Rochester Equity Fund has made seven awards, creating 179 units of affordable housing in the region.

The second example Ms. Lowe offered to the conference attendees was the Rochester Housing Development Fund Corporation. The RHDFC has been receiving positive attention since its inception, last year receiving an award from the New York State Association for Affordable Housing (NYSAFAH). The goal of the RHDFC is to renovate vacant homes and sell them to first time low- and moderate-income homeowners. Created by the City of Rochester, Enterprise Foundation, and the Partnership, RHDFC works closely with the city and the Department of Housing and Urban Development (HUD).

Fostering a close relationship with HUD has allowed RHDFC to purchase HUD-owned single family properties at discounted rates. Once HUD identifies homes possible for the program, the city and RHDFC work together to determine what is necessary to rehabilitate the homes. The homes are then assigned to one of the nine non-profit developers in the area. Through a process involving RHDFC, the non-profit developer, and a contractor, a plan for the home is hatched. RHDFC purchases and holds title to the property during the rehab, until completion, when an eligible buyer will take over the title. The timeline from HUD identification of a property to acquisition is usually 30 days. The non-profit developer and RHDFC are closely involved in monitoring construction, and the non-profit is responsible for marketing the property upon completion.

In addition to a loan agreement that RHDFC has attained to provide funds for acquisition and construction, the projects also required some subsidy because of the weak housing market in Rochester. The RHDFC was able to locate funds from Rochester HOME funds, NYS Affordable Housing Corporation (AHC), the Division of Housing and Community Renewal (DHCR), and Monroe County. Because of the different qualifications attached to each source of money, the RHDFC details all of these in the purchase contract, bringing it all together for the buyer. RHDFC has purchased 245 houses since 2001, and has closed on 176 properties.

Ms. Lowe's presentation at the conference presented a partnership model full of potential for other upstate communities interested in increasing their affordable housing stock. Given the size of upstate communities, the state of the housing market in those communities, and the diminishing government funding experienced by many of those communities, a housing partnership like that which Ms. Lowe described offers much promise and potential.

Endnotes

1. *See* New York State Department of Environmental Conservation , Division of Environmental Remediation, "Draft Brownfield Cleanup Guide" § 2 *available at* http://www.dec.state.ny.us/website/der/bcp_eligibility.pdf (last visited Jan. 25, 2006).
2. *See supra,* note 1.
3. *See supra,* note 1.
4. ECL § 27-1405(2).
5. *See* David J. Freeman & Lawrence P. Schnapf, *Brownfield Cleanup Program's Final Site Eligibility Criteria*, NYSBA The New York Environmental Lawyer, Vol. 25, No. 2, 13.
6. ECL § 27-1405.2.
7. Draft Brownfied Cleanup Program Guide, *supra,* note 1 at § 2.1.
8. *See* New York State Department of Environmental Conservation, Division of Environmental Remediation, "Draft NYCRR Part 375: Environmental Remediation Program, § 375-3.3," *available at* http://www.dec.state.ny.us/website/der/superfund/375draft.pdf (last visited Jan. 25, 2006).
9. *See* David J. Freeman & Lawrence P. Schnapf, *"Brownfield Cleanup Program's Final Site Eligibility Criteria,"* New York Law Journal, April 20, 2005 at 4.

Rachel M. Hezel, Joshua K. Lawrence, and Patricia C. Sandison are all members of the Class of 2007 at the State University of New York at Buffalo School of Law.

Tenancy by the Entirety and Same Sex Marriage in New York

By James M. Pedowitz

The estate of tenancy by the entirety is created by "a disposition of real property to a husband and wife. . . ."[1] Since June 24, 1975, a conveyance of real property, or on or after January 1, 1996, of shares of stock of a cooperative apartment corporation, to persons who are not legally married to one another, but who are described as husband and wife, creates in them a joint tenancy, unless expressly declared to be a tenancy in common.[2]

Tenancy by the entirety existed under the common law, and its antecedents were based on the legal fiction that husband and wife were considered to be one person. That old fiction has persisted into modern times so that in a tenancy by the entirety, unlike a joint tenancy, both tenants own 100% of the entire property, but subject to their survivorship of the other spouse; and upon a divorce or annulment the estate automatically converts into a tenancy-in-common in equal shares. [3]

This article was prompted by the recent article in the New York State Bar Association *Journal* issue of January 2006, Vol. 78, No. 1 entitled "Same Sex Marriage under New York Law," by Derek B. Dorn, Esq. That article should be read by all attorneys with clients who contemplate or have contracted a same sex marriage. As that article points out, although New York Law does not now permit same sex marriages, there is nothing to prevent a New York resident from going to Canada, Massachusetts or where else permitted to consecrate a same sex marriage, and then return to New York. If that couple should then buy a home in New York and take title by a deed that described them as "husband and wife," would they own the property as tenants by the entirety or as joint tenants? Under many circumstances, there could be a vast difference in the outcome of a dispute dependent upon whether the party's interest is that of a joint tenant or a tenant-in-common.[4]

"[A]lthough New York Law does not now permit same sex marriages, there is nothing to prevent a New York resident from going to Canada, Massachusetts or where else permitted to consecrate a same sex marriage, and then return to New York."

Would a title insurance company insure that the title acquired by a same sex couple describing themselves as married, or even as "husband and wife," be a tenancy by the entirety? The parties would certainly own the property, and with a mutual right of survivorship. If as tenants by the entirety they would both own 100% of the property, subject to surviving the other spouse, while in the other case (joint tenancy) they would each own a 50% interest, which on the death of the first to die would be "transferred" by operation of law to the survivor. In the tenancy by the entirety, any liens created by the deceased tenant would not survive the transfer by their death, but in the joint tenancy those liens do survive the decedent. A cautious title insurer should not insure the nature of their estate other than that they both together own a title in fee.

A competent court dealing with this problem should review some of the older cases that considered somewhat similar problems dealing with impediments to marriage, such as affecting the guilty party after a divorce based on adultery.[5]

In *Van Voorhis v. Brintnall,* the adulterous spouse who was prohibited from re-marrying in New York while his divorced innocent spouse was still alive went to Connecticut to re-marry where there was no impediment to the marriage, and then returned to New York with his new spouse, and they then had a child in New York.

The court of appeals held that the second marriage in Connecticut would be recognized as valid in New York, and the child of that marriage was legitimate.

The decision was lengthy and thorough and held that "the validity of a marriage contract is to be determined by the law of the State where it was entered into; if valid there it is to be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law, or the express prohibitions of a statute."[6] The decision then goes on to more fully discuss the latter part of the sentence with respect to the prohibitions of natural law or in statutes. The court refers to incest or polygamy as coming within the prohibitions of natural law.

Since the state of matrimony has always, at least until very recent times, been a union between a man and a woman, would it not be interpreted as part of "natural law," especially since the court in the *Van Voorhis* decision, *supra*, referred to "incest or polygamy" as prohibitions of natural law? Observations of sexual encounters among animals always involve a male and a female,

and that would seem to be part of "natural law." Although it may not be politically correct to say so, the creation of children was also considered to be the "natural" result of a marriage between a man and a woman.

A man can love a man, and a woman can love a woman, but a same sex union cannot create children, except by some artificial intervention. Society can properly recognize those same sex relationships, but it cannot be "marriage" as society has known it ever since Adam and Eve, or whoever else may have been our antecedents according to Darwin.

It would also seem that the use of the words "husband and wife" in EPTL § 6-2.2(b) could not be interpreted as applying to two persons of the same sex. Although Black's Law Dictionary does not contain a specific definition for "husband," there is a definition for "wife" as "a woman united to a man by marriage; a woman who has a husband living and undivorced."

In light of both the decisional law in New York, and the language of EPTL § 6-2.2(b), it is highly unlikely that a same sex couple who have been "married" in a state where same sex "marriage" is permitted could be recognized by a court as tenants by the entirety of real property in New York.

Endnotes

1. EPTL § 6-2.2(b).
2. EPTL § 6-2.2(d).
3. *See e.g., Stelz v. Schreck,* 128 N.Y.263 (1891).
4. *See* "Tenancy by the Entirety in New York" N.Y.S.B.A. Real Property Law Journal, Winter 2005, Vol. 33 No.1.
5. *Van Voorhis v. Brintnall,* 86 N.Y. 18 (1881).
6. *Van Voorhis,* at 18.

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Service of Process and Traverse Hearings in Landlord-Tenant Actions and Proceedings

By Gerald Lebovits and Matthias W. Li

I. Introduction

Service-of-process requirements in summary proceedings are more technical than in plenary actions.[1] Practitioners who do not understand the often seemingly arbitrary rules can lose cases they should win. This article untangles the law on service under the New York Real Property Actions and Proceedings Law (RPAPL) and the New York Civil Practice Law and Rules (CPLR) and discusses how practitioners can get or oppose traverse hearings and have them sustained or overruled.

II. Service of Process

A. Service Generally

A landlord must effect proper service of process for the court to obtain personal jurisdiction over a tenant. Service of process in landlord and tenant actions and proceedings in New York is governed by RPAPL 735, which covers service of process in summary proceedings, and by CPLR Article 3, which covers service of process in plenary actions.[2]

RPAPL 735 is a statutory remedy. The right to maintain a summary proceeding does not exist at common law. RPAPL 735 is strictly construed, as is CPLR Article 3. A departure from the requirements of RPAPL 735 or CPLR Article 3 for service of process is not curable and mandates that the proceeding be dismissed.[3] That a tenant has actual notice of the proceeding is not what confers jurisdiction on the court, even though constitutional due process requires simply that service be reasonably calculated under the circumstances to appraise the litigants about the case and to give them a chance to object.[4] What counts is not notice or receipt but whether service complies with the RPAPL or the CPLR.[5]

Service of process effected under the RPAPL sometimes conforms to the CPLR's dictates, but not always.

The terms of residential lease obligations about service, place of service, or other manner of notice may not modify or restrict RPAPL 735. If a conflict arises about service between a residential lease and RPAPL 735, the conflict must be resolved in favor of the statutory requirements,[6] although a lease may require notice in addition to what the RPAPL requires.[7] In commercial cases, courts are more likely than in residential cases to accept lease terms that limit statutory requirements.[8]

The respondent in a summary proceeding must be served with a notice of petition and a petition.[9] Each named respondent must be served individually,[10] even if each named respondent is part of the same family.[11] Additionally, each lease signatory must be made a respondent and served separately.[12]

In *Friedlander v. Ramos*, the court held that "[t]he object of the RPAPL 733 (1) service requirement is to ensure that respondents receive adequate notice and an opportunity to prepare defenses that they may have."[13] Under RPAPL 733, the process server should serve the petition and notice of petition on each respondent "at least five and not more than twelve days before the time at which the petition is noticed to be heard."[14] If a petition and notice of petition, served pursuant to RPAPL 735, are served fewer than five days before the return date, service is defective and the court will lack jurisdiction over the proceeding.[15] Similarly, a petition served more than 12 days before it is noticed to be heard is defective.[16]

The question sometimes arises whether a court may grant *nunc pro tunc* relief and retroactively permit short filing under RPAPL 733(1) when a tenant has received less than the required five-day notice. In *445 East 85th Street v. Phillips*, the landlord, which had not timely sought *nunc pro tunc* relief, argued that its filing short was excusable and not a jurisdictional defect.[17] The court disagreed and stated that "[s]hort filing denies a tenant adequate time to prepare for court. It is not a simple, ministerial indiscretion."[18] In *K.N.W. Assocs. v. Parish*, however, the court held that the short filing did not prejudice the respondent and thus granted the petitioner's motion for *nunc pro tunc* relief.[19]

B. Service Methods

RPAPL 735 permits a process server to effect service in three different ways: personal delivery, a form of personal service; substituted service to a person of suitable age and discretion who lives or is employed at the premises sought to be recovered, the other form of personal service; or conspicuous-place service, sometimes referred to as "nail and mail" or "affix and mail."[20]

1. Personal Delivery

RPAPL 735(1) provides that "service of the notice of petition and petition shall be made by personally delivering them to the respondent." Similarly, CPLR 308(1) provides that personal delivery on a natural person is effected "by delivering the summons within the state to the person to be served." Personal service can be in-hand delivery or substituted service. Personal delivery is effected when the petition and notice of petition are hand-delivered to the named respondent under RPAPL 735.[21] Personal service is the optimal method of service for a landlord

because it always satisfies the service requirements for money judgments under CPLR Article 3 and decreases the possibility that traverse will be raised and sustained;[22] it is also the optimal method for a tenant because it most assures that the tenant is apprised of the action or proceeding and has an opportunity to defend.

Personal delivery of the petition and notice of petition may be made wherever the tenant, or an authorized representative, may be found.[23] RPAPL 735(1)(a) forbids a default to be entered against tenants not served at their last residence address, even if the landlord learns about the tenant's other residence through attempts to serve. This rule prevents landlords from accidentally evicting people who are in hospitals or nursing homes, or temporarily living with relatives or friends.[24]

Personal delivery is complete immediately on the delivery of a copy of the papers to the intended recipient.[25] The original petition and notice of petition, or order to show cause, should be filed with the court clerk, along with proof of service, within three days after personal service has been effected.

When effecting service on a corporate respondent, personal delivery must be made pursuant to RPAPL 735(1) and comply with CPLR 311(1), which permits personal delivery to be made on an officer, director, managing, general agent, cashier or assistant cashier, or any other agent authorized by appointment or law to receive service on the entity's behalf.[26] Delivery of papers to a mere employee, without any inquiry about the employee's status in the corporate hierarchy or any effort to determine whether the employee is authorized to accept service, is insufficient to effect personal delivery on the corporation, unless the employee is an authorized agent or enumerated corporate official.[27]

Unlike service under CPLR Article 3, RPAPL 735 forbids service on a corporate tenant through the Secretary of State. When effecting service under RPAPL 735 to a corporate respondent, and when a corporate officer, director, agent, or cashier cannot be found, substituted or conspicuous-place service should be used.[28]

Unlike the CPLR, the RPAPL does not specify how personal delivery is effected on a partnership. When serving a partnership, reference should be made to CPLR Article 3.[29] CPLR 310, which governs personal service on a partnership in civil actions, authorizes delivery of papers to any partner of the partnership, the managing or general agent of the partnership within the state, the person in charge of the office within the state of the partnership, or any agent or employee of the partnership authorized by appointment to receive service.[30]

2. Substituted Service

If personal delivery cannot be made on the named respondent, the petitioner may effect service under RPAPL 735(1) "by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it. . . ."[31] CPLR 308(2) provides that service on a natural person is effected "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served."

To determine whether the person served is of suitable age and discretion under RPAPL 735, courts look to whether that individual was likely to transmit the papers to the actual tenant.[32] When effecting substituted service of process, the recipient must reside or be employed at the premises and have the kind of relationship to the tenant from which it can reasonably be expected that the recipient will deliver the papers to the tenant.[33] A process server should ascertain the individual's identity and nexus to the tenant.[34]

When delivery is made to a minor, courts will inquire about the minor's discretion and authority.[35] The age of the person receiving process is a relevant factor, and the statute does not set a fixed minimum age for that person. Courts have therefore been reluctant to establish a benchmark under which service is defective. In *Village of Nyack Housing Authority v. Scott*, the court found that "[w]hile the adoption of the 'suitable age' language in RPAPL 735 implies that 'at some point a person should be deemed by the court, as a matter of law, to be too young to have a valid status as deliveree' we cannot say that a 13-year-old is incapable of accepting service as a matter of law, under RPAPL 735."[36] Other courts have held in the context of service or process that minors as young as age 12 are persons of suitable age and discretion.[37]

Delivery of process to a commercial tenant's employee at the premises sought to be recovered is sufficient to establish jurisdiction over the tenant, regardless of the individual's status in the business organization. In a commercial holdover proceeding, *Manhattan Embassy Co. v. Embassy Parking Corp.*, the court found that the process server properly effected substituted service on the corporate respondent by delivering papers to a garage attendant, who was tenant's employee, who was employed at the premises sought to be recovered, whose job involved performing responsible functions, and who was served only after he told the process server that no manager was on the site.[38]

When effecting service of process on a landlord's employee, a person will be considered of suitable age and discretion if the nature of the relationship with the person to be served makes it more likely than not that the employee will deliver process to the named party.[39] If building personnel like a security guard, doorman, or concierge unrea-

sonably impede a process server's efforts, these individuals should not be served or accept service on the respondent's behalf.[40] If repeated attempts to secure access are unsuccessful, an *ex parte* application authorizing an alternate means of service under CPLR 308(5) is a wise procedural course.[41]

When delivery is made on a commercial tenant's subtenant, service of process may be insufficient, absent a "unity of interest," to confer jurisdiction over the tenant, if the tenant was not also served with process.[42] In *Ilfin Co., Inc. v. Benec Industries, Inc.*, the court held that service on an employee of the respondent's co-tenant failed to comply with RPAPL 735. According to the court, the individual was not a person of suitable age and discretion, and the process server unreasonably believed that the employee was an appropriate person to accept service for this co-tenant.[43] When several companies are under one person's control at the same premises, however, acceptance of process by an employee of one is effective as to all.[44]

Because RPAPL 735 requires that the person accepting service reside or work in the actual premises sought to be recovered, delivery to a tenant's temporary visitor or neighbor might prove insufficient to confer jurisdiction.[45] By contrast, a person living in the subject premises with the respondent's permission and having no other place to live is a person who "resides" at the premises. The Legislature has not provided a specific time period in which a person must remain in the premises to be said to reside there. Determining a sufficient length of time for an individual to be a "resident" is a question of fact.[46]

Unlike personal delivery, which may be effected wherever the respondent or appropriate agent may be found, substituted service requires the delivery to be made at the premises sought to be recovered.[47] Additionally, when substituted service is used, a copy of the papers must be mailed to each respondent both by registered or certified mail and by regular first-class mail within one day of the delivery.[48]

Proof of substituted service should be filed with the court clerk within three days after completing the mailings.[49] Service is complete on filing proof of service.[50]

3. Conspicuous-Place Service

The third method of service of process is conspicuous-place service, or nail-and-mail or affix-and-mail. RPAPL 735(1) provides that conspicuous-place service of the petition and notice of petition may be effected "if admittance cannot be obtained . . . by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises."

Similarly, CPLR 308(4) provides that nail-and-mail service may be effected on a natural person when "service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode."

Conspicuous-place service may not be effected under RPAPL 735 until a reasonable application has been made to obtain admittance and find a person who will receive process. It is thus the least desirable of the three RPAPL service methods.[51] An allegation of conspicuous-place service is the most easily controverted at a traverse hearing. It is the service method most likely to raise an inference of improper service.

With affix-and-mail service, the pleadings may be affixed to a conspicuous part of the premises. "Affixing" means that the pleadings should be affixed to the front entrance or doorway of the tenant's unit or space, if possible, or "placed" under that entrance door.[52] The papers should be affixed in a place where, in the process server's reasonable opinion, it will be sufficiently obvious that the tenant will see them.[53] Service must not be unlikely to succeed, or predestined to failure, or the court may find it equivalent to no attempt at all.[54] If the papers are inappropriately affixed, the action or proceeding will be dismissed.[55]

In *Citibank, N.A. v. Mendelsohn*,[56] after affixing the petition and notice of petition to the door of the building rather than to the door of the apartment sought to be recovered, the petitioner argued that the outer bounds of the premises extended to the outside of the building because unidentified occupants did not allow its process server in. The court found that the tenants had no control over access to the building and that the process server, who was working on the buildings owner's behalf, could have easily gained access to the building. The court concluded that the pleadings were not affixed to a conspicuous part of the premises.

In *Pentecost v. Santorelli*, however, the court held that the "conspicuous part" of the premises may "extend to the location at which the process server's progress is arrested."[57] Similarly, in *F. I. duPont, Glore Forgan & Co. v. Chen*, the court found that "if a process server is not permitted to proceed to the actual apartment by the doorman or some other employee, the outer bounds of the actual dwelling place must be deemed to extend to the location at which the process server's progress is arrested."[58]

4. "Reasonable Application" Standard

Before engaging in conspicuous-place service, a process server must make reasonable application to effect personal service on a tenant. The process server may make either personal delivery or substituted service. Legally, neither method of personal service is preferred to the other,[59] although in-hand service is the safest mode of service for both landlord and tenant. Courts will determine

the meaning of "reasonable application" by assessing whether the process server's efforts were calculated to succeed.[60] If landlords have information about a tenant that would make service easier to effectuate, and therefore more likely that the tenant is notified of the action or proceeding, the reasonable-application standard requires the landlords to pass the information along to their attorneys, who in turn should notify their process server.[61] A landlord's knowledge is imputed to a process server.[62]

In *Elizabeth Broome Realty Corp. v. Sakas*,[63] the process server, at her first attempt at personal service, accepted the concierge's word that the tenant was not at home and therefore did not visit the tenant's apartment. On her second attempt at personal service, the process server affixed the pleadings to the apartment's entrance door. The court held that the first attempt was a nullity because the process server did not attempt to gain admittance to the apartment. The court explained that to perfect a reasonable attempt at personal delivery or substituted service, a process server must use a method with some expectation of success.[64]

Absent information about when the respondent may be expected to be at home, and to adhere to the reasonable-application requirement, a process server should make at least two attempts to deliver the papers: one during regular business hours, the other before or after regular business hours.[65]

The reasonable-application standard under RPAPL 735 is not as stringent as the due-diligence requirement under CPLR Article 3. Although no rigid rule determines whether due diligence has been exercised in attempting to effect service so as to permit substituted service under CPLR 308, several courts, like the *Lara v. 1010 E. Tremont Realty Corp.*[66] court, have held that three attempts to serve on three different days and at different times during the day constitutes "due diligence" under CPLR 308(4).

The differences in service requirements under the RPAPL and CPLR have been cause for controversy over the years. One controversy is whether a court must award a money judgment against a tenant who defaults after receiving a petition and notice of petition by substituted or duly diligent conspicuous-place service.[67] One line of cases, following *In re McDonald*,[68] holds that only personal jurisdiction is gained and therefore that a monetary judgment can be awarded only when a tenant is served in hand or has appeared. *McDonald* requires landlords in nonpayment proceedings and in holdovers seeking use and occupancy to institute two cases against a defaulting tenant: one, a summary proceeding for possession; the other, a plenary action for rent.

On the other hand, the Appellate Term, First Department, in *Oppenheim v. Spike* stated, albeit in dictum, that duly diligent conspicuous service entitles a landlord to a default money judgment.[69] The *Oppenheim* court found that the only reason the Civil Court's "*money* judgment for rent was a nullity" was that "there is no indication that the process server had used due diligence before resorting to conspicuous service."[70] This issue was examined in *Dolan v. Linnen*, in which the court wrote that *McDonald* should not apply to modern-day residential nonpayment or holdover proceedings and that "no constitutional, statutory, or practical reason prevents duly diligent plenary action CPLR 308 (4) conspicuous service from conferring personal jurisdiction in RPAPL summary proceedings"[71] if the landlord complies in effecting service with both the RPAPL and the CPLR.

Even when the process server has reason to believe that the tenant will be at home during normal business hours, a single service attempt made at that time is insufficient.[72] Courts will require that a second attempt be made before or after normal work hours.[73] In *Eight Associates v. Hynes*, for example, the process server effected conspicuous-place service after making only one attempt at personal service shortly after 12 p.m. on a Friday.[74] The court found that one attempt to serve process during normal working hours before effecting conspicuous-place service did not satisfy the RPAPL 735 reasonable-application standard.

In *Metropolitan Life Ins. Co. v. Sharpf*, the court asked, "What then are normal working hours? The court finds that such hours are 9:00 a.m. to 5:00 p.m. (Monday through Friday) with one hour subtracted at the beginning and added at the end of the day for transportation."[75] Following that case, service should not be attempted when it would be reasonable to expect the recipient to be resting or asleep.[76]

Similarly, attempts at service of process on Sundays are prohibited, as are efforts on other days that the landlord knows are days of religious observance for the tenant, if service is maliciously designed to harass.[77] Attempts at service on Saturdays or before normal work hours will not be rejected if the process server's inquiry reveals that it is a time when a residential respondent could reasonably be expected to be home.[78] In some cases, reasonable application might require that a delivery attempt be made at all other known locations before conspicuous-place service may be effected at the premises sought to be recovered.[79]

If finding out the tenant's whereabouts proves impractical, or if service cannot be made at the tenant's home or business, a landlord may move ex parte under CPLR 308(5) for leave to use an alternate service method.[80] In *BHNJ Realty Corp. v. Rivera*,[81] for example, the petitioner used conspicuous-place service and respondent defaulted. After discovering that respondent was incarcerated, petitioner moved to withdraw the original proceeding and pursuant to CPLR 308(5) serve the

Riker's Island Detention Center office designated to receive legal documents on its inmates' behalf. The court granted the petitioner's motion, stating that "[i]f a petitioner has knowledge of the whereabouts of respondent and that service of process at the premises in the manner prescribed by statute will not give notice to respondent then the attempt to serve respondent by the statutory modes of service will not meet constitutional due process standards since it is not reasonably calculated to apprise respondent of the proceeding."[82]

When a process server effects conspicuous-place service, a copy of the petition and notice of petition must be mailed to each respondent by certified mail or registered mail and by regular mail within one day of the papers' affixation.[83] Proof of service should be filed with the court clerk within three days after completing the mailings.[84] Service is complete on filing of the petition (outside New York City), the notice of petition, or order to show cause, and proof of service with the court clerk.[85]

C. Commercial Tenants

Service on a commercial respondent should be attempted when that party normally conducts its business. Otherwise, service might be deemed unreasonable, and the case will be dismissed.[86]

As with service on a residential tenant, service on a commercial tenant must comply with CPLR Article 3 to obtain a monetary judgment unless the tenant appears and waives its objections to personal jurisdiction.[87] Service under Business Corporation Law (BCL), allowing service on the Secretary of State as agent of a domestic or authorized foreign corporation, may not be used to commence a summary proceeding.[88] In *Puteoli Realty Corp. v. Mr. D's Fontana di Trevi Restaurant, Inc.*,[89] the landlord began a proceeding under the RPAPL and served the tenant under BCL 306. The court noted that summary proceedings under the RPAPL are statutory devices by which jurisdiction may be acquired quickly and that because the petitioner failed to follow the RPAPL 735 service requirements, the tenant's motion to dismiss for lack of personal jurisdiction had to be granted.

To comply with the reasonable-application requirements, a process server may be required to make delivery attempts at all other known locations before conspicuous-place service may be effected at the premises sought to be recovered. Doing so assures that the tenant is afforded actual notice of the proceeding's pendency.[90] If finding out the tenant's whereabouts proves impractical, a landlord may move the court *ex parte* for leave to use an alternate service method.[91]

D. Mailing Requirements

A petitioner that effects substituted or conspicuous-place service must comply with RPAPL 735(1)(a) or (b), which require the petitioner to mail a complete copy of the petition and notice of petition to the respondent both by regular mail and by registered mail or certified mail within one day after the substituted or conspicuous-place service. The process server must be able to demonstrate that the mailings carried the correct postage and were deposited with the post office.[92] RPAPL 735(1)(a) and (b) require mailings to locations other than the subject premises if the respondent does not reside at the subject premises or, if a business, its principal place of business is elsewhere.[93]

Mailings to a natural person should be addressed to the tenant at the property sought to be recovered. If the premises are not the tenant's current place of residence, or if other addresses are known to the landlord, the landlord must make additional mailings to those alternate addresses.[94] If the respondent does not appear to reside at the premises sought to be recovered, and the petitioner has no knowledge of the respondent's actual residence address, the papers may be sent to the respondent's last known place of business or employment.[95]

If the tenant is a corporation, joint-stock, or other unincorporated association, the mailings should be sent by registered or certified mail and by regular first-class mail to the premises sought to be recovered. If the premises are not the tenant's principal place of business or principal office, then an additional mailing should be made to the respondent's principal office or place of business in the state, if the landlord has written information of that address. If the landlord has only actual or constructive notice of another office or business address for the tenant, other than the premises sought to be recovered, a copy of the papers should be sent to the other known addresses.[96] Although RPAPL 735 requires mailings only to business addresses in the state, it is advisable to send the mailings to principal offices outside the state, if those addresses are available.[97]

When effecting substituted or conspicuous-place service, which require a mailing, the failure properly to address envelopes that contain the predicate notice and pleadings might result in the proceeding's dismissal.[98] In *Avakian v. De Los Santos*,[99] the court held that it lacked personal jurisdiction over the defendant because the zip code in the defendant's summons and complaint was incorrect. Later, in *New York City Housing Authority v. Fountain*, the court, citing *Avakian*, found under the RPAPL that "[a]ny delay in receipt may result in an unjustified default. Therefore, zip codes are significant and particularly necessary in summary proceedings."[100] The rule is different in plenary actions. CPLR 308(2) service is valid even if the mailing following substituted service contains the wrong zip code.[101] To avoid the possibility of dismissal, all mailings should include at least the recipient's name; street number or name; unit designator; city and state

or authorized two letter abbreviation, and correct five digit ZIP+4 Code.[102]

E. Filing Requirements

RPAPL Article 7 is strictly construed. Cases are often dismissed for lack of adherence to filing requirements. It is important that practitioners are aware of the fine points concerning the filing requirements.

When a court clerk or a judge of the New York City Civil Court, a City Court outside New York City, or a District Court issues a notice of petition, a copy of the notice should be filed with the court clerk, when an index number is usually assigned.[103] In the New York City Civil Court, the original petition should be filed with the court clerk upon issuance of the notice of petition.[104] Once service is complete, the notice of petition or order to show cause (and the petition in courts outside the New York City Civil Court), together with proof of service, which is typically in the form of a notarized affidavit, should be filed with the court clerk within three days after personal delivery to the respondent or the completion of the mailings when service has been effected by substituted or conspicuous-place service.[105]

Defects in the content of an affidavit of service are treated as minor or amendable. They will not lead to dismissal if service was properly effected.[106] Proof of service not timely filed is a jurisdictional defect. The court may issue a *nunc pro tunc* order authorizing a late filing, which will allow the tenant time to answer the petition to run anew upon service of the order permitting the late filing, with notice of entry.[107] On the other hand, because RPAPL 735(2) directs that proof of service be filed with "the clerk of the court," technical noncompliance with the RPAPL, such as filing proof of service with the judge instead of the clerk, has sometimes resulted in dismissal.[108]

When filing a notice of petition with proof of service in the New York City Civil Court in a residential Housing Part proceeding, the petitioner must also submit stamped postcards addressed to all respondents at the premises sought to be recovered and to the other address(es) at which process was served.[109] No default judgment for failure to answer may be entered against a tenant unless the petitioner has complied with the postcard requirement.[110] This postcard should state the respondent's name, address, and ZIP Code. The postcard's return address should reflect the appropriate address of the court clerk's office to which the respondent is being directed.[111] The reverse side of the postcard must contain the following notice in English and Spanish:

> Papers have been sent to you and filed in court asking this court to evict you from your residence. You must appear in court and file an answer to the landlord's claim. If you have not received the papers, go to the housing part of the civil court immediately and bring this card with you. If you do not appear in court, you may be evicted. You may also wish to contact an attorney.

III. Traverse Hearings

Service of process that violates the strict requirements of RPAPL 735 will make the landlord vulnerable to attack based on lack of *in personam* jurisdiction.[112] The objection may be made by a motion or pre-answer motion to dismiss or as an affirmative defense in the tenant's answer.[113]

The hearing held on the issue of service is known as a "traverse" hearing. When no answer or motion to dismiss for lack of personal jurisdiction is made, an objection to jurisdiction is waived, and the court has full jurisdiction for *in personam* and *in rem* judgments.[114] Additionally, in *Textile Technology Exchange, Inc. v. Davis*,[115] the court held that "interposing a counterclaim related to plaintiff's claims will not waive the defense of lack of personal jurisdiction, but that asserting an unrelated counterclaim does waive such defense because defendant is taking affirmative advantage of the court's jurisdiction." And in *Washington v. Palanzo*,[116] the court held that extensive participation in litigation causes the party to waive objections to personal jurisdiction. However, merely filing a notice of appearance and procuring an extension of time to answer does not waive personal-jurisdiction objections.[117]

Although some trial courts have characterized notice-related irregularities as impinging on the court's subject-matter jurisdiction, this characterization has not met with appellate concurrence.[118] It is a defense of personal jurisdiction.

A. Obtaining a Traverse Hearing

When material issues of fact regarding personal jurisdiction arise, a traverse hearing is required.[119] It is necessary to have a sworn affidavit denying proper service to be entitled to a traverse hearing.[120] An affidavit from a person with personal knowledge—not an attorney—is required.[121]

The affidavit creates only a presumption of service. For a tenant to merit a hearing on whether service was done according to RPAPL or the CPLR, the tenant's answer or motion must set forth specific factual allegations that raise genuine issues of fact about the propriety of the process server's efforts. Conclusory statements that the service of process was defective because it was not served in accordance with RPAPL 735 are insufficient.[122] Instead, the process server's affidavit must be credibly and specifically refuted.[123] Otherwise, the objection or affirmative defense may be stricken, or the pre-answer motion or motion to dismiss denied, without a hearing.[124] Courts have applied these rules to objections to service of predicate notices, petitions, notice of petitions, and HP proceedings.[125] An affidavit of service may be insufficient to give the

court jurisdiction if it fails to show that service could not be made personally.[126] Additionally, an affidavit of service, on its own, is inadequate when the tenant disputes not only the service but also what was attached to the petition.[127]

The facts of *230 Equity Inc. v. Kahn*[128] illustrate what a tenant may allege to secure a traverse hearing. One of the respondents averred that she was in her studio apartment when the process server claimed to have effectuated conspicuous service and that it was impossible for the server to have attempted personal service before he resorted to conspicuous service. According to that respondent, if the process server had attempted to serve the petition and notice of petition personally, she would have heard him knock, given that she was then on the telephone in her studio apartment. Petitioner argued that the respondents presented a conclusory denial of a knock on the door and that they did not deny any relevant fact in the server's affidavit of service. Granting the respondents' motion for a traverse hearing, the court wrote that "[a]lthough [the process server's] affidavit notes [that] he effected service when [the respondent] would have been dialing the telephone, respondents have created an issue of fact about whether [the process server] engaged in a reasonable attempt to serve personally before resorting to conspicuous service."[129]

B. The Process Server

A petition and notice of petition may be served by anyone who is not a named party to the action or proceeding and who is at least 18 years old.[130] A licensed process server under the New York General Business Law is defined as person, other than attorneys to an action acting on their own behalf, who (1) derives income from the service of papers in an action; or (2) has effected service of process in five or more actions or proceedings in the 12 month period immediately preceding the service in question.[131] Unlicensed persons who serve process must state by affidavit that they have not served process more than five times in that year.[132] The New York City Administrative Code requires that process servers be licensed.[133] But an otherwise-valid service of process is not rendered invalid, and the court is not deprived of jurisdiction, solely because the process server violated the New York City Administrative Code.[134] In that case, the process server should be punished, however.[135]

People who serve process are regulated by legislative enactments because improper service of process causes those who might have insufficient knowledge or legal assistance to suffer the most. To this end, process servers who testify at traverse hearings conducted in New York City must bring their license and all records in their possession relating to their service efforts.[136]

C. The Logbook

The General Business Law requires process servers to keep legible records of all service effected. The record is referred to as a process server's "logbook." The logbook should include the action's or proceeding's title; physical description and name of the person served, if known; date and time all service attempts were made and completed; address where service was affected; nature of the papers served; court where the papers are returnable; and action's or proceeding's index number, if one has been assigned. If conspicuous-place service was effected in New York City, the logbook should also note the color of the door on which any papers were affixed. [137] These entries should be kept chronologically in a bound volume and maintained for two years.[138]

If the propriety of service of process is challenged, the process server will be required to present the logbook containing these records. Strict compliance with a process server's record-keeping rules is required when a tenant questions the propriety of service.[139]

D. The Traverse Hearing

At a traverse hearing, the petitioner or plaintiff bears the burden of proving the propriety of service of process.[140] That burden is usually met by introducing the process server's testimony and records. If the landlord is successful, the traverse is overruled and the case may proceed to trial. Otherwise, the tenant's challenge is sustained and the proceeding is dismissed.[141]

The court will determine whether service was properly effected based on the *prima facie* evidence and the witnesses' credibility.[142] Although some courts excuse the process server's failure to present a license during traverse hearings, the absence of other relevant records might result in dismissal.[143] This combats the persisting problem of process servers who fail to use appropriate efforts to effectuate service, a scourge called "sewer service."[144]

CPLR 4531 permits an affidavit of service to be admitted as *prima facie* evidence of the delivery, posting, or affixing of a document when the process server is dead, mentally ill, or cannot be compelled with due diligence to attend the hearing. An affidavit of service that omits a process server's license number is "unlawful."[145]

Once a case is referred to a hearing judge for traverse, the judge is advised to wait a reasonable time for the process server to appear, and to appear with the necessary license and records. Several impatient judges who have dismissed cases have been reversed.[146]

IV. Conclusion

Before delivery of service of process is effected, or when the time might come to attack or defend a case on personal jurisdiction, the wary practitioner, whether for the landlord or the tenant, should

become familiar with the technical requirements of RPAPL 735 and CPLR Article 3. The requirements are technical, to be sure, but one person's technicality is another's due process.

Endnotes

1. *See generally Dolan v. Linnen*, 195 Misc. 2d 298, 299, 753 N.Y.S.2d 682, 683 (Civ. Ct., Kings & Richmond Co. 2003) (Gerald Lebovits, J.).
2. *See* CPLR 101, which provides that "[t]he civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."
3. Andrew Scherer, *Residential Landlord-Tenant Law in New York* at § 7:153, at 7–61 (2005 ed.).
4. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950); *see also Velazquez v. Thompson*, 451 F.2d 202 (2d Cir. 1971) (holding that RPAPL 735 service is constitutional because it is reasonably calculated to inform tenants of proceedings against them).
5. *E.g.*, *Raschel v. Rish*, 69 N.Y.2d 694, 697, 512 N.Y.S.2d 389, 390, 504 N.E.2d 22, 24 (1986) (mem.); *Macchia v. Russo*, 67 N.Y.2d 592, 595, 505 N.Y.S.2d 591, 593, 496 N.E.2d 680, 682 (1986) (*per curiam*); http://www.courts.state.ny.us/reporter/3dseries/2006/2006_26008.htm, 2006 N.Y. Slip Op. 26008, at *3 (Civ. Ct., N.Y. Co., Jan. 13, 2006) (Gerald Lebovits, J.) (finding that "notice is a matter of due process, not getting lucky").
6. *Lana Estates, Inc. v. Nat'l Energy Reduction Corp.*, 123 Misc. 2d 324, 326, 473 N.Y.S.2d 912, 914 (Civ. Ct., Queens Co. 1984); 2 Joseph Rasch, Landlord and Tenant Incl. Summary Proceedings § 29:12, at 425 (Robert F. Dolan 4th ed. 1998).
7. *E.g.*, *Lana Estates*, 123 Misc. 2d at 326, 473 N.Y.S.2d at 914.
8. *See, e.g.*, *Bogatz v. Extra Touch Int'l, Inc.*, 179 Misc. 2d 1029, 1031, 687 N.Y.S.2d 558, 560 (Civ. Ct., Kings Co. 1998) (finding subject matter jurisdiction in commercial summary proceeding although required predicate notice was not served as required by RPAPL 735).
9. *See Dep't of Hous. Pres. & Develop. v. Cauldwest Realty Corp.*, 15 H.C.R. 34A, N.Y.L.J., Feb. 10, 1987, p. 5, col. 1 (App Term 1st Dep't (*per curiam*) (holding that party never served with process cannot be added as respondent, even if that party testified on corporate respondent's behalf).
10. *Lam v. Wrzesinki*, 25 H.C.R. 61B, N.Y.L.J., Feb. 10, 1998, p. 18, col. 6 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.) ("While each petition set forth the names of the three respondents, [leaving two sets with the undertenants] was insufficient to satisfy the requirements of section 735 . . . as the petitioners were required to serve a copy upon each respondent.").
11. *World's Busiest Corner Corp. v. Cine 42nd St. Theater Corp.*, 134 Misc. 2d 281, 282, 510 N.Y.S.2d 796, 797 (Civ. Ct., N.Y. Co. 1986).
12. *Sohn v. Kong*, 21 H.C.R. 667A, N.Y.L.J., Dec. 22, 1993, p. 25, col. 2 (Civ. Ct., Bronx Co.) ("Where a party has signed a lease, the landlord-petitioner has knowledge and is required to name and serve the leaseholder tenant. Failure to do so requires a dismissal of the petition.").
13. 3 Misc. 3d 33, 34, 779 N.Y.S.2d 327, 328 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2004) (mem.).
14. RPAPL 733(1); *accord Berkeley Assocs. Co. v. Di Nolfi*, 122 A.D.2d 703, 705, 505 N.Y.S.2d 630, 632 (1st Dep't 1986) (holding that when landlord used conspicuous-place service and filed affidavit of service one day before proceeding was noticed to be heard, RPAPL 733(1) not strictly adhered to because, under RPAPL 735(2)(b), conspicuous-place service is complete on filing of proof of service).
15. *See 445 E. 85th St. v. Phillips*, 2003 N.Y. Slip Op. 51270(U), 2003 WL 22170112,, at *2, 2003 N.Y. Misc. LEXIS 1182 (Civ. Ct., N.Y. Co., Sept. 12, 2002) (Gerald Lebovits, J.) ("The statute's requirements give a tenant some time to consult with an attorney to prepare for the first court date, to appear in court, to gather evidence, and to negotiate a settlement."); *Interstate Realty v. Smalls*, N.Y.L.J., Apr. 23, 1996, p. 27, col. 4 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.) ("Inasmuch the notice of petition and petition were not served at least five days before the time at which the petition was noticed to be heard, the petition must be dismissed. . . .").
16. *Frank v. Ange*, 82 Misc. 2d 465, 465, 370 N.Y.S.2d 365, 366 (Rochester City Ct. 1975).
17. 2003 N.Y. Slip Op. 51270(U), WL 22170112, 2003 N.Y. Misc. LEXIS 1182.
18. *Id.*, WL 22170112, at *2; *accord* B*ranson Assocs., L.P. v. Bentley*, 6 Misc. 3d 1040(A), 800 N.Y.S.2d 343, 2005 N.Y. Slip Op. 50361(U), 2005 WL 670729 (Albany City Ct., Mar. 23, 2005).
19. 5 Misc. 3d 1019(A), 799 N.Y.S.2d 161, 2004 N.Y. Slip Op. 51462(U), 2004 N.Y. Misc. LEXIS 2362 (Civ. Ct., N.Y. Co., Sept. 23, 2004).
20. *See* RPAPL 735; *City of N.Y. v. Clark*, 234 A.D.2d 120, 650 N.Y.S.2d 709 (1st Dep't 1996) (holding that CPLR 308(5) permits alternate service methods in context of summary proceeding).
21. N.Y. Jur. 2d, Real Property: Possessory and Related Actions § 180; Rasch, *supra* note 6, at § 29:12, at 425.
22. CPLR 308(1); *see, e.g.*, *Walber 419 Co. v. Office Design Assocs./Shepard Martin, Inc.*, 20 H.C.R. 257A, N.Y.L.J., May 5, 1992, p. 21, col. 1 (Civ. Ct., N.Y. Co.).
23. *Rodney Co. N.V., Inc. v. Riverbank Am.*, 25 H.C.R. 525B, N.Y.L.J., Oct. 7, 1997, p. 26, col. 5 (Civ. Ct., N.Y. Co.).
24. *See, e.g.*, *Parras v. Ricciardi*, 185 Misc. 2d 209, 212 –13, 710 N.Y.S.2d 792, 795 (Civ. Ct., Kings Co. 2000).
25. RPAPL 735(2)(a); *Park Holding Co. v. Grossman*, 21 H.C.R. 129C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 (App. Term 1st Dep't) (*per curiam*).
26. CPLR 311(a)(1); *Manhattan Embassy Co. v. Embassy Parking Corp.*, 164 Misc. 2d 977, 979, 627 N.Y.S.2d 245, 246 (Civ. Ct., N.Y. Co. 1995).
27. *Manhattan Embassy Co.*, 164 Misc. 2d 977 at 979, 627 N.Y.S.2d 245 at 246.
28. *Trump-Equitable 5th Ave. Co. v. McCrory*, 19 H.C.R. 544A, N.Y.L.J., Sept. 4, 1991, p. 22, col. 3 (Civ. Ct., N.Y. Co. 1991).
29. *See* CPLR 101; Daniel Finkelstein & Lucas A. Ferrara, *Landlord Tenant Practice in New York* at §§ 14:151, at 14–89, 15:310, at 15–188 (2006 ed.).
30. CPLR 310; Finkelstein & Ferrara, *supra* note 29, at §§ 14:151, at 14-89, 15:310, at 15–188.
31. *Accord 319 W. 48th St. Realty Corp. v. Al's Pub Corp.*, 18 H.C.R. 608C, N.Y.L.J., Dec. 27, 1990, p. 21, col. 5 (App. Term 1st Dep't) (*per curiam*).
32. *See, e.g.*, *Ilfin Co. v. Benec Indus., Inc.*, 114 Misc. 2d 411, 413, 451 N.Y.S.2d 643, 645 (Civ. Ct., N.Y. Co. 1982) ("When determining whether service was proper the inquiry must be: Under the circumstances, is it fair to say that the manner of service used is one that, objectively viewed, is calculated to adequately and fairly apprise the respondent of an impending lawsuit?").
33. Scherer, *supra* note 3, at § 7:176, at 7–69.
34. *See Manhattan Embassy Co.*, 164 Misc. 2d at 981, 627 N.Y.S.2d at 247.
35. *See Zellars v. Hanse*, 23 H.C.R. 521A, N.Y.L.J., Aug. 16, 1995, p. 24, col. 1 (Civ. Ct., Kings Co.).
36. 1 Misc. 3d 22, 23, 767 N.Y.S.2d 562, 563 (App. Term 2d Dep't 9th & 10th Jud. Dists. 2003) (mem.) (citation omitted).
37. *See, e.g.*, *Durham Prods., Inc. v. Sterling Film Portfolio, Ltd., Series A*, 537 F. Supp. 1241, 1245 (S.D.N.Y. 1982).
38. *Manhattan Embassy Co.*, 164 Misc. 2d at 981, 627 N.Y.S.2d at 247.
39. *50 Ct. St. Assocs. v. Mendelson & Mendelson*, 151 Misc. 2d 87, 91, 572 N.Y.S.2d 997, 998 (Civ. Ct., Kings Co. 1991).

40. *Napic, N.V. v. Fverfa Investments, Inc.*, 193 A.D.2d 549, 549, 597 N.Y.S.2d 707, 708 (1st Dep't 1993) (mem.) (finding jurisdiction over defendant not acquired by delivering process to building's concierge and mailing another copy to defendant's unit); *Colonial Nat'l Bank, U.S.A. v. Jacobs*, 188 Misc. 2d 87, 88, 727 N.Y.S.2d 237, 239 (Civ. Ct., N.Y. Co. 2000) ("Service on a person of suitable age and discretion is effective only at defendant's actual dwelling. Outside that proximity to the intended party, the inference that delivery to her is 'reasonably likely' fails.") (internal citations omitted).

41. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709–10 (holding that Civil Court properly authorized service under CPLR 308(5) after petitioner proved that it had made three unsuccessful attempts to gain access to building through various entrances and that mailboxes in building's front entrance were non-functional); Finkelstein & Ferrara, *supra* note 29, at §§ 14:158, at 14-93, 15:318, at 15–193.

42. *Ilfin Co.*, 114 Misc. 2d at 413, 451 N.Y.S.2d at 645 ("As a general rule, in a business setting, it would be unfair and improper to say that an employee of *another tenant*, not employed by the tenant on whom service is intended, would be one of suitable age and discretion.") (emphasis in original).

43. *Id.* at 414, 451 N.Y.S.2d at 645; *accord* Peter M. Wendt & Lisa S. Ngai, Service of Process in Summary Eviction Proceedings 10 (unpub. manuscript for N.Y. County L. Ass'n CLE, Mar. 31, 2003).

44. *Arvic Realty v. RST Assoc., LP*, 31 H.C.R. 410A, N.Y.L.J., July 30, 2003, p. 19, col. 2 (Civ. Ct., N.Y. Co.).

45. *See Feenjon Corp. v. Tulipane*, 16 H.C.R. 188C, N.Y.L.J., May 27, 1988, p. 22, col. 2 (App. Term 1st Dep't) (*per curiam*) (holding that although papers were delivered to party visiting tenant, petition was dismissed because recipient lacked requisite nexus to unit).

46. *Kahn v. Sosin*, 130 Misc. 2d 515, 516, 496 N.Y.S.2d 678, 680 (Civ. Ct., N.Y. Co. 1985).

47. *Pena v. Aadal*, 17 H.C.R. 12C, N.Y.L.J., Jan. 13, 1989, p. 22, col. 6 (Civ. Ct., N.Y. Co.).

48. RPAPL 735(1); *Cassidy v. County of Nassau*, 146 A.D.2d 595, 597, 536 N.Y.S.2d 520, 521 (2d Dep't 1989) (mem.) (awarding partial summary judgment because sheriff's office failed to mail copies of warrant of eviction within one day of posting it at tenant's apartment).

49. RPAPL 735(2).

50. *Id.* 735(2)(b); *Park Holding Co.*, 21 H.C.R. 139C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 ("When service of the notice of petition and petition is made other than by personal delivery to respondent, it is not complete until the filing of the proof of service.").

51. *See Eight Assocs. v. Hynes*, 102 A.D.2d 746, 748, 476 N.Y.S.2d 881, 883 (1st Dep't 1984), *aff'd*, 65 N.Y.2d 739, 492 N.Y.S.2d 739, 492 N.Y.S2d 15, 481 N.E.2d 555 (1985).

52. RPAPL 735; *161 Williams Assocs. v. Coffee*, 122 Misc. 2d 37, 39, 469 N.Y.S.2d 900, 902 (Civ. Ct., N.Y. Co. 1983); *Pentecost v. Santorelli*, 31 H.C.R. 392B, N.Y.L.J., July 17, 2003, p. 25, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

53. *161 Williams Assocs.*, 122 Misc. 2d at 39, 469 N.Y.S.2d at 902.

54. *See id.*, 469 N.Y.S.2d at 902.

55. *Ark. Leasing Co. v. Farag*, 21 H.C.R. 321A, N.Y.L.J., June 16, 1993, p. 29, col. 5 (Civ. Ct., Queens Co.); *see Rodwin v. Townsend*, 286 A.D.2d 569, 730, 730 N.Y.S.2d 587, 588 (4th Dep't 2001) ("[T]he process server mailed the papers to respondent and left them between the screen door and inner door of respondent's home. The process server did not thereby properly affix the papers to respondent's door . . . .").

56. 25 H.C.R. 598A, N.Y.L.J., Nov. 12, 1997, p. 30, col. 3 (Civ. Ct., Kings Co.).

57. 31 H.C.R. 392B, N.Y.L.J., July 17, 2003, p. 25, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

58. 41 N.Y.2d 794, 797, 396 N.Y.S.2d 343, 346, 364 N.E.2d 1115, 1117 (1977).

59. *See Palumbo v. Clark's Estate*, 94 Misc. 2d 1, 6, 403 N.Y.S.2d 874, 876–77 (Civ. Ct., N.Y. Co. 1978) ("While it is true that the Legislature removed the higher burden of 'due diligence' from the statute, it did not make conspicuous place service a method of service initially and unconditionally available.").

60. *Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883 ("Under the facts present herein, one attempt to serve process during 'normal working hours' did not satisfy the 'reasonable application' standard set forth in RPAPL 735. In so doing we do not rule that such service during 'normal working hours' would be insufficient under all circumstances.").

61. *See Ancott Realty, Inc. v. Gramercy Stuyvesant Indep. Democrats*, 127 Misc. 2d 490, 491, 486 N.Y.S.2d 672, 674 (Civ. Ct., N.Y. Co. 1985).

62. *30-40 Assoc. Corp. v. DeStefano*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6 (App. Term 1st Dep't) (*per curiam*); *Sie Jie Mei, Inc. v. Ashare*, 31 HCR 681A, N.Y.L.J., Dec. 10, 2003, p. 19, col. 1 (Civ. Ct., N.Y. Co.) (stating that in landlord-tenant matters, process server has duty, in effecting proper service, to communicate to landlord difficulties with service of process).

63. 21 H.C.R. 515A, N.Y.L.J., Oct. 13, 1993, p. 22, col. 5 (Civ. Ct., N.Y. Co.).

64. *Id.*; *see also Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883.

65. *See generally Har Holding v. Feinberg*, 26 H.C.R. 195A, N.Y.L.J., Apr. 2, 1998, p. 29, col. 3 (App. Term 1st Dep't) (*per curiam*) ("Tenant failed to controvert the process server's affidavit which set forth two prior attempts at personal service, one in the afternoon and one in the evening before conspicuous-place service was effected."); *N.Y. St. Hous. Finance v. Fawcett*, 12 H.C.R. 298A, N.Y.L.J., Dec. 19, 1984, p. 19, col. 5 (Civ. Ct., N.Y. Co.) (same).

66. 205 A.D.2d 468, 468, 614 N.Y.S.2d 6, 6 (1st Dep't 1994) (*per curiam*).

67. *See Dolan*, 195 Misc. 2d at 299, 753 N.Y.S.2d at 683.

68. 225 A.D. 403, 233 N.Y.S. 368 (4th Dep't 1929).

69. *See Oppenheim v. Spike*, 107 Misc. 2d 55, 56, 437 N.Y.S.2d 826, 828 (App. Term 1st Dep't 1980) (*per curiam*).

70. *Id.*, 437 N.Y.S.2d at 828 (emphasis added).

71. 195 Misc. 2d at 321, 753 N.Y.S.2d at 698. Since *Dolan*, two Nassau County judges have discussed the matter. Agreeing with *Dolan* is *Guevra v. Cueva*, 5 Misc. 3d 1024(A), 799 N.Y.S.2d 160, 2004 N.Y. Slip Op. 51531(U), 2004 WL 2827675 (Dist. Ct. Nassau Co., Dec. 8, 2004). Disagreeing is *Arnold v. Lyons*, 2003 N.Y. Slip Op. 50766(U), 2003 WL 2004246 (Dist. Ct. Nassau Co., Mar 31, 2003).

72. *See* 102 A.D.2d at 748, 476 N.Y.S.2d at 883 (holding single attempt to effect personal or substituted service during normal working hours insufficient because there is no reasonable expectation that an individual will be at home during those hours).

73. *See, e.g.*, *Kalikow 78/79 Co. v. Naughton*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3 (App. Term 1st Dep't) (*per curiam*) (upholding conspicuous-place service because process server made three attempts, two outside normal working hours.).

74. *See* 102 A.D.2d at 746, 476 N.Y.S.2d at 882.

75. 124 Misc. 2d 1096, 1098, 478 N.Y.S.2d 567, 570 (Civ. Ct., N.Y. Co. 1984).

76. *See id.*, 478 N.Y.S.2d at 570 (holding service attempts between 10:30 p.m. and 6:00 a.m. unacceptable).

77. *Hessel v. Hessel*, 6 Misc. 2d 861, 861, 164 N.Y.S.2d 519, 520 (Sup. Ct., N.Y. Co.) ("If this action were commenced by service of the summons and complaint in New York State on Sunday such service would be void.").

78. *See, e.g.*, *45 Prospect Apts. v. Copeland*, 17 H.C.R. 23D, N.Y.L.J., Jan. 2, 1989, p. 26, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("The actions of the process server in going to tenant's home at 6:45 a.m. on a weekday morning, without making any prior inquiry as to whether tenant would be home at that time, did not suffice as a reasonable application. . . .").

79. *See, e.g.*, *DeStefano*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6 ("The record supports Civil Court's finding that landlord had knowledge of tenant's incarceration and that conspicuous place service at the subject apartment would not give actual notice to the tenant, who also suffers from a psychiatric impairment."); *Kalikow 78/79 Co.*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3.

80. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709.

81. 144 Misc. 2d 241, 242, 543 N.Y.S.2d 883, 884 (Civ. Ct., N.Y. Co. 1989).

82. *Id.* at 244, 543 N.Y.S.2d at 885.

83. RPAPL 735(1).

84. *Id.* 735(2).

85. *Id.* 735(2)(b); *Park Holding Co.*, 21 H.C.R. 139C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 ("When service of the notice of petition and petition is made other than by personal delivery to respondent, it is not complete until the filing of the proof of service.").

86. *See Naman v. Sylveen Realty Co.*, 222 A.D.2d 564, 565, 636 N.Y.S.2d 344, 345 (2d Dep't 1995) (mem.) ("The process server attempted to serve the notice of petition and petition during the [tenant's] posted office hours. This attempt encompassed a reasonable expectation of success and thus satisfied the requirement of 'reasonable application.'"); *Chase Manhattan Bank, N.A. v. Beary*, 14 H.C.R. 176B, N.Y.L.J., May 21, 1986, p. 15, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("Attempted personal service at 6:30 at night, after usual business hours, on office tenant, is not reasonable attempt at personal service.").

87. *Leven v. Browne's Business School, Inc.,* 71 Misc. 2d 842, 842–43, 337 N.Y.S.2d 307, 308–09 (Dist. Ct., Nassau Co. 1972).

88. Andrew R. Brodnick, *Avoiding the Trap: Service of Process on Commercial Tenants Under RPAPL*, N.Y.L.J., June 8, 1994, p. 5, col. 2 (citing *Omabuild Corp. v. Dolron Rest., Inc.*, 20 H.C.R. 412A, N.Y.L.J., July 1, 1992, p. 24, col. 3 (Civ. Ct., N.Y. Co.)).

89. 95 Misc. 2d 108, 110, 407 N.Y.S.2d 118, 120 (Dist. Ct. Suffolk Co. 1978).

90. *See, e.g.*, *Kalikow 78/79 Co.*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3; *30-40 Assocs.*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6.

91. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709.

92. *See Marrero v. Escoto*, 145 Misc. 2d 974, 975, 554 N.Y.S.2d 375, 376 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1990) (mem.) ("In the absence of proof by the petitioner that this envelope had the proper postage for certified mail, or in the absence of any stamp by the post office to establish that the envelope was treated as certified mail, it is the conclusion of this court that petitioner has failed to establish that the certified mail copy was ever sent to the appellant.").

93. *Lana Estates*, 123 Misc. 2d at 327, 473 N.Y.S.2d at 915 ("'[S]ubstituted' or 'conspicuous place' service requires that a copy of the notice of petition and petition be sent by regular and certified mail to a corporate respondent addressed to the subject premises *and* also to the corporate tenant's last known principal office or principal place of business if this is 'not located on the property sought to be recovered.'") (emphasis in original); *Delmonico Hotel Co. v. Fiddler Gonzalez & Rodriguez*, 19 H.C.R 360A, N.Y.L.J., June 12, 1991, p. 23, col. 4 (Civ. Ct., N.Y. Co.).

94. *Weise v. Gershman*, 90 Misc. 2d 799, 800, 396 N.Y.S.2d 316, 317 (Civ. Ct., Kings Co. 1977) (noting that RPAPL 735 "provides for substituted service on a natural person, when the premises are not his residence, not only at the premises but also by registered or certified mail at the respondent's residence if petitioner has 'written information' of the residence address").

95. *See* RPAPL 735(1)(a).

96. *See id.* 735(1)(b); *E.O.R.. Five of N.Y. v. Fountain House, Inc.*, 23 H.C.R. 576A, N.Y.L.J., Sept. 22, 1995, p. 26, col. 1 (App. Term 1st Dep't) (*per curiam*) (holding that process must be mailed to corporate address when conspicuous-place service on corporation is attempted and landlord has written information that corporation's principal office of place of business is not located on property sought to be recovered).

97. *See Cooke Props., Inc. v. Masstor Sys. Corp.*, 21 H.C.R. 1A, N.Y.L.J., Jan. 4, 1993, p. 21, col. 3 (Civ. Ct., N.Y. Co. 1993) (noting, in upholding service on sub-tenant's employee, that mailings were made to tenant's out-of-state principal office); *Delmonico Hotel Co.*, 19 H.C.R.360A, N.Y.L.J., June 12, 1991, p. 23, col. 4 (holding that when tenant is partnership, mailings are controlled by RPAPL 735(1)(b), which does not limit mailings to in-state addresses).

98. *See Foster v. Cranin*, 180 A.D.2d 712, 712–13, 579 N.Y.S.2d 742, 743 (2d Dep't 1992) (mem.) (dismissing because of incorrect mailing); Finkelstein & Ferrara, *supra* note 29, at §§ 14:182, at 14–105, 15:342, at 15–205.

99. 183 A.D.2d 687, 688; 583 N.Y.S.2d 275, 278 (2d Dep't 1992) (mem.).

100. 172 Misc. 2d 784, 794, 660 N.Y.S.2d 247, 254 (Civ. Ct., Bronx Co. 1997) citing 6 RCNY § 2-238.

101. *See Karlsson & Ng v. Cirincione*, 186 Misc. 2d 359, 360–61, 718 N.Y.S.2d 783, 784–85 (Civ. Ct., N.Y. Co. 2000).

102. S*ee* Wendt & Ngai, *supra* note 43, at 11.

103. 22 NYCRR 208.42(h) (Civ. Ct.); 22 NYCRR 210.42(d) (City Ct.); 22 NYCRR 212.42(d) (Dist. Ct.).

104. Civ. Ct. Act § 401(c).

105. CPLR 306(d); RPAPL 735(2); Finkelstein & Ferrara, *supra*, note 29, at §§ 14:147 at 14–87, 15:307, at 15–187.

106. *See, e.g.*, *Halpern v. State Furniture Co.*, 186 Misc. 551, 553, 61 N.Y.S.2d 618, 619 (App. Term 1st Dep't 1946) (*per curiam*) ("[A]n omission to place upon the copy petition served the name of the notary, is not a jurisdictional defect.").

107. Civ. Ct. Act § 411; UDCA § 411; UCCA § 411; UJCA § 411; *Fame Equities & Mgmt. Co. v. Malcolm*, N.Y.L.J., Oct. 28, 1996, p. 27, col. 4 (App. Term 1st Dep't) (*per curiam*).

108. *See, e.g.*, *Shields v. Benderson Dev. Co., Inc.*, 76 Misc. 2d 322, 323 350 N.Y.S.2d 549, 551 (Monroe County Ct. 1973).

109. 22 NYCRR 208.42(i).

110. *Id.* 208.42(i)(2).

111. *Id.* 208.42(i)(1).

112. *Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883; Finkelstein & Ferrara, *supra* note 29, at §§ 14:236, at 14–127, 15:393, at 15–227.

113. *See, e.g.*, *Baer v. Lipson*, 194 A.D.2d 787, 787, 599 N.Y.S.2d 618, 619 (2d Dep't 1993) (mem.), *appeal dismissed*, 83 N.Y.2d 788, 611 N.Y.S.2d 127, 633 N.E.2d 481 (1994) (denying respondent's motion to vacate default judgment because respondent failed to assert defense of lack of personal jurisdiction and did not rebut proof of service by affidavit or statement based on personal knowledge).

114. *New Generation Mgmt. Corp. v. Park*, 32 H.C.R. 289A (Civ. Ct., N.Y. Co. 2003).

115. 81 N.Y.2d 56, 59, 595 N.Y.S.2d 729, 730, 611 N.E.2d 768, 769 (1993).

116. 192 Misc. 2d 577, 580, 746 N.Y.S.2d 875, 877-78 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

117. *2290 12th Ave. LLC v. Doe*, 30 HCR 695A, N.Y.L.J., Dec. 5, 2002, p. 22, col. 5 (Civ. Ct., N.Y. Co.).

118. *Parkchester Apts. Co. v. Walker*, 24 H.C.R. 488A, N.Y.L.J., Sept. 16, 1996, p. 28, col. 3 (App. Term 1st Dep't) (*per curiam*) ("The purported defects in the demand were not 'jurisdictional.' 'The failure of petitioner to comply with a statutory notice requirement . . . represents merely the

failure to comply with a condition precedent to suit and cannot properly be said to affect the court's jurisdiction.'") (quoting *170 W. 85th Tenants Ass'n v. Cruz*, 173 A.D.2d 338, 339, 569 N.Y.S.2d 705, 707 (1st Dep't 1991) (mem.)). (alteration in *Walker*); Finkelstein & Ferrara, *supra* note 29, at § 14:235, at 14–127.

119. *67-25 Dartmouth St. Corp. v. Silberman*, 21 HCR 409A, N.Y.L.J., Aug. 11, 1993, p. 24, col. 5 (Civ. Ct., Queens Co.).

120. *Glorious v. Siegel*, 33 HCR 74A, 5 Misc. 3d 1015(A), 5 Misc.3d 1015(A), 798 N.Y.S.2d 709, 2004 N.Y. Slip Op. 51378(U), *4, 2004 WL 2609413, at *4 (Civ. Ct., N.Y. Co., Sept.15, 2004) (Gerald Lebovits, J) (denying traverse because "[r]espondent did not assert the allegations of improper service in a sworn affidavit included in his answer as required by CPLR 3020"); *106 E. 116th St., LLC v. Vergas*, 33 H.C.R. 185A, N.Y.L.J., Mar. 16, 2005 p. 19, col. 3 (Civ. Ct., N.Y. Co.) (holding that personal-jurisdiction defense will be stricken if process server's affidavit of service is wholly proper on its face and if person with knowledge does not contradict by affidavit).

121. *See, e.g.*, *Hasbrouck v. City of Gloversville*, 102 A.D.2d 905, 477 N.Y.S.2d 486, 487 (3d Dep't 1984) (mem.), *aff'd*, 63 N.Y.2d 816, 483 N.Y.S.2d 214, 472 N.E.2d 1042 (1984) (mem) (discussing summary-judgment motions).

122. *Clarkson Arms v. Arabatiz*, 19 H.C.R. 424B, N.Y.L.J., July 3, 1991, p. 23, col. 6 (App. Term 1st Dep't) (*per curiam*) (holding bare conclusory remarks that service of process fails to comply with RPAPL 735 are insufficient to warrant hearing); *De Meo v. Travalos*, 12 H.C.R. 256C, N.Y.L.J., Nov. 7, 1984, p. 13, col. 3 (holding that sworn denial of receipt of process requires traverse hearing).

123. *Jackson v. Hertz*, 20 H.C.R. 65A4, N.Y.L.J., Aug. 19, 1992, p. 23, col. 3 (Civ. Ct., N.Y. Co.) (holding that when tenant moves to dismiss for lack of personal jurisdiction, landlord must attach copy of affidavit of service to opposing papers).

124. *See In re Shaune TT*, 251 A.D.2d 758, 758, 674 N.Y.S.2d 457, 458 (3d Dep't 1998) (holding respondent's "conclusory denial of service was insufficient to raise an issue of fact necessitating a traverse hearing"); *Carlino v. Cook*, 126 A.D.2d 597, 598, 511 N.Y.S.2d 38, 40 (2d Dep't 1987) (mem.) (allowing party to refute process server's affidavit of service by "detailed and specific controversions" of pertinent allegations).

125. *See Worrell v. 845 E. 136th St., Inc.*, 129 A.D.2d 528, 529, 514 N.Y.S.2d 380, 380 (1st Dep't 1987) (mem.); *see* Wendt & Ngai, *supra* note 43, at 14 (citing *Runyon v. Mirsky*, N.Y.L.J., Feb. 24, 1992, p. 3, col. 1 (App. Term 1st Dep't) (*per curiam*)).

126. *Matthews v. Carman*, 122 App. Div. 582, 586, 107 N.Y.S. 694 (1st Dep't 1907) (*per curiam*).

127. *President St. v. Bernstein.*, 21 H.C.R. 337A, N.Y.L.J., June 23, 1993, p. 30, col. 5 (Civ. Ct., Kings Co.).

128. 7 Misc. 3d 1009(A), 2003 N.Y. Slip Op. 51754(U), 2003 WL 24038304, N.Y. Misc. LEXIS 1992 (Civ. Ct., N.Y. Co., Aug. 8, 2003) (Gerald Lebovits, J.).

129. *Id.*, 2003 N.Y. Slip Op. 51754(U), at *2, 2003 WL 24038304, at *2, 2003 N.Y. Misc. LEXIS 1992.

130. CPLR 2103(a); *Grid Realty Corp. v. Gialousakis*, 129 A.D.2d 768, 768, 514 N.Y.S.2d 760, 760 (2d Dep't 1987) (mem.) (upholding propriety of corporate officer's service of process); *N.Y. City Hous. Auth. v. Smith*, 18 H.C.R. 469A, N.Y.L.J., Oct. 3, 1990, p. 23, col. 4 (Civ. Ct., N.Y. Co.) (upholding landlord's employee's service of petition and notice of petition).

131. GBL §§ 89-u, 89-cc; *see also* GBL § 89-t; N.Y.C. Admin. Code §§ 27–403 (providing that in New York City, process servers are persons who charge a fee or who serve process five or more times "in the twelve month period immediately preceding the service in question" and are subject to licensing and record-keeping requirements).

132. Scherer, *supra* note 3, at § 7:154, at 7–61.

133. N.Y.C. Admin. Code §§ 20–403.

134. *E.g.*, *Timur on Fifth Ave. Inc. v. Jim, Jack & Joe Realty Corp.*, N.Y.L.J., Sept. 29, 2000, p. 29, col. 1 (App. Term 1st Dep't) (*per curiam*); Scherer, *supra* note 3, at § 7:159, at 7–63.

135. *See, e.g.*, *Barr v. Dep't of Consumer Affairs*, 70 N.Y.2d 821, 823, 517 N.E.2d 1321, 1322 (1987) (upholding fine and revocation of license of process server who consistently failed to maintain proper records of service of process); Scherer, *supra* note 3, at § 7:159, at 7–63.

136. 22 NYCRR 208.29; *see also Cent. Conn. Teachers Fed. Credit Union v. Raton*, N.Y.L.J., Apr. 24, 1997, p. 32, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("Such records are vital to a proper cross examination."); *Citibank, N.A. v. Mendelsohn*, 25 H.C.R.598A, N.Y.L.J., Nov. 12, 1997, p. 30, col. 3 (Civ. Ct., Kings Co.) ("The first [proceeding] was dismissed because the process server failed to produce his logbook. . . .").

137. GBL §§ 89-u, 89-cc.

138. *Id.* § 89-u; 89-cc; *see generally Leander v. Burnett*, 25 H.C.R 645A, N.Y.L.J., Dec. 3, 1997, p. 25, col. 5 (Civ. Ct., Kings Co.).

139. *Bullen v. Ctr. Garage Corp.*, 31 H.C.R. 486A, N.Y.L.J., Aug. 29, 2003, p. 19, col. 2 (Civ. Ct., N.Y. Co.).

140. *E.g.*, *Liberman v. Gelstein*, N.Y.L.J., Oct. 3, 1990, p. 21, col. 5, 18 H.C.R. 462A (Sup. Ct., N.Y. Co.).

141. On the other hand, the court in *475 Sixth Ave. Props. Corp. v. Otto*, 11 H.C.R. 176B, N.Y.L.J., July 13, 1983, p. 12, col. 1 (App. Term 1st Dep't) (*per curiam*), held that a traverse court may not impose traverse costs on a tenant whose traverse motion is overruled.

142. *E.g.*, *Silber v. A.J. Clarke, Inc.*, 14 H.C.R. 322D, N.Y.L.J., Sept. 26, 1986, p. 12, col. 4 (App. Term 1st Dep't) (*per curiam*) (overruling traverse based on process server's credibility).

143. *Inter-Ocean Realty Assocs. v. JSA Realty Corp.*, 152 Misc. 2d 901, 902, 587 N.Y.S.2d 837, 838 (Civ. Ct., N.Y. Co. 1991) (dismissing proceeding because process server failed to produce police report or other probative evidence about whereabouts of logbook: "Courts must strictly uphold compliance by process servers with the regulations to soundly effectuate a public policy that prevents questionable service practices."); *26th W. Assocs. v. Slattery*, 13 H.C.R. 373A, N.Y.L.J., Nov. 13, 1985, p. 13, col. 6 (Civ. Ct., N.Y. Co.) (holding that process server's log held minimal weight in traverse hearing); *Griffith v. Bessent*, 21 HCR 434A (Civ. Ct., Kings Co. 1993) (holding that failure to maintain bound log of service of process together with lack of independent memory of how many copies of process were served mandates dismissing petition).

144. Scherer, *supra* note 3, at § 7:155, at 7–62.

145. N.Y.C. Admin. Code §§ 89, 20–405.

146. S*ee, e.g.*, *Ezragim Assocs., LLC v. J.H. Design, Inc.*, 4 Misc. 3d 130(A), 791 N.Y.S.2d 869, 2004 N.Y. Slip Op. 50684(U), 2004 WL 1489858, 32 H.C.R. 398B, N.Y.L.J., June, 22, 2004, p. 23, col. 2 (App. Term 1st Dep't, June 17, 2004) (*per curiam*) ("[T]he court's refusal to grant landlord an adjournment of the traverse so that it could produce proof of the certified mailings of the demand for rent and nonpayment petition was an improvident exercise of discretion.").

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Deadline Looms for UCC Article 9: Cooperative Unit Security Interests Impacted

By Michael J. Berey

Model legislation drafted by the National Conference of Commissioners on Uniform State Laws revising Article 9 ("Secured Transactions") of the Uniform Commercial Code ("UCC") was enacted in substantially the same form in the fifty states of the United States, the District of Columbia, Guam and the United States Virgin Islands. July 1, 2001 was the effective date of the revision to Article 9 ("Revised Article 9") in New York State and in most other jurisdictions.[1] Accordingly, Revised Article 9 has governed the perfection of security interests in New York State, and in most other jurisdictions, since July 1, 2001.

Generally applicable rules governing the location of the filing office in which a financing statement is to be filed when the filing of a financing statement is required to perfect a security interest were changed in Revised Article 9.[2] Under Revised Article 9, except when dealing with real-property-related financing statements (concerning as-extracted collateral, timber to be cut, fixtures and "cooperative interests"), which are filed in the office in which a mortgage on the related real property would be filed, financing statements are filed in the central filing office in the jurisdiction in which the Debtor is located.[3] In New York State and in most all of the other jurisdictions, the central filing office is the office of the jurisdiction's Secretary of State.

A Debtor who is an individual is located at his or her principal residence; a debtor that is an organization other than a "Registered Organization" is located where it has its place of business if it has only one place of business, or where its chief executive office is located if it has more than one place of business. A "Registered Organization," defined by Section 9-102 of Revised Article 9 to be "an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized," such as a corporation or a limited liability company, is located in the State of its organization.

A financing statement filed under former Article 9 which has not lapsed and is still effective is required to comply with the filing requirements of Revised Article 9 prior to July 1, 2006 in New York and in the majority of the other jurisdictions, which have adopted the uniform transition end date of June 30, 2006. A security interest perfected under former Article 9 by other than filing remained effective if perfected under Revised Article 9 within one year of its enactment.[4]

A security interest perfected by filing under former Article 9 in a jurisdiction that is not the Revised Article 9 location of the Debtor jurisdiction can remain effective by filing in the central filing office of the newly applicable jurisdiction either a UCC-1 financing statement or, preferably, to continue the priority of the initial filing, an "Initial Financing Statement in Lieu of a Continuation Statement." Without such a further filing under Revised Article 9, the existing financing statement will lapse and no longer be effective.

As noted above, real-property-related financing statements are filed in the office in which a mortgage on the related real property would be filed, which would be the County Clerk, or the Register's office in the Counties of Manhattan, Bronx. Kings, and Queens, not in the office of New York's Department of State. The process to file a financing statement against a Cooperative Interest merits particular attention.

Cooperative Units

Section 9-102(27-b) of Revised Article 9 defines a "Cooperative Interest" as "an ownership interest in a cooperative organization, which interest, when created, is coupled with possessory rights of a proprietary nature in identified physical space belonging to a cooperative organization."

Prior to October 1, 1988 a security interest in the shares of stock and the related proprietary lease representing ownership of a cooperative unit could be perfected by the lender taking possession of the borrower's cooperative stock and proprietary lease. On and after October 1, 1988 only the filing of a financing statement in the County in which a mortgage on the cooperative corporation's real property would be recorded could perfect such a security interest. In addition, a financing statement on a cooperative unit filed on or after October 1, 1988 could provide that it was effective until it was terminated of record.[5] Subject to any local filing rules, the filing would be located on a search of the recorder's document index until a Termination was filed. (For example, unless a UCC-1 filed in Westchester County stated that the "collateral is shares of stock in, and a proprietary lease from, a corporation formed for the purpose of cooperative ownership of real property," the filing was not indexed in the index for transfers involving cooperative units.) Due to Revised Article 9, these security interests will no longer be effective after June 30, 2006, unless further steps are taken by the Secured Party.

To perfect a security interest as to a Cooperative Interest under Revised Article 9, a UCC Financing Statement (Form UCC-1) must be filed in the office in which a mortgage on the cooperative corporation's real proper-

ty would be recorded, without regard to the location of the Debtor. Box "6" on the UCC-1, stating that "(t)his financing statement is to be filed in the Real Estate Records," needs to be checked.

A Form UCC-1 filed against a Debtor's Cooperative Interest is sufficient under UCC Section 9-502 only if it sets forth (i) the names of the Debtor and the secured party or its representative, (ii) the collateral covered, (iii) the number and street address of the cooperative unit and the town or city, or the county if it is in New York City, (iv) that it covers a cooperative interest and is to be filed in the real estate records, (v) the name of the record owner of the real property, and (vi) a description of the real property to which the collateral relates. The description of the real property is to be made either by reference to a deed or mortgage book and page of recording or by street address, and, in the City of New York and the Counties of Nassau or Onondaga, also by reference to the book and page.

A Form UCC-1 meeting these requirements ("Minimum Standards") is effective for five years, subject to continuation. If, however, a New York UCC Financing Statement Cooperative Addendum (Form UCC1Cad) ("Cooperative Addendum") is also filed, the security interest will be effective for 50 years.

A Cooperative Addendum contains (i) the names of the Debtor, the Secured Party or its representative, and the "Cooperative Organization," (ii) identification of the collateral by its unit number, the street address (including the name of the city, town or village and county in which the cooperative unit is located), and the tax designation of the real property in which the cooperative unit is located, and (iii) the file number of the initial financing statement, if the Cooperative Addendum was not filed as an attachment to the UCC-1.

Accordingly, to initially perfect a Security Interest in a Cooperative Interest under Revised Article 9, or to continue the perfection of a Security Interest in a Cooperative Interest under Revised Article 9 of a Security Interest previously perfected under former Article 9, the following procedures need to be followed:

1. A UCC-1 filed on or after July 1, 2001 needs to comply with the requirements of Revised Article 9, and a Cooperative Addendum should be filed with the UCC-1. If a Cooperative Addendum was not filed with the UCC-1, it should be filed prior to the expiration of the five-year period for which a UCC-1 filed alone is effective.
2. When the Security Interest in a Cooperative Interest was perfected by filing before July 1, 2001, either a UCC Financing Statement Amendment (Form UCC3) filed as a Continuation (a "Continuation Statement"), which provides perfection of the Security Interest for only five years, or a Cooperative Addendum, which provides perfection of the Security Interest for 50 years, needs to be filed. The filing of a Cooperative Addendum for 50 year perfection is the preferred alternative.

   A UCC3 Financing Statement Amendment for a "Collateral Change" should also be filed if the existing UCC-1 does not satisfy the Minimum Standards. Box "8" ("Amendment") should be checked to "add" collateral by setting forth the address and block and lot of the real property owned by the cooperative corporation and the name of the cooperative corporation as the Record Owner of the real property.

   The New York City Register has advised the author that the Amendment can be filed with a Cooperative Addendum as a single filing for one filing fee. Filing procedures will need to be verified in other recording offices.
3. Where a security interest in the shares of stock and a proprietary lease representing ownership of a cooperative unit was perfected by possession only before October 1, 1988, a UCC-1 and a Cooperative Addendum need to be filed before July 1, 2006; the Security Interest in the Cooperative Interest will then be perfected under Revised Article 9 for 50 years.[6]

Lenders and their counsel should act to ensure their UCC filings are in compliance with Revised Article 9 in advance of July 1, 2006. Recognized experts in the filing of financing statements who can provide assistance include Clare Oliva at National Corporate Research (800) 221-0102 and, as to cooperative units, Eva-Marie Davis at Modern Abstract Corporation (212) 880-0720. A lender with a security interest perfected under former Article 9 complying with Article 9 may also consider obtaining a title policy to insure that its interest is properly perfected under Revised Article 9.

Endnotes

1. Revised Article 9 as enacted became effective in Connecticut on October 1, 2001 and in Alabama, Florida and Mississippi on January 1, 2002.
2. A Security Interest may also be perfected without filing merely by "Attachment," by possession by or delivery to the Secured Party, or by the Secured Party having Control of the Collateral, depending on the type of the Collateral. See NY UCC Section 9-308 through Section 9-314.
3. Under Section 9-401 of New York's former Article 9, the office in which a financing statement was to be filed was determined by rules relating to the Debtor's place of business and, in certain instances, the location of the collateral.
4. NY UCC Section 9-705.
5. McKinney's Unconsolidated Laws Ch 333 (1988).
6. Revised Article 9 Forms can be obtained on the New York State Department of State's WEB Site at http://dos.state.ny.us/corp/uccforms.html.

Michael J. Berey is the Senior Underwriting Counsel and Senior Vice-President of the First American Title Insurance Company of New York.

BERGMAN ON MORTGAGE FORECLOSURES: Consequences of Delay

By Bruce J. Bergman

This one should be a no brainer and ought not (you say) be the subject of written analysis. Delay in the foreclosure case is rarely beneficial and we all know that. True enough, but there is nuance even to the old commandment, thou shalt not unduly delay thy foreclosure action. (See *Danielowich v. PBL Development*, 292 A.D.2d 414, 739 N.Y.S.2d 408 (2d Dept. 2002) to be focused on in a moment.)

Although sometimes a foreclosure action is put on hold by a mortgage lender or servicer to accommodate a possible workout or settlement, generally the goal is to speed through the foreclosure as quickly as possible for a host of obvious reasons. One notable basis, of course, is that time translates into interest accrual which in turn reduces and eventually eliminates whatever equity cushion there may be. This is why there are prevailing timelines to prosecute foreclosures and why investors watch servicers and servicers watch their counsel.

Nonetheless, some delays are perhaps inevitable. Any number of them are simply unavoidable–like elusive defendants or choked court schedules. But those are not the subject here. What *is* the point is the possible dangerous consequence of an appreciable delay arising solely from inaction in the camp of the mortgage holder. To explain: a mortgage foreclosure action in New York is deemed an action in equity. The practical result is that courts will generally derogate to themselves more discretion to do that which is deemed fair and equitable—sometimes regardless of what a statute might say. The law in New York, for example, has been evolving in recent years to confirm that in an equitable action (i.e., mortgage foreclosure) interest is assessed within the courts' discretion (regardless of what the mortgage documents say). This means that courts can reduce or deny altogether interest accruing during a period of delay caused by the mortgage holder. Particularly with reference to default interest, courts are uncomfortable saddling borrowers with increased debt occasioned solely by lenders' or servicers' neglect.[1]

In the past though, this has been an issue only when a borrower was outraged by *excessive* delay. The new case suggests that the courts' discomfort with delay can be even more acute.

Quickly, here are the facts of the noted case which makes the point. Mortgage holder gets referee's computation of the sum due on April 11. At that moment, the mortgage holder could have applied for judgment (and confirmation of the referee's report). Inexplicably, though, it did not proceed with that step until October—some five months later.

Faced with continued mounting of default interest, the borrower objected to the judgment and the Second Department *reduced* default interest of 16% down to the judgment rate of 9% for the delay period, which was found to be four months. In other words, the court concluded that the plaintiff could have reasonably moved for judgment on May 16—five weeks after the referee's report was in hand. All the time plaintiff sat from May until October would only accrue interest at 9% instead of the 16% which would otherwise have prevailed.

While the monetary result of this case is hardly devastating, it highlights the possible *additional* consequences of delay. Had there been an explanation for the wasted four months (such as the plaintiff held in place at borrower's request to consider a settlement) there would undoubtedly have been no loss of interest. But if plaintiff just does nothing, or is slow to locate information or documentation needed to proceed, punishment could be in the offing.

Endnote

1. The consequences of delay in the mortgage foreclosure action are a particularly perilous arena for mortgage holders—a subject discussed in far more detail at 1 *Bergman on New York Mortgage Foreclosures*, § 2.20, Matthew Bender & Co, Inc. (rev. 2004).

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures* (Matthew Bender & Co., Inc., rev. 2004), is a partner with Berkman, Henoch, Peterson & Peddy, P.C., Garden City, NY; an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course; and a special lecturer on law at Hofstra Law School. He is also a member of the USFN and the American College of Real Estate Lawyers.

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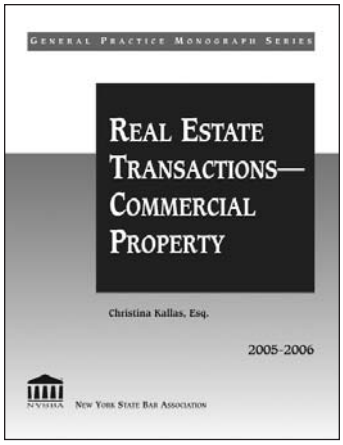

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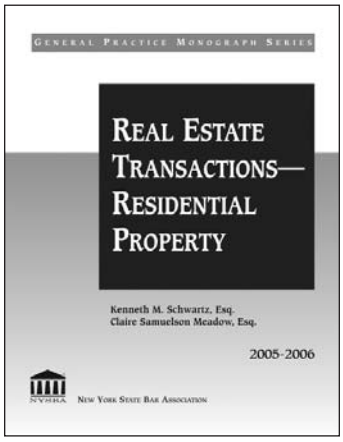

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The International Environmental Law Committee
Environmental Law Section
in Conjunction with the
International Law and Practice and Real Property Law Sections
New York State Bar Association
Presents
Shanghai Conference and China
October 2006

The International Environmental Law Committee of the Environmental Law Section will be holding a conference in Shanghai, China in October 2006. We are coordinating this conference with the Fall Meeting of the International Law and Practice Section which is being held in Shanghai during the same period of time. The Real Property Law Section agreed to be a co-sponsor of the conference. We intend to have a half-day joint MCLE program with the International Law and Practice Section as well as our own half-day program with the assistance of the Environmental Law Faculty of the University of Shanghai. After the conference, an optional six night tour to Xian and Beijing has been scheduled. The tentative schedule for the complete 10 day, 11 night trip is as follows:

Wednesday, October 18th	Depart New York City or other gateway city for overnight flight to Shanghai
Thursday, October 19th	Afternoon arrival in Shanghai. Group transfer to Okura Garden Hotel (a Leading Hotel of the World). Remainder of day at leisure.
Friday, October 20th	Morning—Optional MCLE Program with International Law and Practice Section at JW Marriott Hotel. (B)
	Afternoon—half-day Shanghai City Tour, including visits to the Jade Buddha Temple and the Yu Garden (B)
	Evening—Optional social event with International Law and Practice Section
Saturday, October 21st	Morning—Optional meeting with Environmental Law Faculty of University of Shanghai.
	Evening—Chinese acrobat performance with dinner (B, D)
Sunday, October 22nd	Full-day tour to Suzhou, the "Venice of the East" famous for its many canals, traditional Chinese gardens and homes, including visit to Silk Factory (B, L)
Monday, October 23rd	Group transfer to Shanghai Airport for flight to Xian, an ancient capital of China. Transfer to the Sofitel Renmen Square Hotel.
	Afternoon—Xian City Tour, including Big Wild Goose Pagoda and Provincial Museum (B)
Tuesday, October 24th	Full day tour to Museum of Terra Cotta Warriors, a World Heritage Site. Visits to Huaquing Hot Springs, City Markets and Han Museum.
	Evening—Dinner theatre performance of the Tang Dynasty. (B, L, D)
Wednesday, October 25th	Transfer to Xian Airport for flight to Beijing. Transfer to Peninsula Palace Hotel. Remainder of day at leisure. (B)
Thursday, October 26th	Full day tour features the Temple of Heaven and an excursion outside Beijing to the Great Wall of China at Badaling and the 13 Tombs of the Ming Emperors (B, L)
Friday, October 27th	All day Beijing City tour, including Forbidden City Palace, Tiananmen Square, Summer Palace and visit to traditional Northern Chinese country home. (B, L)
Saturday, October 28th	Entire day free to explore Beijing on your own.
	Evening—Farewell Peking Duck Dinner. (B, D)
Sunday, October 29th	Group transfer to Beijing Airport for return flights to New York or other city. (B)

The all inclusive price which includes deluxe hotels throughout, buffet breakfast daily (B), other meals as indicated (L, D), all sightseeing, group transfers to and from airports in Shanghai Xian and Beijing and flights to Xian and Beijing. Private Chinese escort for group throughout China.

Program details available in Spring 2006 will be finalized by representatives of Environmental Law, Real Property Law and International Law and Practice Sections.

Optional tours, including Guilin and Yangtse River Cruise—available upon request.

Airfare between New York and China—available upon request—or utilize frequent flyer awards.

For additional information e-mail rsachs@richtravel.com.

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The Real Property Law Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers or Committee Chairs for further information about the Committees.

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The *Journal* welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to any one of the Co-Editors whose names and addresses appear on this page.

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