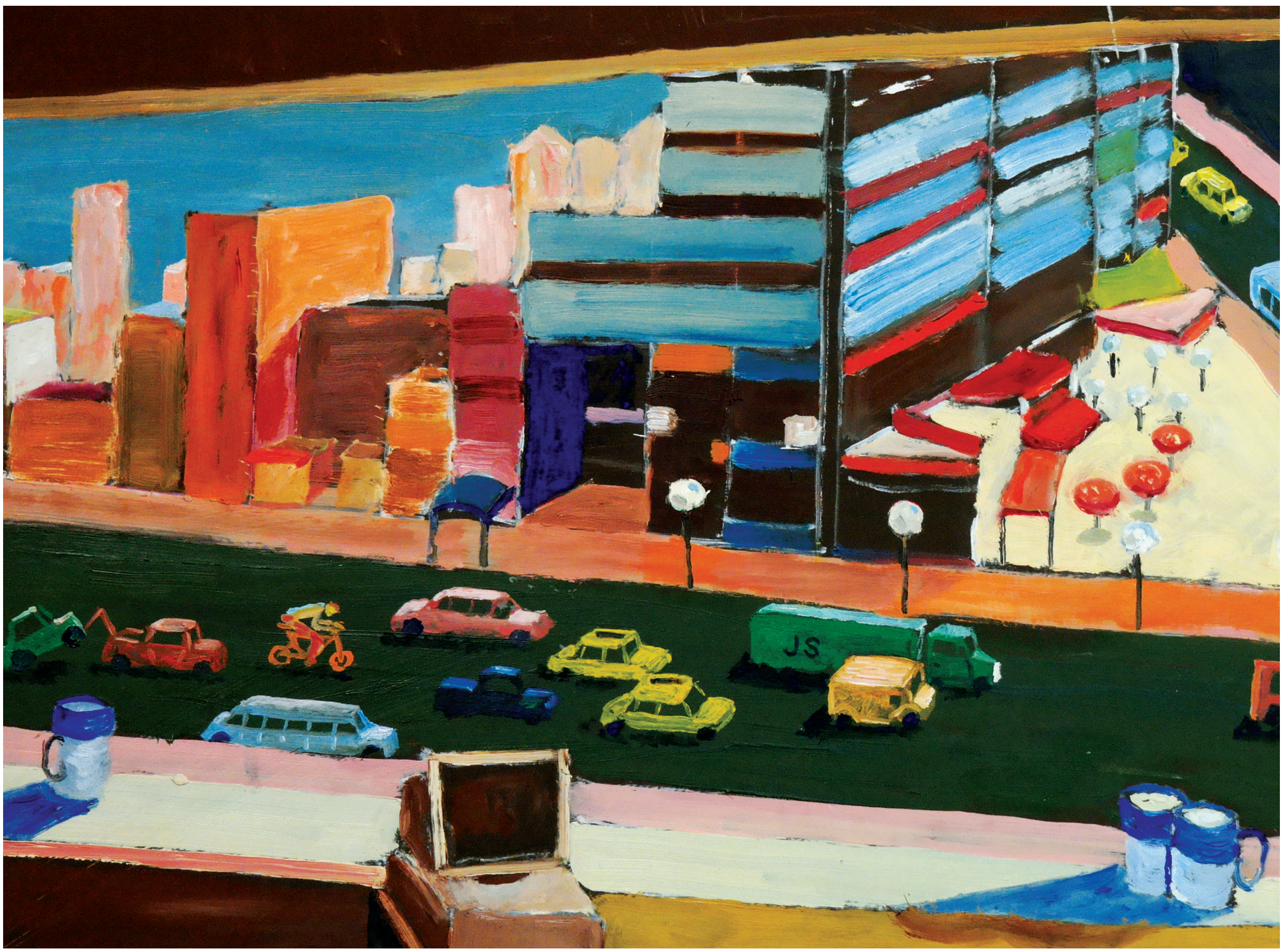
NYSBA SUMMER/FALL 2019 | VOL. 47 | NO. 2

N.Y. Real Property Law Journal

A publication of the Real Property Law Section
of the New York State Bar Association



Inside:


ANNUAL
MEETING
AND EXPO
CONNECT • INSPIRE • LEARN
JANUARY 27 – 31
NEW YORK CITY
2020
NYSBA
NEW YORK STATE
BAR ASSOCIATION

Message from the President

Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Real Property Law Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

• According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.

• Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.

• Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.

• Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.

• Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads on Diversity

Hank Greenberg

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. (See http://www.nysba.org/diversitychairs)

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

Hank Greenberg can be reached at hmgreenberg@nysba.org.

Table of Contents

Message from the Chair


Gerard G. Antetomaso

When the nominating committee of our Section asked me to serve as an officer, I did not respond immediately. While I was honored to be asked, the thought of balancing the workload with all that was going on in my practice seemed daunting. In hindsight I would be even quicker to accept the offer. The office, however, has had its challenges. First and probably most impactful was the passage of the Housing Stability and Tenant Protection Act of 2019. This is likely the most significant piece of real estate-related legislation in New York in decades. In order to address the sweeping changes that are enacted by the new law, the Executive Committee has created a task force led by Mindy Stern, former chair of our Section and a practitioner with a passionate commitment to educating our Section about the law as well as possibly presenting some changes or clarifications for consideration by the legislature. Mindy has constructed this task force by recruiting experienced, knowledgeable practitioners who deal on a daily basis with the effects of this new law. She has reached out to and joined efforts with the New York City Bar in carrying out the purposes of the task force. Given the track record of those involved, I know their work will not only serve the needs of the community at large, but also those of our Section.

With respect to the changes effectuated by the Act, I would like to thank Ed Filemyr, who on less than a week's notice put together a presentation to give to the Executive Committee as well as to the CLE attendants at our summer meeting in Vermont. While it was too late to qualify for CLE credits, Ed did a wonderful job of explaining the highlights of the Act and touched upon numerous areas impacted by the law.

On the subject of our summer meeting, our First Vice-Chair, Ira Goldenberg, put together a series of wonderful social events along with CLE presentations that were timely, interesting and in some cases even provocative. On Friday, Joel Sachs, Heather Rogers and Rose Marie Cantanno updated us on New York's Zombie Housing Law; Dennis Greenstein discussed ethics and hot topics in condo and co-op law; Gil Hoffmann and Mitch Pawluk discussed the implications of cannabis under New York law; Peter Coffey spoke about statute of limitations issues in foreclosures and Ann Reynolds Copps treated us once again to her ever-popular ethics and chocolate. Her presentation was held in the old courthouse in Manchester. On Saturday, Nick Ward Willis discussed environmental considerations in residential real estate transactions; John Caffrey, Richard Larson and Jessie Larson spoke about conservation easements; Michael Greco presented on tax credit financing for affordable housing, and Michelle Wildgrube and Tim McLeron discussed implicit bias, inclusion and ethics in the practice of real estate law. The event was one of the better attended events in many years and Ira's passion for the Manchester area was obvious in all the wonderful events that he organized.

At our Executive Committee meeting we addressed a number of other issues. As you may have heard, this year NYSBA President Hank Greenberg is overhauling the New York State Bar Association's website and creating a Virtual Bar Center. Consistent with that effort, the Real Property Law Section is creating a task force to enhance our social media and online presence while attempting to better serve our membership and support the growth of our Section. That task force is being led by Susan Scarbach and Michael Stevens, who also head our Website and Electronic Communication Committee. The Executive Committee also appointed a temporary task force to be led by Peter Coffey, another former chair of our Section, to comment on COSAC's proposed changes to the Rules of Professional Conduct.

This year we had a number of first-time attendees at our summer meeting. We also had a number of members attend who had only recently been first time attendees. I would encourage everyone to place July 9-11, 2020 on your calendars and make a commitment to attend the meeting, which this coming year will be held in Montreal. We will likely again have specials for first-time attendees and, as others have found, the meeting is worth your being part of each year. I promise you will not be disappointed as the subject matter, the social events and the comaraderie are without equal.

Gerard G. Antetomaso

Representing Foreign Buyers and Sellers in United States Real Estate Transactions

By S.H. Spencer Compton and Diane Schottenstein

Today, many parts of the world are unsettled due to a variety of economic, political and/or environmental issues. Such unrest can lead to rapid inflation which can devalue local currencies. Certain nations restrict the amount of local currency a citizen may take out of her country. Where does international money consistently find a safe home? Foreign investors have historically considered United States real estate to be an attractive and stable investment.

According to the National Association of Realtors Report on 2017 International Investment in U.S. Residential Real Estate, between April 2016 and March 2017 foreign buyers and recent immigrants purchased $153 billion in U.S. residential property. This represented about 284,455 homes, an increase from 214,885 homes in the previous 12-month period, or 5% of all existing residential home sales in that 12-month period.[1] Furthermore, international investors have purchased over $365 billion in U.S. commercial real estate since 2010, with the majority of capital flowing to the largest metropolitan regions. Manhattan alone represented nearly a fifth of all foreign investment in commercial real estate.[2] In fact, the National Association of Realtors in its study on Commercial Real Estate International Business Trends 2018 reported that during 2017, 18% of its surveyed commercial real estate brokers closed transactions with international clients.[3] Because so much U.S. real estate is being bought and sold by foreign investors, it is ever more likely that you, as an attorney, will represent either a foreign purchaser or seller of U.S. real estate or a domestic client buying U.S. real estate from a foreign person. This article will discuss issues you may encounter in such circumstances.

Customs and Expectations

In the U.S., local real estate laws and customs vary, sometimes greatly, from state to state. For example, certain states levy a tax on mortgage recording; other states levy a tax on real property transfers, but not on transfers of the entity that owns the real property. In the U.S., title insurance is commonplace, but in most foreign countries, title insurance is rarely used.

The views and opinions expressed in this article are solely those of the authors, and do not necessarily reflect the views, opinions, or policies of one author's employer, First American Title Insurance Company.

S.H. Spencer Compton

Diane Schottenstein

Certain customs and practices can make for unpleasant surprises (which are devoutly to be avoided). For example, a foreigner (or anyone else) buying a New York City condominium should be advised that there is a 1 percent "mansion tax" that a purchaser must pay on residential conveyances over $1,000,000. Similarly, when the purchase is based on a floorplan in a glossy brochure that is marketing a building yet to be constructed, the buyer should expect to pay the seller's New York State and New York City transfer taxes. Because the buyer is now paying the seller's tax obligation, that cost is deemed additional consideration and is added to the purchase price to reach the grossed-up purchase price upon which the buyer will pay the computed transfer taxes. A purchaser's expectation for the availability of services and amenities on the move-in date should also be tempered. Contracts often provide for a closing as

S.H. Spencer Compton is Vice President and Special Counsel of First American Title Insurance Company, New York Division. He is a frequent contributor to Lexis/Nexis websites, *The Practical Real Estate Lawyer* **and this journal. Compton is a graduate of New York University and holds a J.D.** *cum laude* **from Brooklyn Law School.**

Diane Schottenstein is an experienced attorney practicing law in New York City for over 30 years. Diane's clients have included major national and international corporations and banks, not-for profit organizations, smaller businesses and a broad range of individuals. She received her B.S. from Cornell University and her J.D and LL.M. in Taxation from New York University School of Law. She has published articles on real estate law in The Practical Real Estate Lawyer and this journal.

soon as a temporary certificate of occupancy is obtained (so that occupancy is legal), but, despite the developer's good faith efforts, certain construction may be ongoing and full services, such as a health club or screening room, might not be available until a later date (which can be much later).

You should ascertain your client's expectations as to immigration and U.S. citizenship. Property ownership is not sufficient to entitle a person to reside in the U.S. and does not create a pathway to citizenship, except pursuant to a specific program, such as the EB-5 program.

Once you understand your foreign client's proposed transaction, you should walk her through the steps necessary to consummate it and explain what the expectations of the parties to the transaction will be (and listen to hers).

Complexities

Certain complexities that might not arise with a U.S. party may slow down or complicate a transaction for a foreign party. If a transaction is to be financed, for example, a foreign party may have more hoops to jump through in getting a mortgage than a domestic buyer might. There could be additional documentation requirements to prove credit worthiness and confirm international assets. Currency conversion issues can impact transaction timing due to either (or both) requirements of the U.S. banking system or of the home country. An international wire transfer will likely not move as quickly or smoothly as a domestic one.

Documents executed in a foreign country with a notarial attestation which are to be recorded in a U.S. jurisdiction must be authenticated. Many countries, including the U.S., have joined a treaty called the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. This treaty reduces the authentication process to the issuance of a certificate called an apostille by an authority designated by the country where the document was issued. If your client plans to execute a document in a foreign country where attestation is required in the U.S., she must obtain an apostille, generally from a U.S. consulate or embassy. This process should be initiated well in advance of closing.

Note that it is generally more difficult to serve and sue a foreign person than a domestic one. For this reason, sellers have been known to require a larger down payment, rather than to rely solely on their ability to take a foreign person to court. Likewise, any judgment obtained against a foreign person might be difficult to enforce, if all or most of their assets are located abroad. Nonetheless, many successful transactions today involve foreign persons and these complexities need not deter or derail a mutually satisfactory closing.

Cooperative and Condominium Ownership

Although there are many cooperative apartments available in locales like New York City, a foreign purchaser should consider carefully before seeking to purchase one. It is generally accepted that a cooperative's board of directors has the right to accept or reject a purchaser for any reason, or no reason, as long as it does not violate anti-discrimination laws. Cooperative boards can and do ask for detailed financial and social information that a foreign buyer may not want to produce. Compared to ownership of a condominium, cooperative ownership is more restrictive: limited or no subleasing permitted and more occupancy and use requirements etc. Although there is a board approval process for a condominium purchase, it is generally less rigorous than for a cooperative, and condominium boards rarely prohibit corporate or other types of ownerships often favored by foreign investors. Rather than a purchaser approval right, a condominium board has merely a right of first refusal to purchase the unit. Where a board does not wish the transaction to go through, it can refuse to waive its first refusal right. The resulting cloud on title can (and often will) discourage a commercial lender from granting a mortgage. Such refusals to waive are rare, but not unheard of. Where a foreign buyer is determined to purchase a cooperative (and not a condominium), she might consider buying a sponsor cooperative unit, where board approval is not required.

Foreign Investors' Tax and Structural Considerations.

This article is not intended to give tax advice, and readers should encourage foreign buyers or sellers in real estate transactions to consult tax advisors. That said, a foreign person buying or selling U.S. property should be aware of potential tax issues: there are income taxes, gains tax, and state and local transfer taxes, as well as estate tax issues to be concerned with. In addition to federal, state and local tax considerations, deciding how to structure the transaction can be a multilayered and fact-specific process. Considerations include: the nature of the property; the intended holding period;[4] the buyer/seller's situation and the totality of its/their U.S. connections; tax treaties between the foreign investor's home jurisdiction and the U.S.; the treatment of income repatriated to the foreign investor's home jurisdiction; and the organizational structure of the foreign investor. The answers also depend on the size of the investment and whether it is for personal use or part of a business. Should an individual or a U.S. or a foreign entity purchase? And, if an entity, what kind of entity? A common structure for holding U.S. property is a limited liability company, a pass-through tax entity, which offers certain privacy and other benefits. However, as of 2017, IRS regulations mandate that a single member foreign-owned limited liability company comply with specific complex requirements established under Section 6038 A of the Internal Revenue Code, which can include designating a responsible party, complying with reporting requirements, and retaining permanent records regarding related-party transactions.[5] Will this be acceptable to your client? There can be large penalties for non-compliance.

Income Tax Issues

Income tax consequences will vary depending on the use of the property. If a property is for personal benefit, such as a vacation home and no income will be generated, this analysis may not apply. However, where rental income will be generated, the Internal Revenue Service has two divergent approaches to taxing income of foreign persons. On the one hand, where income can be effectively connected with the conduct of a U.S. trade or business, foreign persons are taxed on the amount of effectively connected income net of deductions allocable to such income, which may consist of such items as mortgage costs, taxes, insurance and brokerage fees. The net is then taxed using the regular rate that applies to U.S. persons. Alternatively, income can be characterized as Fixed, Determinable, Annual or Periodic (FDAP). Generally, income from U.S. sources that constitutes interest, dividends, rents or royalties are FDAP income, and are taxed at a flat rate of 30% of the gross income with no deductions. That being said, where there is rental income, even if it is not considered effectively connected, the investor may be able to make a special election to have it taxed on a net basis. To further complicate the analysis, under certain circumstances where a foreign person is present in the U.S. over a specified period of time, that person might be deemed a U.S. resident for U.S. income tax purpose and consequently required to file a U.S. income tax return and pay taxes on their worldwide income. Clearly, your client should consult with an experienced tax advisor to identify and work through any such issues.

Taxes on Disposition

What taxes will be due on the disposition of the property?

Where the estate of a deceased foreigner sells property that foreigner owned individually, U.S. estate tax (if applicable) will apply to the fair market value of the property on his date of death, without adjustment for inflation and with limited credits. Additionally, there will be U.S. capital gains taxes on the gain.

FIRPTA Liability for U.S. Purchaser

The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) [6] creates a procedure for the payment of U.S. capital gains tax by a foreign seller. With some exceptions, 15% of the purchase price must be remitted to the IRS. Note that a buyer of real property from a foreign seller must be concerned with FIRPTA compliance because the buyer will be liable for the applicable gains taxes, if the foreign seller fails to pay them.

At a typical closing, the buyer receives a seller's affidavit certifying that the seller is not a foreign person in which event there are no issues, unless the buyer has reason to doubt the certification. However, where the seller is a foreign person and cannot legitimately deliver a FIRPTA affidavit, the FIRPTA statute imposes secondary liability for the foreign seller's unpaid capital gains taxes on the buyer. In this way, the law makes the buyer a party to a seller's non-compliance and buyer must assure that there is proper compliance or will be left with an unwanted liability. Since the seller's gains tax liability can be a large amount, the seller will often file for a determination that a lesser amount is due. Under this scenario, the seller files for a Notice of Determination and the 15% tax, rather than being paid to the IRS at the time of the closing, is held in escrow. Once the IRS determination letter is received, the escrow agent will remit the indicated tax amount to the IRS and refund any balance to the foreign seller. The buyer may want evidence that a Notice of Determination has been applied for as a condition to closing and withholding. Further, the buyer may want to know the foreign seller's basis in the property in order to calculate the estimated liability amount. For example, if the foreigner sold at a loss, the capital gains tax due will be less than the 15%, so the buyer's transferee liability will be accordingly reduced.

Other Restrictions and Reporting Requirements

There is no blanket prohibition on foreigners owning real estate in the U.S. However, there are a number of U.S. reporting requirements and restrictions which may apply in certain circumstances:

BEA Reporting Requirements

In 1976, Congress passed the International Investment and Trade in Services Survey Act, requiring the Bureau of Economic Analysis (BEA) to regularly collect data on international capital flows and investments in the U.S. However, in 2009, the BEA's filing requirement for the acquisition of a direct or indirect interest in U.S. real estate by a foreign investor was discontinued for budgetary reasons. It wasn't until 2014 that the BEA reinstated such mandatory reporting requirements. The BEA rules even apply to a U.S. business investing in U.S. real estate if any foreign person has a 10 percent or more direct or indirect interest in that business. There are many rules and exceptions relating to the BEA reporting requirements, as well as a form to file for exemption from reporting.[7]

Agricultural Foreign Investment Disclosure Act of 1978

This Act mandates filing requirements in connection with the acquisition or transfer of any agricultural land to a foreign person. Hefty fines will be levied for a failure to report. The statute's goal is to prevent purchaser anonymity for acquisitions of agricultural land in the U.S.[8]

Foreign Asset Control Rules

The U.S. federal government imposes economic sanctions against, and prohibits certain transactions with, specified countries, entities, individuals and organizations. The Office of Foreign Asset Control at the U.S. Department of Treasury (OFAC) oversees and enforces these sanctions. All U.S. persons as defined by OFAC must comply with these restrictions. According to applicable rules, the term "United States person" or "U.S. person" means "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States."[9]

Patriot Act Compliance

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (commonly known as the "Patriot Act") was passed after September 11, 2001, primarily to deter and punish terrorist acts in the U.S, and around the world, as well as to enhance law enforcement's investigatory tools. No U.S. citizen or company may do business with any Specially Designated Global Terrorist, which is a designation authorized under U.S. Executive Order 13224 (among other executive orders), and Title 31, Parts 595, 596, and 597 of the U.S. Code of Federal Regulations (among other U.S. laws and regulations). People or entities are designated as "Specially Designated Global Terrorists (SDGTs)" under Executive Order 13224 by the U.S. Department of State or the U.S. Department of the Treasury.[10]

The penalties for failure to comply with the Patriot Act are up to $500,000 for companies or up to $250,000 and/or 10 years' imprisonment for individuals. Most purchase and sale agreements for real estate today contain representations to establish the parties' compliance with the Patriot Act. Accordingly, it is critical to know the background of each counterparty all the way down to its individual constituents. Patriot Act representations should be thoroughly evaluated. Section 352 of the Patriot Act imposes requirements on every financial institution and all persons involved in real estate settlements and closings. Patriot Act issues can have a significant impact on a transaction and its ability to close.

Miscellaneous Issues

There are other federal requirements, which may apply to specialized situations (such as antidumping, antitrust, traffic in arms, etc.) yet probably would not apply to an everyday real estate transaction. There also may be local and/or state filing requirements that must be complied with.

Absentee Ownership

Where a foreign purchaser intends to own, but not occupy, her property, maintenance and management processes should be put in place.

Diplomatic Immunity

From a foreigner's perspective, diplomatic immunity is a good thing but, from a counterparty's perspective, it is troubling. Many will hesitate to enter into a contract with someone who is not subject to the same rules as they are. There are a number of potential ways to address this concern: a deep-pocketed domestic guarantor, a designated U.S. agent for service of process and/or a larger contract deposit than usual to be held in escrow in the event the foreign purchaser decides to default.

Conclusion

This article is intended to illuminate issues that may arise in real estate transactions involving foreign persons. Although each situation is unique and nuanced, an attorney who is sensitive to potential concerns can guide her client to a positive outcome.

Endnotes

1. Nat'l Ass'n of Realtors, 2017 Profile of International Activity in U.S. Residential Real Estate 3 (2017), https://www.nar.realtor/sites/default/files/documents/2017-Profile-of-International-Activity-in-US-Residential-Real-Estate.pdf.
2. Evan Gentry, *Why Foreign Investors Love U.S. Commercial Real Estate, And Why More Will Follow.*, Forbes (2018), https://www.forbes.com/sites/forbesrealestatecouncil/2018/05/30/why-foreign-investors-love-u-s-commercial-real-estate-and-why-more-will-follow/#23727bdb3509.
3. Nat'l Ass'n of Realtors, Infographic: 2018 Commercial Real Estate International Business Trends (2018), https://www.nar.realtor/infographics/infographic-2018-commercial-real-estate-international-business-trends.
4. *See* Brian Hayes, C.P.A., *New Reporting Requirements for Foreign-Owned U.S. Disregarded Entities*, The Tax Adviser (April 1, 2017).
5. *See* Brian Hayes, *New Reporting Requirements for Foreign-Owned U.S. Disregarded Entities*, The Tax Adviser (Apr. 1, 2017), https://www.thetaxadviser.com/issues/2017/apr/reporting-requirements-foreign-owned-us-disregarded-entities.html.
6. Foreign Investment in Real Property Tax Act of 1980, (FIRPTA), enacted as Subtitle C of Title XI (the «Revenue Adjustments Act of 1980») of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599, 2682 (1980). I.R.C. §§ 897 and 6039C were enacted in FIRPTA;[3] the Act also made conforming amendments to other various provisions of the Internal Revenue Code.
7. *See* Bureau of Economic Analysis, A Guide to BEA's Direct Investment Surveys, https://www.bea.gov/sites/default/files/2018-04/a-guide-to-bea-direct-investment-surveys.pdf.
8. 7 C.F.R. § 781.3.
9. 31 C.F.R. § 560.314.
10. 15 C.F.R. § 744.12.

The Ethics of Sharing Real Estate Contracts with Brokers in New York City

By William D. McCracken

An opinion recently issued by the New York State Bar Association Committee on Professional Ethics[1] has New York City real estate attorneys concerned that they have unwittingly been acting unethically by coordinating with brokers to facilitate co-op and condo board approval of purchase contracts. This article is meant to assure those practitioners that this new opinion is probably nothing for them to be worried about.

The Ethics Opinion, No. 1161, was issued on January 4, 2019, and concerns a New York real estate lawyer who drafted a contract of sale on behalf of the seller in the transaction.[2] The client has a broker who has requested a copy of the signed contract. But the lawyer does not want to hand it over. The inquiring lawyer's reasons are that (a) the lawyer does not have the client's informed consent to share the contract, and also (b) the lawyer "frequently encounters this broker in other real estate matters and does not wish the broker to learn what the inquirer depicts as provisions uniquely of the inquirer's design."

What makes this opinion interesting is how the Ethics Committee answered the inquiry. The opinion concluded that (a) the lawyer was not permitted to disclose the contract to the broker absent informed consent from the client, and (b) the lawyer's concern about "unique" provisions in the contract created a conflict of interest that must also be disclosed to the client.

"It is not uncommon for brokers to have years—or even decades—of experience working with particular co-ops or condos, so they add significant value to the sometimes opaque process of obtaining board approval and completing a sale."

While the inquiring lawyer was probably happy to have a reason not to share the contract with the broker (although perhaps less happy to be told he or she had a conflict of interest), when the opinion was released it raised immediate flags among the New York City real estate transactional bar. If sharing contracts with brokers is deemed ethically suspect, at least without formal permission from the client, then real estate practice in New York City (and elsewhere) may have to change dramatically.

Before continuing, a brief primer on how brokers are used in different parts of New York State. Broadly speaking, the practice in many parts of upstate New York is for brokers to prepare a locally approved form of contract, which is then entered into by the parties "subject to attorney review." The attorney's role can be limited to approving the contract (or not), either "as is" or subject to specific requested changes.[3] It is also important to note that most real estate transactions outside of New York City involve the transfer of single family residences in fee simple, not co-ops or condos.

William D. McCracken

In the New York City area, by contrast, brokers typically put together "deal sheets" that contain the essential business terms, but the contract itself is drafted by the attorneys. Still, brokers have a particularly important role, especially in co-op and condo sales. Once the parties enter into a formal contract, the brokers will assist in preparing and delivering the board application packages. It is not uncommon for brokers to have years—or even decades—of experience working with particular co-ops or condos, so they add significant value to the sometimes opaque process of obtaining board approval and completing a sale.

William D. McCracken is a partner in Ganfer Shore Leeds & Zauderer LLP. He can be reached at wmccracken@ganfershore.com.

The outsized role that brokers play in co-op and condo sales, and the fear that this traditional arrangement may have to change, is what focused attention on the conclusions set forth in the new ethics opinion. A close reading of the opinion, however, should set most lawyers at ease. As litigators like to say, this case is distinguishable.

First, let's look at the opinion's conclusion that the lawyer was not permitted to disclose the contract to the broker absent informed consent from the client. Note, however, that this is less a "conclusion" than an "assumption." The opinion even says so: "we *assume* that the sale contract is confidential information, the sanctity of which the inquirer must preserve absent the client's consent" [4] (emphasis added).

But should we really assume that a signed real estate contract is "confidential information" protected from disclosure? In most cases, I would submit that the answer is no, at least as real estate law is practiced in the New York City area. How could it be? In order to complete a sale in a co-op or condo, that signed contract is going to need to be shared with many others, including the counterparty, the board, the managing agent, the lender if there is financing involved, appropriate governmental agencies—and also the broker.

Rule 1.6 of the New York Rules of Professional Conduct actually has a relatively narrow definition of what qualifies as "confidential information."[5] The information must be (a) protected by the attorney-client privilege, (b) detrimental to the client, or (c) information that the client has requested to be kept confidential. By way of contrast, the ABA Model Rules prohibit the revelation of "information relating to the representation of a client," which is a much broader and less specific concept than the one described in New York's version of Rule 1.6.[6] None of the requirements set forth in New York's definition of "confidential information" are satisfied in the typical co-op or condo sale, because the contract and its key underlying terms have been shared with so many outsiders for the benefit of the client and the deal.

It should also be noted that Rule 1.6 provides an exception where disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community. Despite the opinion asserting that there is "no factual basis on which to conclude that these factors apply in the circumstances presented," I believe that in most if not all cases involving a board application, this exception would actually apply. Providing the broker with the signed contract is reasonable, customary, and in the best interests of the client.

Let's assume for the sake of discussion that the signed contract is "confidential information." The consequence of that is that the lawyer must obtain "informed consent" from the client before sharing it. The question may be asked—what is so bad about that? Don't we want to our clients to be kept fully informed?

The answer is a bit technical, but there is a difference, expressly recognized in the Rules, between a lawyer's baseline duty to communicate with his or her client during the course of a representation and the greater obligation to obtain "informed consent" before taking action.

Every lawyer must "reasonably consult with the client about the means by which the client's objectives are to be accomplished" (Rule 1.4(a)(2)) and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" (Rule 1.4(b)).[7] These parameters give discretion to the lawyer to choose the proper means to accomplish a client's objectives. This includes providing a signed contract to the broker, especially because the need to share information with brokers is at least implicit in the very nature of these types of representations.

On the other hand, the duty to get a client's informed consent, as this opinion would impose, would require the lawyer to secure "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." These are a lot of procedural burdens to impose on a lawyer for what should be a routine and necessary step in a transaction. Moreover, while in some cases informed consent may be implied, the problem is that the lawyer must then assume the risk that the client's consent was ill-informed and invalid.

In short, a higher "informed consent" standard should not be imposed on lawyers for no reason, but it is true that good communication habits with your client will obviate most concerns either way.

The opinion's second conclusion is that the inquiring lawyer is burdened by a "conflict of interest" in the inquirer's statement of "concern" about sharing the contract with the broker "because the inquirer frequently encounters this broker in other real estate matters and does not wish the broker to learn what the inquirer depicts as provisions uniquely of the inquirer's design."

There are three points to be made about this. First, bear in mind that this opinion, like most NYSBA Ethics opinions, is given in response to a specific inquiry, involving specific facts and circumstances. The conclusions drawn from the response to that inquiry are applicable to the general reading public only to the extent that the specific inquiry is itself a general problem. There is a sense from reading the opinion that there are undisclosed facts and circumstances particular to the inquiring lawyer that may not apply to the average practitioner.

Second, it would not be typical for real estate lawyers in the New York City area, at least, to take an overly proprietary interest in the provisions of their real estate contracts vis-à-vis brokers. Recall that the brokers may have already negotiated all of the most important business terms even before the lawyers got involved. Moreover, because contracts need to gain the approval of multiple outsiders, there is significant value in not surprising those outsiders with novel or bespoke contract provisions. It just does not pay to reinvent the wheel. So, for most practitioners, there is little danger that they will be so enamored of their contract drafting that they will be unwilling to share it with others necessary to complete the deal.

Third, Rule 1.7(a)(2) of the New York Rules provides that a conflict of interest arises only when there is a "significant risk" that the lawyer's professional judgment would be adversely affected by his or her personal interest.[8] Even granting that this is what happened in this opinion, it remains a very high bar most of the time. It is difficult to imagine a circumstance where a lawyer would deliberately choose to risk the success of a deal just to restrict access to the lawyer's work product.

The bottom line for real estate practitioners in the New York City area is that if you keep your client well informed about the process of purchasing a co-op or condo apartment, and if you acknowledge ahead of time that your client's signed contract will need to be reviewed by multiple outsiders, including brokers, then you can avoid the ethical quandaries that are discussed in NYSBA Opinion No. 1161.

Endnotes

1. NYSBA Comm. on Professional Ethics, Formal Op. 1161 (Jan. 4, 2019), http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=89956.
2. NYSBA Op. 1161.
3. It is worth noting that real estate attorneys outside of New York City often take on an additional role as title insurance agent, lender's attorney, escrow agent, or abstractor for their clients. While these arrangements may raise conflict of interest issues of their own, which have been the subject of numerous prior ethics opinions, those issues do not seem to be germane to the purported conflict of interest described in NYSBA Op. 1161.
4. NYSBA Op. 1161.4
5. N.Y. CLS Rules Prof. Conduct R 1.6
6. *Id.*
7. N.Y. CLS Rules Prof. Conduct R 1.4
8. N.Y. CLS Rules Prof. Conduct R 1.7.

Disclosing Condo-Coop Self-Dealing Contracts

By Vincent Di Lorenzo

Introduction

In 2017 legislation was enacted in New York imposing disclosure obligations regarding all contracts between cooperative housing corporations or condominium associations and interested directors or board members. The legislation became effective on January 1, 2018. This article explores the disclosure obligations created by the new legislation and the potential heightened risk of litigation from alleged breach of fiduciary duties on the part of directors or board members.

Disclosure Obligations

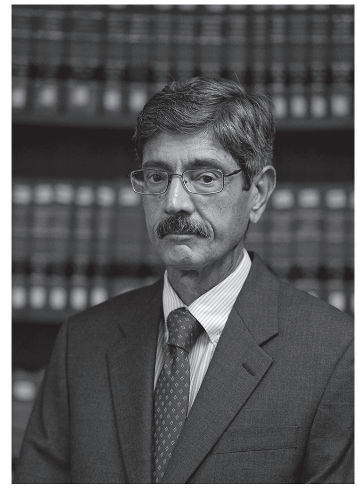
Two disclosure obligations were imposed by the new legislation—a disclosure obligation to board members and a disclosure obligation to shareholders or members. First, every condominium or cooperative corporation must provide to the board a copy of section 713 of the Business Corporation Law (dealing with contracts with interested directors), or section 715 of the Not-For-Profit Corporation Law (dealing with related party transactions), as applicable to the corporation or association.

Second, an annual report must be submitted to shareholders or members, signed by each director, containing information on any contracts made or otherwise voted on by the board involving an interested director. The annual report must include (1) a list of all such contracts, including information on the contract recipient, contract amount and purpose of the contract; (2) the record of each meeting including director attendance, voting records for the contracts, and how each director voted; and (3) the date of each vote on each contract and the date the contract would be and remain valid.[1]

If no actions were taken with respect to an interested director contract, then the board must submit an annual document signed by each director, indicating "no actions taken by the board were subject to the annual report required pursuant to section 727 of the Business Corporation Law."[2]

Litigation Risks

The annual disclosures to shareholders of a cooperative housing corporation or unit owners of a condominium association raise the risk that shareholders or unit owners may sue the board for breach of fiduciary duty due to approval of self-dealing contracts. Annual disclosure of the existence of any such contracts may lead to increased scrutiny.



Vincent Di Lorenzo

Under section 713 of the N.Y. Business Corporation Law, contracts and transactions between a director, or a company in which the director has a substantial financial interest, and a corporation are not void or voidable for that reason alone. This is true if all material facts as to a director's interest are disclosed in good faith to the board, or known to the board, and the board approves the contract or transaction, without counting the vote of any interested director, or if similarly approved by the shareholders.[3] In this article, such contracts or transactions are hereafter referred to as Section 713 Approved Contracts.

If such approval is not obtained, the corporation may avoid the contract unless it is established that the contract was fair and reasonable to the corporation.[4] The N.Y. Not-For-Profit Corporation Law also contains a provision regarding self-dealing contracts, which it refers to as related party transactions. However, it requires that the board determine the contract to be "fair, reasonable and in the corporation's best interest…."[5]

The issue that arises is whether Section 713 Approved Contracts can nonetheless be challenged by the shareholders or unit owners. The challenge might be that the contract is not in the best interest of the corporation.

Before exploring this issue, an initial question concerns the applicability of Section 713 to unit ownership developments. Certainly Section 713 applies to any cooperative corporation or condominium association

Vincent Di Lorenzo is Professor of Law at St. John's University School of Law. He is the author of *New York Condominium and Cooperative Law* (West).

incorporated under the New York Business Corporation Law. Does it apply, however, to unincorporated condominium associations? Before enactment of the 2018 amendment to the 2017 statutory disclosure obligation, Section 713 would not itself apply to such associations. Rather, common law limitations and liabilities regarding self-dealing contracts would apply.[6]

The 2017 self-dealing legislation imposed the disclosure obligations on cooperative housing corporations or condominium associations incorporated under the Business Corporation Law or the Not-For-Profit Corporation Law.[7] However, the 2018 amendment to the statute was enacted to correct and clarify statutory references and it imposed its disclosure obligations on cooperative housing corporations created pursuant to the Business Corporation Law and condominium associations created pursuant to the Real Property Law.[8] This disclosure mandate made Section 713 itself applicable to all condominium associations. Interestingly, once Section 713 becomes applicable, a claim could be made that the statute shields board members from liability for Section 713 Approved Contracts.

Two Possible Interpretations of the Statute

Section 713 of the Business Corporation Law makes clear that if a self-dealing contract is *not* approved by disinterested directors or by shareholders, it is nonetheless valid if the parties to it can establish the contract is fair and reasonable to the corporation. The issue raised in interpreting the statute involves contracts or transactions approved by disinterested directors or by shareholders. The issue is whether a Section 713 Approved Contract is valid if it is not, in fact, in the best interest of the corporation.

One interpretation of the statute is that it creates two alternatives—namely, a self-dealing contract is valid: (a) if it is fair to the corporation, or (b) if it has been approved by disinterested directors, or by shareholders, after full disclosure. There is language in the legislative history of the 1971 revision of the statute that supports this interpretation. The Joint Legislative Committee to study the Revision of the Corporation Laws in the 1970s explained that pursuant to the statute:

> If full and fair disclosure was made, *the contract cannot be avoided* by the corporation; if such disclosure was not made, the corporation can avoid the contract unless the interested director can establish that despite the nondisclosure, the transaction was fair and reasonable to the corporation when made.

An alternative interpretation of the statute is that it serves a more limited purpose and therefore approval by disinterested directors, or shareholders, does not shield the self-dealing contract from challenge. The Joint Legislative Committee to study Revision of Corporation Laws established in the 1960s explained the purpose of Section 713 in these terms: "the function of this section is not to provide a basis for validating for all purposes a contract or transaction between an interested director and his corporation." Rather, the limited purpose of Section 713 was to clarify that self-dealing contracts were not void for all purposes, as had been stated in some earlier court decisions. The viewpoint that Section 713 was not meant to validate contracts for all purposes finds support in the terms of the statute itself. It states that no contract or transaction between a corporation and one or more of its directors "shall be either void or voidable for this reason alone…..."

Case Law: Contract Validity and Director Liability

Section 713 Approved Contracts raise two questions—a question of validity and a question of liability. The first question is whether the Section 713 Approved Contract can nonetheless be declared invalid by a court if not in the best interest of the corporation. The second question is whether directors may be held liable for breach of fiduciary duty if a contract is approved by disinterested directors but it is not in the best interest of the corporation.

The New York Court of Appeals discussed these issues in *Rapoport v. Schneider*, but its statements are dicta. In *Rapoport*, plaintiffs, in their status as directors and shareholders, brought a derivative action against other directors to prevent allegedly improper payment of a duplicate claim for real estate commissions. The issues raised were: (a) the invalidity of the resolution authorizing the payment, in part due to conflict of interest of some directors who voted for it, and (b) the sufficiency of facts alleged to charge directors with misconduct for authorization or payment of the improper claim.

The Court first noted that the directors' resolution in question had been approved by a majority of disinterested directors pursuant to Section 713 of the Business Corporation Law. The Court then declared that "[d]espite the validity of the resolution under section 713, the interested directors may in any event be liable for having participated in a transaction from which they may derive an indirect personal benefit." However, the Court noted it was not necessary for it to reach this question. The allegation was of waste of corporate assets, and a director may be held accountable for waste, whether intentional or negligent, without limitation to transactions from which a director benefits.

Two appellate level decisions have addressed the issue of contract validity and/or director liability for Section 713 Approved Contracts. *Aronoff v. Albanese* involved, *inter alia*, reduced rent charged by one corporation to another. The transactions in dispute were approved by a majority of shareholders. The allegation was that there was a waste or gift of corporate assets. Plaintiffs—stockholders—commenced a derivative action to recover lost profits. The court noted that a waste of corporate assets or a gift of corporate assets would be a void act that could not be ratified by a majority of shareholders. However, as to an allegation of a gift of corporate assets, the fact finder would need to examine if the corporation received a benefit from the transactions in question. This, the court noted, is committed to the sound business judgment of the directors.

The court then discussed the ramifications of a contract being a Section 713 Approved Contract. It noted that "…compliance with section 713 of the Business Corporation Law does not automatically validate any transaction." The court cited the *Rapoport* decision. It also cited a decision in the California courts, *Remillard Brick Co. v. Remillard-Dandini Co*., noting that Section 713 is derived from former Section 820 of the California General Corporations Law.

The *Remillard* case involved contracts the lower court had concluded were unfair to the corporation. It was argued that the contracts were impervious to attack, pursuant to a statute very similar to Section 713, because they had been approved by a majority of shareholders. The appellate court clearly rejected any such claim. It ruled:

> neither section 820 of the Corporations Code nor any other provision of the law automatically validates such transactions simply because there has been a disclosure and approval by the majority of the stockholders. That section does not operate to limit the fiduciary duties owed by a director to all the stockholders, nor does it operate to condone acts which, without the existence of a common directorate, would not be countenanced. That section does not permit an officer or director, by an abuse of his power, to obtain an unfair advantage or profit for himself at the expense of the corporation. The director cannot, by reason of his position, drive a harsh and unfair bargain with the corporation he is supposed to represent. If he does so, he may be compelled to account for unfair profits made in disregard of his duty. Even though the requirements of section 820 are technically met, transactions that are unfair and unreasonable to the corporation may be avoided.

The second appellate decision examining the validity of or liability for Section 713 Approved Contracts is the decision of the Seventh Circuit in *Cohen v. Ayers*. That case involved stock options issued by a corporation. The court noted that Section 713 of the N.Y. Business Corporation Law is ambiguous as to a fairness test after full disclosure and approval by disinterested directors or shareholders. The court admitted the statute could be read to ratify any Section 713 Approved Contract irrespective of its fairness. However, the court concluded the statutory language "by reason alone of the director's interest" suggests that all other grounds for attacking the transaction remain available.

In the Seventh Circuit's view, the act of approval by disinterested directors or by shareholders serves merely to shift the burden of proof. After such approval, corporate waste is not presumed. Instead, the party challenging the contract must bear the burden of proving the unfairness of the transaction.

Conclusion

Recent legislation discloses to all shareholders of cooperative housing corporations, and all unit owners in condominium associations, all self-dealing contracts with directors on an annual basis. Such disclosures raise the likelihood of close scrutiny and perhaps challenge on the part of shareholders or unit owners. New York law is clear that the mere existence of self-dealing does not make a contract void. However, the limited case law available has clarified that any contract not in the best interest of the corporation may be challenged regardless of approval by disinterested directors or by shareholders, and that directors remain liable for any breach of fiduciary duty. As a result, the New York disclosure statute raises the risk of litigation and director liability when shareholders or unit owners are confronted with self-dealing contracts in annual disclosures mandated by the new legislation.

Endnotes

1. N.Y. Bus. Corp. L § 727(a) (2) and (b) (McKinney 2018); *see also* N.Y. Not-For-Profit Corp. L. §519-a (a) (2), (b) (McKinney 2018).
2. N.Y. Bus. Corp. L. § 727(c) (McKinney 2018); *See also* N.Y. Not-for-Profit Corp. L. § 519-a(c) (McKinney 2018) (referring to no actions taken subject to the annual report required pursuant to section 519-a of the Not-for-Profit Corporation Law).
3. N.Y. Bus. Corp. L. § 713(a) (McKinney 1971).
4. *Id.* § 713(b).
5. N.Y. Not-for-Profit Corp. L. § 715 (McKinney 2017).
6. *E.g. ,Everett v. Phillips,* 288 N.Y. 227, 236-7, 43 N.E.2d 18, 19 (1942) ("[t]he dual position of the directors, making the unprejudiced exercise of judgment by them more difficult, should lead the courts to scrutinize these transactions with care. It does not, however, alone suffice to render the transactions void").
7. 2017 Sess. Law News of N.Y. Ch. 305 (A. 8261-A) (McKinney's).
8. 2018 Sess. Law News of N.Y. Ch. 9 (S. 7279) (McKinney's). The amended version of the statute is found at N.Y. Bus. Corp. L. § 727 (McKinney 2018) and N.Y. Not-for-Profit Corp. L. § 519-a (McKinney 2018).
9. N.Y. Bus. Corp. L. § 713(b) (McKinney 1998).
10. Joint Legislative Committee to Study Revision of Corporation Laws, Explanatory Memorandum accompanying S. 1223C; A. 1328C (April 21, 1971), New York Legislative Annual 1971 at 128 (emphasis added).

11. Joint Legislative Committee to Study Revision of Corporation Laws. Revisers' Notes and Comments, N.Y. Legislative Document No. 12 at 49, New York Legislature, 1961 Session, reprinted in Note, *The State of the Fairness Test Under Section 713 of the New York Business Corporation Law,* 76 Colum. L.Rev. 1156, 1169 (1976) (emphasis added).
12. Section 713 was "designed to eliminate the inconsistent positions taken in *Munson v. Syracuse, Geneva & Corning R.R. Co.* . . . and *Everett v. Phillips*." Joint Legislative Committee, *supra* note 11.
13. N.Y. Bus. Corp. L. § 713(a) (McKinney 1998).
14. 29 N.Y.2d 396, 328 N.Y.S.2d 431, 278 N.E.2d 642 (1972).
15. *Id.* at 402, 328 N.Y.S.2d at 437, 278 N.E.2d at 646.
16. 85 A.D.2d 3, 3-4, 446 N.Y.S.2d 368, 369 (2d Dep't 1982).
17. *Id.* at 6, 446 N.Y.S.2d at 371.
18. *Id.* (citing 109 Cal. App. 2d 405, 241 P. 2d 66 [Cal. Ct. App. 1952]).
19. 109 Cal. App. 2d 405, 418, 241 P.2d 66, 74 (Cal. Ct. App. 1952).
20. 596 F.2d 733 (7th Cir. 1979).
21. *Id.* at 741, footnote 15.
22. *Id* .at 740; *accord Arnoff*, 85 A.D.2d 3, 6, 446 N.Y.S.2d 368, 371; *Blake v. Blake*, 225 A.D.2d 337, 638 N.Y.S. 2d 632 (1st Dep't 1996).

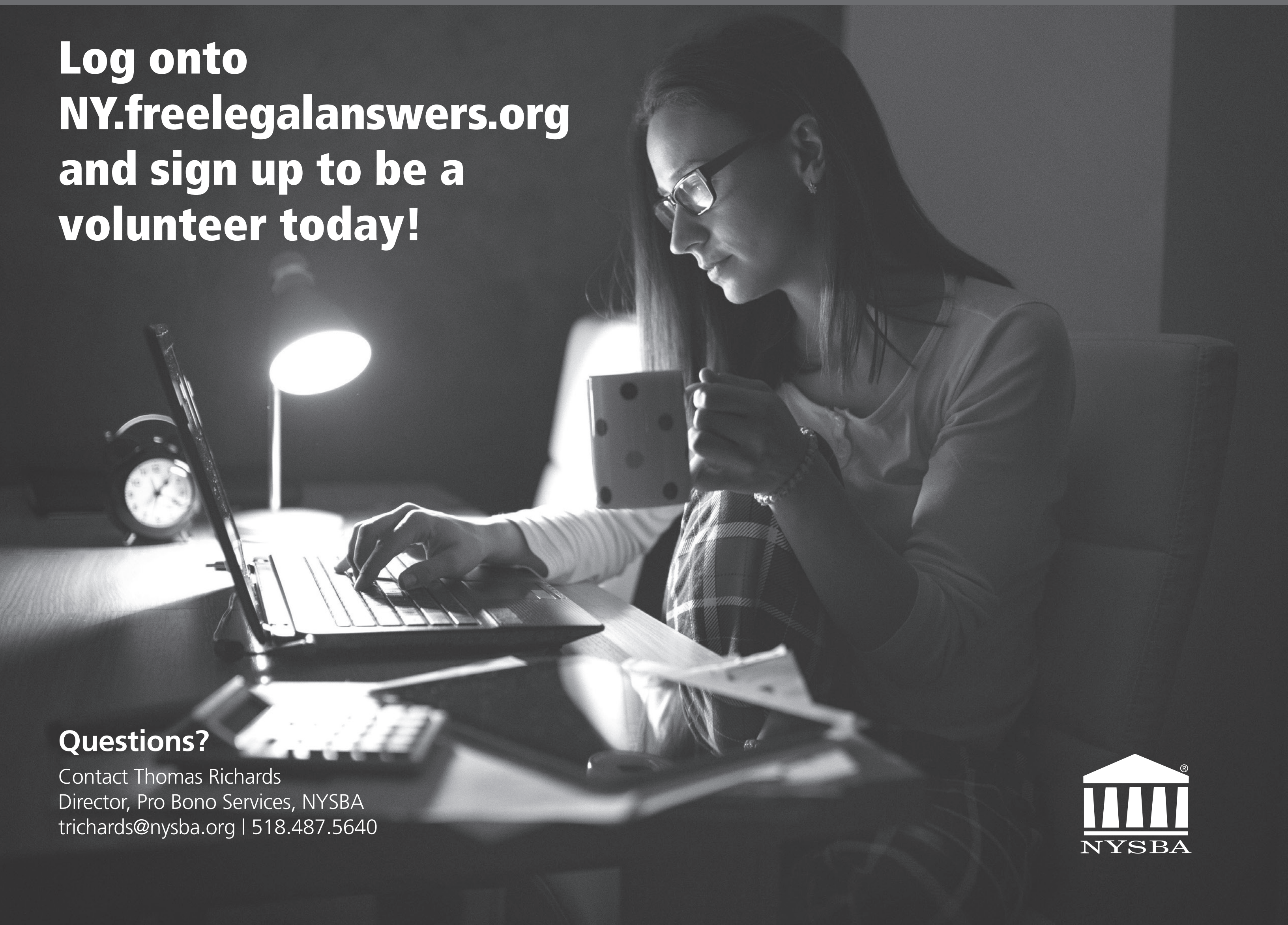
NEW YORK STATE BAR ASSOCIATION

"Pro Bono in Your PJs"

Volunteers Needed!

Whether you are a government attorney, solo practitioner, part-time attorney, or any other type of attorney looking for an easier way to do pro bono work, Free Legal Answers is for you!

NY.freelegalanswers.org is a website where low-income members of the public can go to post basic legal questions that attorneys can answer for free. Attorneys may, at their leisure, log on to the website and respond to questions from anywhere at any time. You can even do pro bono in your PJs!



Log onto NY.freelegalanswers.org and sign up to be a volunteer today!

Questions?

Contact Thomas Richards
Director, Pro Bono Services, NYSBA
trichards@nysba.org | 518.487.5640

NYSBA

Summer Meeting 2019
Equinox Resort &Spa
Manchester, VT, July 11-14

Attendees enjoyed a private out-door farmers market, sampling food and drink from local vendors.

It was a beautiful evening for a reception at The Equinox Pond House.

Speakers addressed timely topics including rent regulation, implicit bias, zombie housing, ethics in condos and co-ops, and do's and don'ts for real estate practitioners.

The weekend included a tour and dinner at Hildene, the historical home of Robert Todd Lincoln.

More photos can be found at :

www.nysba.org/rpflickr.

For your **dedication**,
For your **commitment**, and
For recognizing the **value** and
relevance of your membership.

As a New York State Bar Association member, your support helps make us the largest voluntary state bar association in the country and gives us credibility to speak as a unified voice on important issues that impact the profession.

Henry M. Greenberg
President

Pamela McDevitt
Executive Director

Bergman on Mortgage Foreclosures:

Renewal motions and tenant notices

By Bruce J. Bergman

Renewal Motions – Not So Easy

Underlying the whole mortgage foreclosure process is the invariable actuality that a borrower defaulted in making payments that were due, either installments or the full balance on maturity. (Payment default is, of course, the most common). Yes, sometimes the case is the result of some other variety of default, and on rare occasions there is a genuine issue about whether there was a default at all. But overwhelmingly, the borrower *did* default in remitting payments, so that lender's view of the action is pemeated with the thought that the foreclosure ought to be able to proceed without serious issue or undue delay.

Putting aside for this discussion the reality that foreclosures have so many technical and procedural aspects that proceeding with dispatch is often not so readily available, lenders will typically be dismayed when they are defeated, for example, upon a motion for summary judgment. Recall that this is the stage where the foreclosing party endeavors to dispose of the answer (which the lender will deem baseless); in the meantime, the process is in hiatus until that answer can be banished.

What then is the lender to do? Simply making a successive motion for summary judgment is typically not available (although there are exceptions to that, not especially relevant to this discussion). The other alternatives are either to re-argue or renew.

Re-argument is the posture that the court has misapprehended the law or the facts of the case and, therefore, issued an erroneous decision. This certainly can happen and whether a re-argument motion is worth the effort is something for the lender to review with its counsel.

The other alternative—the focus of this excursion—is the motion to renew. This is certainly one way to bring the issue anew to the court's attention. This, though, leads to the critical thought that it behooves the lender to supply to its counsel at the outset all the relevant information needed for the motion, and counsel should be aware of precisely what that information is so it can be requested, if not initially offered. As a recent case advises yet again in this arena [see *HSBC Bank USA N.A.* v. *Nemorin*, 167 A.D.3d 855, 90 N.Y.S. 3d 270 (2d Dep't. 2018)], a motion for leave to renew must be based upon new facts not offered on the prior motion that would change the initial determination. In addition, the motion to renew must contain reasonable justification for the failure to present such facts on the prior motion.

Thus, a motion for leave to renew cannot be considered as a second chance readily provided to a party who has not exercised due diligence in the first instance in making the initial factual presentation.

In fact, the trial court lacks discretion to grant renewal where the moving party has omitted reasonable justification for failing to present the new facts on the original motion.

So the message here should be clear. If there was something important that the court needed to grant summary judgment in favor of a foreclosing lender, it needed to be presented upon the motion for summary judgment. Coming forward after having lost the motion with new information that was previously available, will not be a successful path.

Another Issue with the Tenant Notice Requirement in Foreclosures

Among the borrower-friendly legislative acts of the last decade and beyond in New York is a requirement that the foreclosing plaintiff give certain notice information to tenants— even if they are not named in the action and even when their tenancy will not be affected by the foreclosure. It was always recognizable that this would create problems for foreclosing lenders and, of course, it has.

Overview of Requirements

Pursuant to RPAPL § 1303, the foreclosing party in a foreclosure action upon residential real property must provide certain notice as to the tenants' rights to any tenant of a dwelling unit. While the similar notice to a mortgagor is to be served *with* the summons and complaint, notice to the tenant must be delivered within ten days of service of the summons and complaint.

The notice is required to be on its own page in bold, 14-point type, to be printed on colored paper other than the color of the summons and complaint. The title of the notice must be larger, in bold 20-point type.

If the building has less than five units, delivery is to be by certified mail, return receipt requested,and by first class mail to the tenant at the property, if the tenant's identity is known. If the identity is not revealed, the mailing is to be by first class mail addressed to "occupant." Should the building consist of five or more units, the notice must be posted "on the outside of each entrance and exit…"

There is, not surprisingly, more to the statute, but the purpose here is to highlight the essence of the requirements.

Problems for Lenders and New Case Confirmation

A careful examination of the entire statute in detail exposes both ambiguities and myriad problems for lenders to successfully comply. Because the purpose of this excursion is not to delineate all of those, readers who want to have more on this subject are referred to 1 *Bergman on New York Mortgage Foreclosures* § 2.01(3)(a) (Lexis Nexis Matthew Bender, rev. 2019)— a subsection entitled "Practice Tips Regarding Notice to Tenants."

In that section we predicted some years ago that it would be easy for the defaulting owner, or tenants, to remove the posted announcements, then claim that they had never been present. Whether that happened in the recent case to be mentioned or not, the end result was that the lender lost—see *938 St. Nicholas Avenue Lender, LLC v. 936-938 Cliffcrest Housing Development Fund Corporation*, 178 A.D.3d 623, 98 N.Y.S.3d 53 (1st Dep't. 2019). In this case (the foreclosure of an underlying co-op mortgage), various unit owners swore that they had never seen foreclosure notices posted at the building. It is apparent that the plaintiff's process service had submitted an affidavit that the notices *were* posted. Nonetheless, the court found that the denials by the unit owners were sufficient to rebut the process server's affidavit, in turn warranting a traverse hearing—the determination of whether the service (in this case posting) was valid or not.

Here, the finding was that there had not been a posting and that led to *dismissal of the entire complaint* because the plaintiff had failed to establish compliance with the subject statute, RPAPL § 1303. This is certainly a draconian result, setting the whole case back to its very beginning with all the consequential cost and interest accrual. Was the notice actually posted? Well, that is a philosophical question. The court found that it was not. But this exposes one of the problems with the tenant notice requirement. There is always room for denial of compliance by defaulting borrowers or their tenants, which can lead to a battle on that peripheral point alone, which in turn can threaten the integrity of the foreclosure.

This is yet another burden that foreclosing lenders must cope with in New York and whatever value being aware of such requirements affords, they are presented here.

Bruce J. Bergman is the author of the four-volume treatise, *Bergman on New York Mortgage Foreclosures* (LexisNexis Matthew Bender) and is a member of Berkman, Henoch, Peterson, Peddy & Fenchel, P.C. in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in *Best Lawyers in America* and *New York Super Lawyers.*

5 Pointz: The Conflict Between Moral Rights and the Individual Rights of Property Owners

By Jack Piontkowski

I. Introduction

On November 12, 2013, the United States District Court for the Eastern District of New York denied a preliminary injunction that would have prohibited the demolition of a building in Long Island City.[1] In this case, *Cohen v. G & M Realty L.P.*, a group of graffiti artists brought an action against the owner of the building asserting that the street art they had painted on the building was protected from destruction under the Visual Artists Rights Act of 1990 (VARA).[2] Immediately after the preliminary injunction was denied, the street art was whitewashed by the owner of the building.[3] However, eight days later, on November 20, 2013, the court issued its written opinion that stressed the artists' right to monetary damages under VARA.[4] This decision precipitated the artists bringing a second action against the owners of the building under VARA.That case, *Cohen II*,[5] is the subject of this case comment.

In *Cohen II*, the graffiti artists brought a claim against the owners of the building under VARA seeking monetary damages..[6] The artists asserted that their street art was protected from demolition under VARA and that they were thus entitled to an award of damages for its destruction.[7] The district court ruled that 45 specific pieces of street art qualified for protection under VARA, and thus, were entitled to an award of money damages.[8] Because a market value for each piece of work could not be determined, actual damages were not awarded.[9] Instead, the court ordered the maximum amount of statutory damages.[10] At $150,000 for each of the 45 works of art destroyed, the statutory damages totaled $6,750,000.[11] The court determined that the maximum amount of statutory damages was justified because the owners of the building acted willfully when the artwork was whitewashed.[12] Based upon the testimony of one of the owners of the building, the court inferred that his behavior was an emotional act of revenge to retaliate against the graffiti artists who had sued him to protect their art, and therefore, classified the behavior as willful.[13]

II. Background

A. Moral Rights

To aid in the understanding of the purpose and intention of VARA, it is necessary to first examine the concept of moral rights. The progression of moral rights in jurisprudence in the United States resulted in the passage of VARA. Moral rights can best be summarized as follows:

Jack Piontkowski

> Moral rights vary in scope, but they all recognize certain rights n an artist's work that are distinct from traditional property rights and that rely less on economic rationales than on the right to the continued control of the artist's creative personality through control over the art itself. oral rights acknowledge that an artist has, in addition to an economic interest in his reputation, a creative persona that is injected into the work of art at creation and which remains a part of the work despite his physical relinquishment of the object to others. The subsequent disposition of the work, especially if it lies in public view, has a lasting effect on the artist's reputation, with impact on his dignity and career.[14]

Moral rights champion the value that an artist derives from his reputation both physically through economic gain afforded by his reputation, as well as mentally and emotionally through the personal satisfaction realized through creation.[15] Moreover, the security provided by moral rights encourages artists to engage in the act of creation. Although a broad interpretation of moral rights can include several different rights,[16] the two rights most often protected in jurisdictions that recognize moral rights are attribution and integrity.[17]

Jack Piontkowski is a 2019 graduate of St. John's School of Law and former Managing Editor of R*eal Property Law Journal*. The author wishes to thank Prof. Margaret V. Turano for her advice and guidance in the production of this article.

The right of attribution is the right of an artist to have his name attached to all of his creations.[18] This right prevents the work from being attributed to another artist. It also includes the right of an artist to prevent others from using his name on works he has not created. Next, the right of integrity enables the artist to prevent the alteration of his work, such as mutilation or distortion of their art.[19] However, depending on the jurisdiction, the right of integrity does not always protect against destruction of a work.[20]

Until the enactment of moral rights laws by a few states in the late 1970s and 1980s, followed by the enactment of VARA in 1990 at the federal level, moral rights were largely not recognized by federal and state courts in the United States. *Vargas v. Esquire, Inc.*[21] and *Crimi v. Rutgers Presbyterian Church*[22] exemplify the rejection of moral rights by American courts. In *Crimi*, a well-known artist was commissioned to create a 26-foot-wide by 35-foot-high fresco mural painting on the rear chancel wall of a church in Manhattan.[23] The mural was completed in 1938, but in 1946, the mural was painted over when the church was redecorated. The artist was not given notice before the mural was painted over. Once the artist became aware of what had occurred, he asked the church for the right to remove the mural and take it away or remove the paint in order to expose the mural in its original state. When the church denied both requests, the artist brought four causes of action against the church: breach of custom and usage, violation of his limited proprietary interest, irreparable damage, and an anti-social act against public policy. The court held that in order for an artist to retain any right in his work after it has been sold, this right must be agreed to in writing under the terms of the agreement between artist and buyer.[24] If an artist unconditionally sells his work, then he does not retain his rights to this work. The court reached this conclusion because the mural was considered a part of the real estate of the church since it was attached to the wall. Thus, any interest in the mural, including proprietary interest, must adhere to Real Property Law,[25] which demands that this interest be in writing. Before reaching this conclusion, the court examined the concept of moral rights which would provide an artist with a valid interest in a work that he is commissioned to create. The court acknowledged that some countries in Europe have incorporated "droit moral"[26] into their law. However, in contrasting scholarly writing and European case law with American case law, the court determined that moral rights have not yet been accepted in American law. In its analysis, the court relied on *Vargas v. Esquire, Inc*.

Vargas involved a dispute over the reproduction of pictures that were created by a painter employed by the magazine *Esquire*..[27] When the painter terminated his contract with the magazine, the magazine reproduced pictures that the painter had delivered before termination. However, the pictures were published without the painter's name. The court held that the painter had no right to the pictures because the language of the contract between the painter and the magazine "leave[s] no room for a contention that any right, claim or interest in the pictures remained in the plaintiff after he had sold and delivered them to the defendant."[28] Further, with respect to any moral rights the painter had to the pictures, the court concluded that moral rights relate to the law of foreign countries and have no place in the law of the United States. The court opined:

> What plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect.[29]

Accordingly, both *Vargas* and *Crimi* rejected the notion of moral rights in American law. Although *Vargas* used established principles of contract law to trump moral rights and *Crimi* championed economic rights in property, both cases had the same effect on "droit moral." Moral rights had no place in mid-20th century case law.

However, there are instances where courts in the United States acknowledged moral rights. In these cases, courts relied on other areas of law to affirm moral rights.[30] The court in *Carter v. Helmsley-Spear, Inc.* opined, "American courts have in varying degrees acknowledged the idea of moral rights, cloaking the concept in the guise of other legal theories, such as copyright, unfair competition, invasion of privacy, defamation, and breach of contract." This treatment was exemplified in *Gilliam v. American Broadcasting Companies, Inc*,.[31] where the court used breach of contract and infringement of common-law copyright as a vehicle to enforce the moral right of integrity. *Gilliam* involved a dispute between "Monty Python," a group of British writers and performers, and ABC. The group had an agreement with the BBC addressing the broadcasting of their work, which included a provision that the group retained all rights to the script. Additionally, BBC could not make any significant changes to any "Monty Python" scripts without first consulting the group. Yet, the BBC had the right to license the recordings of the "Monty Python" programs to overseas territories and they exercised this right in the United States.[32] The subject of the dispute in this case arose when ABC broadcast a 90-minute "Monty Python" special that omitted 24 minutes of the original recordings, effectively mutilating the original work. The court reasoned that the right of the group to prevent mutilation of their work has its origin in "droit moral." The court conceded that violation of a moral right is not a valid cause of action under American copyright law "since the law seeks to vindicate the economic, rather than the personal, rights of authors."[33] Despite this limitation, the monetary incentive to create "cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."[34] The perception of "Monty Python" by American viewers illustrates this point: it is possible that ABC's first nationwide broadcast of the heavily edited "Monty Python" recording negatively impacted reception of the show in America. After viewing both the original, unedited version and the edited ABC recording, the court determined that the edited version was "a mere caricature of their talents."[35] Thus, the broadcast of the edited version jeopardized the overall success of "Monty Python" in the United States. By relying on the group's proprietary rights to vindicate the moral right of integrity, the court was able to enforce the group's right to have their work broadcast in the form in which it was created.

In an effort to provide greater protections for artists outside of common law, a handful of state legislatures codified their own moral rights standards.[36] The moral rights protections first enacted largely struck at two main principles.[37] First, state moral rights statutes emphasized protection: works of art needed to be protected because of their overall benefit to society. Second, states recognized the importance of incentivizing artists to create. This incentive included an artist's interest in his reputation because of the economic and personal satisfaction associated with this reputation.[38] As a result, art that can be viewed by the public deserves protection because unwarranted alteration of the work which is then viewed by the public could result in a degradation of the artist's reputation.[39] California led the enactment of state moral rights that embodied both of these principles through the California Art Preservation Act (CAPA), which was passed in 1979.[40] CAPA solidified protection for the rights of attribution and integrity.[41] Under the statute, the right of integrity includes the protection of works of art from destruction.[42] CAPA also contains a minimum quality standard which demands that a work is deemed to be "fine art" in order to receive protection.[43] California's example spurred Massachusetts, Pennsylvania, Louisiana and New Mexico to pass their own moral rights statutes during the 1980s that were modeled on CAPA.[44] A handful of other states, including New York,[45] also enacted moral rights statutes, but failed to go as far as to protect against destruction.

Independent state action in regard to moral rights highlighted the absence of readily available protections available to artists and, consequently, spurred federal protection. This federal protection came in the form of VARA.[46] VARA affords qualifying artists the right of attribution and integrity.[47] It also provides artists with the right to prevent destruction of their work if it is determined that the work reaches the standard of "recognized stature." CAPA's influence on VARA manifests itself in VARA's protection of an artist's reputation as well as protection of works of recognized stature from destruction. The recognized stature standard in VARA mimics CAPA's fine art standard and similarly results in ambiguity with respect to what qualifies a work of art to have met the quality standard.

B. The Visual Artists Rights Act of 1990

The graffiti artists relied on VARA in their suit against Wolkoff. According to the relevant section of VARA applicable to this case, "the author of a work of visual art" has the right "to prevent any destruction of a work of recognized stature, and any intentionally or grossly negligent destruction of that work is a violation of that right."[48] This right exists for the entire life of the author[49] and can only be waived if the artist signs a written waiver.[50] This waiver must "identify the work, and uses of that work, to which the waiver applies, and the waiver shall apply only to the work and uses so identified."[51] Additionally, the scope of VARA under 17 U.S.C. § 106A is further qualified by 17 U.S.C. § 113(d). Under this statute, a work of visual art attached to a building must have been created after June 1, 1991, the effective date of VARA, in order to receive protection under VARA.[52] Finally, if an owner of a building wants to remove a work of visual art attached to their building and it is possible for the work to be removed from the building while maintaining its integrity, then the owner can avoid a VARA claim by making a good faith attempt to provide notice to the author of the visual art 90 days in advance of its destruction.[53] The purpose of this notification is to provide the author with 90 days to remove their work before it is destroyed.

In *Cohen II*, the works of the graffiti artists post-dated VARA, and the owner of the building did not obtain written waivers.[54] Further, the owner did not make a good faith attempt to provide notice to the authors of the street art 90 days before he whitewashed the works. Since these elements of VARA were easily determined by the court, the court's analysis of the artists' claim under VARA was largely centered on the phrase "recognized stature."

C. Factual Background

The origins of the story can be traced back to 1993, when the industrial space that developer Gerald Wolkoff owned was called "Phun Phactory."[55] The Phun Phactory existed as a 200,000 square foot warehouse in Queens, New York.[56] Tourists traveled to the warehouse to paint the walls with art that could best be described as graffiti.[57] Then, to improve conditions of the industrial space that had fallen into disrepair and the neighboring area that had a crime issue, Wolkoff approached Jonathan Cohen.[58] Cohen, known as "Meres One,"[59] is an aerosol artist with well-established notoriety in his field. The district court described Cohen as "one of the world's most accomplished aerosol artists."[60] Wolkoff admired Cohen's work and had an appreciation for Cohen's artistic taste. In 2002, Cohen was put in charge of the warehouse and tasked with curating an outdoor exhibition of aerosol art.[61] Cohen named the project "5 Pointz" because he wanted the space to represent the intersection of five New York boroughs where both local and international artists could be invited to display their talent.[62]

In an effort to provide discipline and order, Cohen instituted a system of rules.[63] He determined who would be invited to paint and how long a piece would remain on a wall.[64] Cohen differentiated between short-term walls and long-standing walls.[65] The short-term walls were designated for beginners.[66] Art on these walls changed daily or weekly and Cohen clearly communicated to artists painting on these walls that their work would likely be painted over within a day or two.[67] In the time that Cohen was in charge, 10,000 works were destroyed, which Cohen described as "calculated destruction."[68] For the long-standing walls, Cohen communicated with the more advanced artists before they painted and assured them that high quality street art would attain a more semi-permanent or permanent status at 5 Pointz.[69] Long-term status was determined by quality of the work and not the reputation of the artist.[70] In this way, it left the potential for a beginner artist to achieve long-standing status for a piece of street art if Cohen deemed it of a certain quality. The most sought-after real estate to paint on was the exterior walls that faced the 7 train and were seen daily by commuters as well as the walls near the loading docks which were in close proximity to the street and could clearly be seen by passersby.[71] Walls inside the building, although less exposed to the traffic outside, were mostly long-standing,which also made them appealing to artists.[72]

5 Pointz evolved into the largest collection of outdoor aerosol art in the world.[73] At its height, a good day at 5 Pointz entailed roughly 40 artists who traveled to 5 Pointz to paint and six to ten tour buses that would drop off tourists interested in viewing their work product.[74] 5 Pointz attracted school tours, videographers, famous musicians and was even featured in the Hollywood movie *Now You See Me*.[75] It was also seen by millions of commuters traveling on the 7 train and New Yorkers who passed by it on the street.

D. Factual Analysis Under VARA

The success of the graffiti artists' claim under VARA turned on the court's interpretation of the phrase "recognized stature."[76] This term is not defined in VARA. However, case law can be used to establish a standard for this phrase. The court chose not to examine this case law in detail in order to reach an "appropriate evidentiary standard since the plaintiffs adduced such a plethora of exhibits and credible testimony, including the testimony of a highly regarded expert, that even under the most restrictive of evidentiary standards almost all of the plaintiffs' works easily qualify as works of recognized stature."[77] But, the court did not stop here with its analysis. It further opined that Cohen chose only a few works out of the thousands of pieces of street art to have a place on long-standing walls.[78] These select pieces that had permanent and prominent placement warranted recognized stature.[79] Moreover, Cohen, a respected member of the artistic community, chose all of the specific works involved in the litigation.[80] He believed that these chosen works were particularly exemplary and deserved VARA protection.[81] This fact, the court believed, evidenced the recognized stature of these chosen works.[82] Finally, the most dramatic line of the court's analysis can be found in the last line of the final paragraph on "Works of Recognized Stature"[83]: "If not a single one of these works meet the recognized stature standard, it is hard to imagine works that would, short of a Caravaggio or Rembrandt."[84]

In order to better understand the court's conclusion on works of recognized stature, it is helpful to examine the case law that has shed light on the interpretation of this phrase. The discussion of this case law was thoroughly examined in *Cohen I*. The first case to address recognized stature following the enactment of VARA was *Carter v. Helmsley-Spear, Inc.* In that case, artists brought an action to prevent the destruction of a sculpture in the lobby of a commercial building in Queens, New York.[85] In its analysis of VARA, the district court defined a two-tiered showing for works of recognized stature: "(1) that the visual art in question has 'stature,' i.e., is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."[86] The district court determined that the sculpture was a work of recognized stature because of the testimony of multiple art experts including two professors and the

"5 Pointz evolved into the largest collection of outdoor aerosol art in the world. At its height, a good day at 5 Pointz entailed roughly 40 artists who traveled to 5 Pointz to paint and six to ten tour buses that would drop off tourists interested in viewing their work..."

president of the Municipal Art Society of New York.[87] However, on appeal (*Carter II*), this definition was not addressed by the Second Circuit. The circuit court held that the sculpture fell within one of the exceptions to VARA because it was a "work made for hire."[88] As a result, it did not need to comment on or affirm *Carter I*'s two-tiered test for works of recognized stature.[89]

The *Carter I* test outlined by the district court was next referenced in a 7th Circuit case, *Martin v. City of Indianapolis*.[90] In that case, the circuit court suggested that the *Carter I* test "'may be more rigorous than Congress intended.'"[91] The circuit court accepted evidence outside of expert testimony to speak to the recognized stature of the work.[92] Examples of accepted evidence included newspaper and magazine articles and a letter from a director of an art gallery.[93] Whereas *Carter I* relied solely on expert testimony in its determination on the statue's recognized stature, *Martin* added new types of evidence available to a claimant that could be used to argue for a work's recognized stature under the *Carter I* test. The district court in *Cohen II* noted, "The circuit court's decision in *Martin* appropriately recognizes, therefore, that expert testimony is not the *sine qua non* for establishing that a work of visual art is of recognized stature . . . ."[94] The *Cohen II* court, in its analysis of works of recognized stature, relied upon the *Martin* decision with regard to evidence to establish the validity of evidence other than expert testimony. The *Cohen II* court detailed the abundance and variety of evidence that was presented during trial in order to leave the reader with no question that recognized stature had been achieved by the 45 selected works.[95] Expert testimony, newspaper articles, online videos, social media, and Jonathan Cohen's credibility in the art community were all referenced in the *Cohen II* decision in order to clearly specify that the evidentiary standards established in both *Carter I* and *Martin* were satisfied.[96]

III. Analysis

A. Interpretation of the *Cohen II* Court's Decision

Although an award of damages in the amount of $150,000 for each of the 45 different works of art may be viewed by some as shocking, it is hard to contest that the overall analysis of VARA by the court in *Cohen II* was inaccurate. When one peels back some of the verbiage used in the opinion of the court, which drips with disdain for Wolkoff's actions both at 5 Pointz and in the courtroom, there is a clear and reasonable application of the law. Cohen's graffiti exhibition post-dated VARA (thereby affording it protection under the statute) and Wolkoff failed to obtain simple written waivers from the graffiti artists who painted at 5 Pointz, which would have prevented any claim from arising under VARA. Next, the evidence presented during trial established under two applicable evidentiary standards that 45 works could be classified as works of recognized stature. As a result, the artists of those 45 works were entitled to prevent the destruction of their works. The whitewashing of their works without notification 90 days in advance was a clear violation of the artists' rights under VARA. Finally, Wolkoff's decision to whitewash the works immediately after the preliminary injunction was denied in *Cohen I*, but before the *Cohen I* court issued its written opinion, was an indication of his willful intent and justified an award for the maximum amount of statutory damages.

One possible critique of the *Cohen II* court's holding is its determination that 45 specific works qualified for protection under VARA. Although the exterior and interior of a 200,000 square foot warehouse was covered in street art of varying levels of quality, only 49 of the works at 5 Pointz were included in the lawsuit. Of these 49 works, the court determined that 45 qualified for protection. Was 45 the correct number? The advisory jury[97] found that 36 of the 49 works qualified for VARA protection.[98] When calculated, this is the difference of $1,350,000 between the amount the jury would have awarded versus what the court ultimately awarded—a significant sum. So, how did the court reach the number 45? Thirty-seven of the protected works were on long-standing walls and met the standard for recognized stature because they were selected by Cohen to be placed on walls that were more permanent than the short-term walls.[99] Also, the status of these 37 works was justified by expert testimony and the folios of the artists who painted the 37 works.[100] Next, for the remaining12 works involved in the lawsuit, the court adopted the jurors' findings on each of the 12 works.[101] Thus, eight of the 12 works qualified for protection under VARA, while four works did not.[102] The court justified the adoption of the jurors' findings for these 12 works because the court found value in the jurors' perspective.[103] They represented the community and could be classified as a "cross-section of society."[104] As a result, "their input as an advisory jury was of value to the Court, 'particularly . . . in cases [such as this one] involving community-based standards.'"[105]

A critic might take issue with the 37 works that were lumped together and deemed to be of recognized stature, particularly since the court largely adopts Cohen's personal determination that the works had merit since he authorized them to be placed on long-standing walls. Despite this, the court was careful to also view the folios of the artists who painted the 37 works. These folios portrayed the notoriety the works had achieved across various mediums of our society and this certainly factored into the court's decision. Thus, the court was likely justified in its selection of the 45 works.

After discussing the court's reasoning in Cohen *II* and its application of VARA, it is beneficial to next address the policy implications of the court's holding.

B. The Tension Between Moral Rights Codified in VARA and the Protection of Individual Property Rights

At its simplest form, the facts of the case can be boiled down to a dispute between a property owner who wants to develop his property and extract value from an investment versus a group of talented graffiti artists who do not want to see their iconic masterworks destroyed. What is apparent from this description is that the right of an individual's property stands at odds with moral rights. The *Cohen II* court commented on this tension—the pitting of property rights versus moral rights— in its opening discussion of the *Cohen I* holding. The court opined:

> In denying the plaintiffs' application for preliminary injunctive relief, the Court recognized that the rights created by VARA were at tension with conventional notions of property rights and tried to balance these rights. It did so by not interfering with Wolkoff's desire to tear down the warehouses to make way for high-rise luxury condos, but cautioned that "defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs' works were of 'recognized stature'" under VARA.[106]

The *Cohen II* court's holding attempts to align with the holding of *Cohen I* in that the award of damages to the graffiti artists in *Cohen II* is the means by which the court balances the need to compensate those artists for the loss of their creative works with the property owner's interest in building high-rise luxury condos. While the payment of these damages may negatively impact the economics of the owner's high-rise luxury condos, the award of damages did not directly deprive the property owner of his right to develop the warehouse.

Although the *Cohen II* holding may seem equitable, VARA and the policy implications of *Cohen II* could result in future disputes between artists and property owners that limit the rights of these property owners. Particularly concerning is the application of the recognized stature standard. Due to the ambiguity surrounding the threshold at which a work of art achieves recognized stature, a threshold that is set too low could result in unfair restrictions placed on property owners.[107] Moreover, the standard for recognized stature remains entirely in the hands of the courts. Legislators failed to define recognized stature when VARA was drafted and, perhaps intentionally, left this standard to the courts to decide on a case by case basis. The determination that the selected works of street art at 5 Pointz satisfied the recognized stature standard was easily reached by the *Cohen II* court. However, not all VARA cases include an abundance of conclusive evidence that points to a work's recognized stature. Cases where a recognized stature determination is more challenging can lead to an encroachment on property rights and the risk of substantial monetary damages.

Despite this concern, courts have generally been cautious in allowing VARA to limit property rights. In *English v. BFC & R East 11th Street LLC*, Judge Baer championed the strength of property rights over VARA for both public policy and constitutional reasons.[108] In that case, six artists created a community garden on East 11th Street in Manhattan.[109] The artists sought protection under VARA for five murals and five sculptures in this garden, which they argued should be considered in whole as one work of art.[110] Yet, the artists did not obtain consent from the City before they constructed the garden.[111] The lot that contained the garden was sold to the NYC Partnership Housing Development Fund and BFC & R East 11th Street LLC was brought in to develop the site.[112] The court held that VARA does not apply to works of art that are placed on a person's property without their consent.[113] Thus, the garden did not qualify for protection under VARA. In reaching this conclusion, Judge Baer provided interesting insight into property rights, and specifically the rights of a developer, under VARA. Of the five murals, three were painted on a building owned by some of the artists.[114] According to development plans, the building being constructed on the lot would not touch the walls of the building owned by the artists.[115] Although the new building would prevent the public from viewing two of the three murals, none of the murals on the artists' building would be physically harmed.[116] As a result, Judge Baer reasoned that this would not constitute destruction, mutilation or even modification.[117] Judge Baer wrote,

> A contrary holding would effectively allow building owners to inhibit the development of adjoining parcels of land by simply painting a mural on the side of their building. Such an interpretation of the statute would stretch VARA to its constitutional limits (if not beyond) and raise serious public policy concerns.[118]

This excerpt strikes at the dangers associated with the lack of clarity in the text of VARA, and particularly the potential risk then posed by a court's loose interpretation of VARA. *English* highlights that VARA should not be used as a tool to narrow the rights of property owners, and more specifically, developers. There are well established land use laws that determine what a property owner or developer can and cannot do with their property. To allow VARA to be used to place an additional restriction on an individual's freedom to use their property as they please would be contrary to the intentions of those who drafted the statute.

C. How Can Property Owners and Developers Prevent Liability Under VARA?

An initiative to raise awareness of the rights afforded artists in VARA that are outside of well-established copyright laws would likely be the most impactful way to prevent conflict between property owners and artists. One alternative suggestion is legislation to create a "national registry of highly significant art" that would supplement VARA.[119] The works on the registry would be selected by a panel of experts who would consider factors such as aesthetic value and historical and cultural significance.[120] The purpose of the registry would be to preserve works of national significance through a ban on intentional or grossly negligent mutilation or destruction of the selected works.[121] One significant benefit of the registry is that it would prevent judges and juries from determining whether a work on the registry would otherwise meet the threshold required for protection under VARA. However, for claims disputed in court that do not involve nationally significant works, this registry would not aid judges and juries in making tough determinations on the recognized stature standard under VARA. Further, the registry would do little to reconcile moral rights and property rights. The registry in combination with VARA would inequitably strengthen moral rights laws in the United States and would exert greater pressure on traditional property rights. Finally, from a practical standpoint, the registry would face significant challenges to its implementation such as passage by Congress, funding and enforcement.[122]

As a result, a campaign to publicize VARA to property owners and artists would likely be more practical and impactful. Property owners of commercial real estate, developers and artists should be specifically targeted for education on VARA. Property owners on the small-scale consumer level need not be targeted because in most cases works of art at this scale do not reach the recognized stature standard. In *Scott v. Dixon*,[123] the district court ruled that a sculpture commissioned by a property owner for the backyard of the property did not qualify for protection under VARA because it did not meet the recognized stature standard.[124] This conclusion was reached because hedges on the property prevented the public from viewing the sculpture.[125] The recognized stature of the sculptor's other works was not sufficient to prove the recognized stature of the specific sculpture in the property owner's backyard.[126] Thus, barring exceptional situations where an artistic work on a residential property is viewed on a large scale and achieves recognized stature, VARA does not usually apply to the average homeowner.

However, for property owners and developers that have real estate assets that are viewed by the public each day on a large scale, VARA is especially relevant. For this type of property owner, conflicts between the property owner and artists can easily be prevented by a waiver. According to Section 106A(e)(1) of VARA, artists can waive their rights through a written instrument that they sign. The use of a written instrument serves as a clear notice to the artist of the intention and rights of the property owner. In the case of 5 Pointz, Wolkoff could have prevented the dispute and eventual award of significant damages if he had been aware of Cohen's rights and the rights of the other artists Cohen brought in.[127] If Wolkoff had obtained a signed waiver from Cohen, this would have been sufficient to prevent all liability under VARA. 106A(e) specifically states that "a waiver of rights under this paragraph made by one such author waives such rights for all such authors."[128] As a result, if Wolkoff had obtained a VARA waiver from Cohen, not only would it have been clear to Cohen that Wolkoff had the right to demolish the property and the art attached to the property at any time, but this waiver would have also waived the rights of all other artists that came to 5 Pointz to paint.

Owners of commercial property that plan to undertake redevelopment or ground-up development of the real estate asset should check for any potential VARA claims before beginning demolition. To the extent artwork exists on the development site, the prudent owner or developer would then provide notice to the artist(s) so that development plans can proceed unimpeded.

IV. Conclusion

Moral rights and traditional property rights can be harmonized. The *Cohen II* holding and its large award of damages provides a drastic example of one way that VARA can be used to combat the revengeful act of a property owner. Yet, this is an extreme example of how VARA can be used. While *Cohen II* emphasizes to property owners the importance of understanding VARA, its holding should not be used to scare property owners and discourage the interplay of the arts and real estate. Moral rights and property rights can co-exist and can even complement each other. The City Planning Commission recognized this before litigation began between the artists and Wolkoff by requiring that 3,300 square feet of the exterior of the new residential towers at 5 Pointz be made available for art.[129] Further, Judge Block in *Cohen I* concluded his opinion by encouraging the members of the development project at 5 Pointz to bring Cohen in as curator of the art at the new buildings and allot more than the required 3,300 square feet of the exterior to art.[130] Judge Block's hope was that the new buildings could provide a permanent home for the work of Cohen and the aerosol art community where 5 Pointz can be reincarnated.[131]

A powerful exhibition of industrial brawn complemented by street art can be found at the Museum of Street Art (MoSA). MoSA opened in October of 2018 at the CitizenM New York Bowery, a new hotel in the Lower East Side of Manhattan.[132] The museum is located in the stairwell of the hotel and features the work of 20 artists that painted at 5 Pointz.[133] Cohen served as art director for the space, which spans the 20-floor staircase and can be viewed by both guests of the hotel and the public free of charge.[134] Cohen also painted a 5,000 square foot mural on an exterior wall of the hotel that is the centerpiece for the public plaza in the front of the building.[135] The hotel, which is the world's tallest modular hotel,[136] in combination with the work of Cohen and his team of artists, demonstrates how reasonable minds can find harmony between street art and commercial real estate.

Endnotes

1. *Cohen v. G & M Realty L.P*. ("*Cohen I*"), 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).
2. *Id.* at 215; *see* 17 U.S.C. § 106A(2)(B).
3. *Cohen v. G & M Realty L.P.* ("*Cohen II*"), 320 F. Supp. 3d 421, 427 (E.D.N.Y. 2018).
4. *Cohen I*, 988 F. Supp. 2d at 227.
5. *Cohen II*, 320 F. Supp. 3d 421.
6. *Id.* at 426-28.
7. *Id.*
8. *Id.* at 428.
9. *Id.* at 442.
10. *Id.* at 428.
11. *Id.*
12. *Id.*
13. *Id.* at 445.
14. Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. 1935, 1939 (2000).
15. *Id.* at 1939-1940.
16. *Id.* at 1939. ("At their most expansive, moral rights invest in the artist the right to: (1) have his name associated with all his creations and no others (paternity or attribution); (2) prevent mutilation, distortion or alteration of the art (integrity); (3) choose when and if his work will be revealed to the public (disclosure); and (4) withdraw and alter his work once revealed (retraction or withdrawal).").
17. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d. 77, 81 (2d Cir. 1995).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947).
22. *Crimi v. Rutgers Presbyterian Church*, 89 N.Y.S.2d 813, 818 (Sup. Ct. 1949).
23. *Id.* at 814.
24. *Id.* at 819.
25. *See* N.Y. Real Prop. Law § 242 (McKinney 2011).
26. A French term that means "moral rights."
27. *Vargas v. Esquire, Inc.*, 164 F.2d 522, 523-524 (7th Cir. 1947).
28. *Id.* at 525.
29. *Id.* at 526.
30. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d. 77, 82 (2d Cir. 1995).
31. *Gilliam v. Am. Broadcasting Cos.*, 538 F.2d 14 (2d. Cir. 1976).
32. *Id.* at 17-18.
33. *Id.* at 24.
34. *Id.*
35. *Id.* at 25.
36. Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. 1935, 1941 (2000). Robinson comments:

    > The inadequacy of protections afforded the artist was a subject of debate long before the United State['s entry to Berne [the Berne Convention] in 1988. Attempts to enforce a moral right equivalent under common law actions such as defamation, although promising in principle, were rarely successful, in particular when the courts saw traditional property rights compromised. Congress made numerous unsuccessful attempts to pass moral rights legislation. Prompted by press attention to particularly egregious maltreatment of well-known works of art, state legislatures, led by California, began to enact their own moral rights protection.

37. *Id.*
38. *Id.* at 1941-42.
39. *Id.*
40. Cal. Civ. Code § 987 (West 1982 & Supp. 2000).
41. *See id*.
42. *See id.* § 987(c).
43. *See id.* § 987(a).
44. Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. 1935, 1943 (2000).
45. N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney 1999) (In 1983, New York enacted the Artists Authorship Rights Act. Under this act, an artist's work was protected from display to the public in an altered or mutilated form. It also afforded an artist the right to claim or disclaim authorship of a work. Thus, the rights of attribution and integrity were the main moral rights codified in the Artists Authorship Rights Act. Yet, the New York legislature did not go as far as to protect a work from destruction under the right of integrity).
46. *See* 17 U.S.C. § 106A.
47. *Id.; see Carter v. Helmsley-Spear, Inc.*, 71 F.3d. 77, 83 (2d Cir. 1995).
48. 17 U.S.C. § 106A(a)(3)(B).
49. *Id.* § 106A(d)(1).
50. *Id.* § 106A(e)(1).
51. *Id.*
52. *Id.* § 113(d)(1).
53. *Id.* § 113(d)(2).
54. *Cohen v. G & M Realty L.P.* ("*Cohen I*"), 988 F. Supp. 2d 212, 215 (E.D.N.Y. 2013).
55. *Id.* at 219.
56. *Id.*
57. *Cohen v. G & M Realty L.P.* ("*Cohen II*"), 320 F. Supp. 3d 421, 433 (E.D.N.Y. 2018).
58. *Id.*
59. *Cohen I*, 988 F. Supp. 2d at 218-19.
60. *Cohen II*, 320 F. Supp. 3d at 431.
61. *Id.* at 432-433.
62. *Cohen I*, 988 F. Supp. 2d at 219.
63. *Cohen II*, 320 F. Supp. 3d at 433.
64. *Id.* at 433-34.
65. *Id.*

66. *Id.* at 433.

67. *Id.*

68. *Id.* at 434.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 433.

74. *Cohen v. G & M Realty L.P.* ("*Cohen I*"), 988 F. Supp. 2d 212, 219 (E.D.N.Y. 2013).

75. *Id.*

76. *Cohen II*, 320 F. Supp. 3d at 437.

77. *Id.* at 438.

78. *Id.*

79. *Id.*

80. *Id.* at 439.

81. *Id.* at 438-39.

82. *Id.* at 439.

83. *Id.* at 437.

84. *Id.* at 439.

85. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 311-313 (S.D.N.Y 1994) ("*Carter I*"), *aff'd in part, vacated in part, rev'd in part*, 71 F. 3d. 77 (2d Cir. 1995) (*Carter II*").

86. *Id.* at 325.

87. *Cohen v. G & M Realty L.P.* ("*Cohen I*"), 988 F. Supp. 2d 212, 217 (E.D.N.Y. 2013).

88. *Id.* at 216.

89. *Id.* at 217.

90. *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999).

91. *Cohen v. G & M Realty L.P.* ("*Cohen II*"), 320 F. Supp. 3d 421, 438 (E.D.N.Y. 2018) (quoting Martin v. City of Indianapolis, 192 F.3d 608, 612 (7th Cir. 1999)).

92. *Cohen II*, 320 F. Supp. 3d at 438.

93. *Id.*

94. *Id.*

95. *Id.* at 438-39.

96. *Id.*

97. The artists waived their jury rights immediately before summations. Since the jury was present for the entire trial, the court converted the jury into an advisory jury. *Id.* at 427.

98. *Id.*

99. *Id.* at 439.

100. *Id.*

101. *Id.* at 440.

102. *Id.*

103. *Id.*

104. A "cross-section of society" references the *Carter I* test. *See Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F. 3d. 77 (2d Cir. 1995).

105. *Cohen II,* 320 F. Supp. at 440 (quoting *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 398 (E.D.N.Y. 2002)).

106. *Cohen II,* 320 F. Supp. at 427 (quoting *Cohen v. G & M Realty L.P.* (*Cohen I*), 988 F. Supp. 2d 212, 227 (E.D.N.Y. 2013)).

107. Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. 1935, 1968 (2000) (Robinson noted the challenges associated with interpretation of the recognized stature standard of VARA in his note. An excerpt from his note on this issue was also quoted by the *Cohen II* court. Robinson wrote, "By setting the standard too high, courts risk the destruction of the unrecognized masterwork; by setting it too low, courts risk alienating those forced to live with art they may despise, and whose legitimate property interests are curtailed.").

108. *English v. BFC & R East 11th St. LLC*, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997), aff'd, 198 F. 3d 233 (2d. Cir. 1999).

109. *Id.* at 1.

110. *Id.*

111. *Id.* at 4-5.

112. *Id.* at 1.

113. *Id.* at 4 ("VARA is inapplicable to artwork that is illegally placed on the property of others, without their consent, when such artwork cannot be removed from the site in question." The Judge in *English* also noted that VARA should be inapplicable to illegal artwork because "otherwise parties could effectively freeze development of vacant lots by placing artwork there without permission. Such a construction of the statute would be constitutionally troubling, would defy rationality and cannot be what Congress intended in passing VARA.").

114. *Id.* at 1.

115. *Id.* at 6.

116. *Id.*

117. *Id.*

118. *Id.* (Judge Baer also noted the strength of the testimony provided by the expert for the Partnership and the Developer. This expert testified that the garden did not meet the recognized stature standard).

119. Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. 1935, 1972 (2000).

120. *Id.*

121. *Id.* at 1973.

122. *Id.* at 1975.

123. *Scott v. Dixon*, 309 F. Supp. 2d 395 (E.D.N.Y.2004).

124. *Cohen v. G & M Realty L.P.*, 988 F. Supp. 2d 212, 218 (E.D.N.Y. 2013).

125. *Id.*

126. *Id.*

127. The *Cohen I* court noted, "Wolkoff gave his blessings to Cohen and the aerosol artists to decorate the buildings, and he did not choose to protect himself from liability by requiring VARA waivers." *Id.* at 227.

128. 17 U.S.C. § 106A(e)(1).

129. *Cohen I*, 988 F. Supp. 2d at 227.

130. *Id.*

131. *Id.*

132. Lauren Hard, *5 Years Ago, Their 5Pointz Art Was Erased. Now There's a Museum for It.*, N.Y. Times (Sept. 16, 2018), https://www.nytimes.com/2018/09/16/nyregion/5pointz-street-art-graffiti-museum-nyc.html.

133. *Id.*

134. *Id.* .

135. Jenna Wang, *Inside CitizenM's New York Flagship, The World's Tallest Modular Hotel*, Forbes (October 19, 2018, 11:40 AM), https://www.forbes.com/sites/jennawang/2018/10/19/with-new-york-flagship-citizenm-seeks-to-increase-us-portfolio-by-700-in-2020/#2d51673a27d2.

136. *Id.*

The Real Property Law Section Welcomes New Members

The following members joined the Section between February 7, 2019 and August 29, 2019:

First District
William Anderson
Alexa Bakhash
Nancy Bannon
Joy Baskin
Diana Basso
Michael Benzi
David Cohen
Joshua Dachs
Christopher Dylewski
Christian Frazier
Brendan Fredette
William Geller
Catherine Gibson McCauley
Andrew Green
Jason Grossman
Kristin Haley
Jason Jones
Jordan Katz
Marney Kimmel
Larissa Kravanja
Charles LaSister
Brenden Mahoney
Patrick McGlashan
Laura Mehl Sugarman
Diana Mohyi
Christopher Palladino
Sheena Paul
Alex Pia
Michelle Quinn
Kristen Ramos
Reginald Richter
Kelly Ringston
Carolyn Rualo
Roger Sachar
Zev Safran
Shira Sandler
Evan Sarzin
Richard Shore
Rachel Sigmund
Julia Solo
Juan Soto
Glenn Spiegel
Juliana Thibaut
Steven Tishco
Jerry Weiss
Marissa Welner
Devin Yasuda
Matthew Zinder
Petro Zinkovetsky
Stephane Zwirn

Second District
Binyomin Bendet
Matthew Budofsky
Tarik Davis
Peter DeVries
Kelly Decker
Alexander Golant
Cheryl Kinch
Aurelia Kotlarewski
Zachary Levy
Vlad Lishilenko
Richard Naddeo
Arrohon Rosskamm

Third District
Melissa Ashline-Heil
Taylor Basford
Jaclyn Cahill
Salvador Capecelatro
William Chellis
Marc Ganz
Joseph Jacob

Fourth District
Anthony Adang
John Carusone
Andreas Christou
Ethan Crofut

Fifth District
Daniel Austin
Dominic Giordano
Jennifer Hicks
Rosemary Nwawka
Edward Perry
Theodore Trespasz
Jane Zhang

Sixth District
Dorian Ames
Brett Cowen
Brad Helmetsie
Carrie Wenban

Seventh District
George Brown
Bruce Freeman
Jacqueline Ledgerwood
Elizabeth Oklevitch
Nicholas Reeder
Steven Tranelli
Richard Tucker
Christopher Turner

Eighth District
Daneal Barnaby
Scott Bogucki
Henrik Hansen
Justine McCargo
Carrie McElroy
Robert Merino
Julia Mombrea
Rexford Morgan
Barbara Nuchereno
Thomas Pares
Jia Passucci
Brian Sarama
Seth Seegert

Ninth District
Lily Adler
Kelly Aran
Ivan Bonet
William Bowman
Kimberley Carpenter
Lori Dickson
Drew Gamils
Joan Iacono
Anjili Jani
Julie Jeung
Dale Lois
Sonia Lopez Gonzalez
Rumbi Mabuwa
Jacqueline Martineau
Jennifer McCave
Robert McManus
Ruth Post
Kathryn Ryan
Arnold Streisfeld
Ronald Tomlins
Jose Torres
Douglas Trokie
Christopher Valencia
Earl Williams
Jeffrey Yanowitz
Kenneth Zebrowski

Tenth District
Ronald Alber
Charles Berg
Laura Brennan
Carla Brydson
John Cacchioli
Dennis Carrion
Sal Cataldo
John Churneftsky
Laura Dilimetin
Edward Donnelly
Brian Goldberg
Ronald Hariri
Camille Hart
Kate Henning
Theresa Kelly
Danielle Laibowitz
James Locantro
Eric Mcavey
Michael Meehan
Leslie Anne Mendoza
Scott Packman
Mark Posner
Corrado Pulice
Susanne Roxbury
Johanna Sanchez-Albarracin
Melissa Schlactus
Avani Shah
Edward Shendell
David Shyer
Jacob Simany
Claire Talwar
Peter Tamsen
Shantel Thompson
Rocco Tomassetti

Eleventh District
Minerva L. Alonso
Liqin Ban
Joseph Brees
Peter Chang
Shu Chen
Stephen Chou
Sharon Cook
Barbie Hsu
Tobin Kandathil
Weiyu Li
Yasir Miah
Darlene Mottley
Adelina Pinkhasova
Seth Sahr
Kerry-Ann Scott
Tara Snow
Shelbey Tamayo
Nick Tsoromokos
Qingqing Zhou

Twelfth District
Kenneth Bushell
Kristine Garcia-Elliott
Emanuele Pepe

Thirteenth District
Brittany Daniels
Kirill Muchnik
Sean O'Sullivan
Michael Reneo
Selina Storz

Out of State
Amanda Attenasio
Mary Callahan
R. Coryat
James Crane
Grace DeLuna
Alan Didino
David Fleming
Ellie Forche
Joseph Harkins
Adam Herron
Yu Yeong Jeon
Eric Keifer
Mengxi Li
Sheryl McCabe
Lorri Meils
Tamilla Nurizada
Eric Puma
Ahmet Seyithanoglu
Joel Stein
Joseph Supp
Keyne Villert
Jialu Wu
Xiaoyan Xu

Section Committees and Chairs

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.

Attorney Opinion Letters
Gregory P. Pressman
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NYNY 10022-4728
gregory.pressman@srz.com

Charles W. Russell
Harris Beach PLLC
99 Garnsey Road
Pittsford, NY 14534
crussell@harrisbeach.com

Awards
Peter V. Coffey
Sciocchetti & Abbott, PLLC
800 Troy-Schenectady Road, Suite 102
Latham, NY 12110
pcoffey@pvslaw.com

Climate Change Committee
Joel I. Binstok
York Consulting
570 Lexington Avenue, Suite 2900
New York, NY 10022
JBinstok@yorkleaseaudit.com

Nicholas M. Ward-Willis
Keane & Beane, PC
445 Hamilton Avenue
Suite 1500
White Plains, NY 10601
nward-willis@kblaw.com

Sujata Yalamanchili
Hodgson Russ LLP
The Guaranty Building
140 Pearl St., Suite 100
Buffalo, NY 14202-4040
syalaman@hodgsonruss@com

Commercial Leasing
Deborah Leigh Goldman
Joshua Stein PLLC
501 Madison Avenue, Room 402
New York, NY 10022-5635
debbie@joshuastein.com

Robert J. Shansky
Scarola Zubatov Schaffzin PLLC
1700 Broadway, 41st Floor
New York, NY 10019
rjshansky@szslaw.com

Sujata Yalamanchili
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street Suite 100
Buffalo, NY 14202-4040
syalaman@hodgsonruss.com

Condemnation, Certiorari and Real Estate Taxation
Karla M. Corpus
National Grid
300 Erie Boulevard West
Syracuse, NY 13202
kmcorpus@gmail.com

Steven Wimpfheimer
Steven Wimpfheimer, Esq.
166-25 Powells Cove Blvd.
Whitestone, NY 11357
wimpf1@gmail.com

Condominiums & Cooperatives
Dale J. Degenshein
Stroock & Stroock & Lavan LLP
180 Maiden Lane, Suite 3961
New York, NY10038
ddegenshein@stroock.com

Steven D. Sladkus
Schwartz Sladkus Reich Greenberg
& Atlas LLP
270 Madison Avenue
9th Floor
New York, NY 10016
ssladkus@ssrga.com

Continuing Legal Education
Scott A. Sydelnik
Davidson Fink LLP
28 E. Main Street, Suite 1700
Rochester, NY 14614
ssydelnik@davidsonfink.com

Shelby D. Green
Pace University School of Law
78 North Broadway
White Plains, NY 10603-3796
sgreen@law.pace.edu

Diversity
Antar P. Jones
The Law Office of Antar P. Jones, PLLC
538 East 24th Street
Brooklyn, NY 11210
antar@antarlaw.com

Harry G. Meyer
96 Morningside Lane
Williamsville, NY 14221-5033
hgmeyer96@gmail.com

Land Use and Environmental Law
Alan J. Knauf
Knauf Shaw LLP
2 State Street, 1400 Crossroads Building
Rochester, NY 14614-1314
aknauf@nyenvlaw.com

Linda U. Margolin
Margolin Besunder, LLP
1050 Old Nichols Road
Suite 200
Islandia, NY 11749
lmargolin@margolinbesunder.com

Landlord and Tenant Proceedings
Paul N. Gruber
Borah, Goldstein, Altschuler,
Nahins & Goidel, P.C.
377 Broadway
New York, NY10013
pgruber@borahgoldstein.com

Peter A. Kolodny
Kolodny PC
101 Lafayette Street
10th Floor
New York, NY 10013
pk@kolodnylaw.com

Legislation
Richard A. Nardi
Loeb & Loeb LLP
345 Park Avenue
21st Floor
New York, NY10154
rnardi@loeb.com

Samuel O. Tilton
Woods Oviatt Gilman LLP
700 Crossroads Building
2 State Street
Rochester, NY 14614-1308
stilton@woodsoviatt.com

Low Income and Affordable Housing
James S. Grossman
Barclay Damon LLP
100 Chestnut St., Suite 2000
Rochester, NY 14604-2404
JGrossman@barclaydamon.com

Richard C. Singer
Hirschen Singer & Epstein LLP
902 Broadway
13th Floor
New York, NY 10010
rsinger@hseny.com

Membership
Jaime Lathrop
Law Offices of Jaime Lathrop, PC
641 President Street
Suite 202
Brooklyn, NY 11215-1186
jlathrop@lathroplawpc.com

Harry G. Meyer
96 Morningside Lane
Williamsville, NY 14221-5033
hgmeyer96@gmail.com

Not-for-Profit Entities and Concerns
Emanuela D'Ambrogio
Barclay Damon LLP
125 East Jefferson St.
Syracuse, NY 13202
edambrogio@barclaydamon.com

Susan E. Golden
Venable LLP
1270 Avenue of the Americas
New York, NY 10020-1700
SGolden@Venable.com

Professionalism
Patricia E. Watkins
Bartlett, Pontiff, Stewart & Rhodes PC
One Washington Street
P.O. Box 2168
Glens Falls, NY 12801-2168
pew@bpsrlaw.com

Nancy A. Connery
Schoeman, Updike & Kaufman
551 Fifth Avenue
New York, NY 10176
nconnery@schoeman.com

Public Interest
Maria Theresa DeGennaro
Empire Justice Center
Touro Law Center PAC
225 Eastview Drive
Central Islip, NY 11722
mdegennaro@empirejustice.org

Daniel Farwagi Webster
Webster & Dubs, P.C.
37 Franklin Street, Suite 1000
Buffalo, NY 14202
dan@websterdubs.com

Publications
Marvin N. Bagwell
5408 Post Road
Bronx, NY 10471
MBagwell1@OldRepublicTitle.com

William P. Johnson
Nesper, Ferber, DiGiacomo,
Johnson & Grimm, LLP
200 John James Audubon Parkway
Suite 302
Amherst, NY 14228
wjohnson@nfdlaw.com

Matthew J. Leeds
Ganfer Shore Leeds & Zauderer, LLP
360 Lexington Avenue
New York, NY 10017
mleeds@ganfershore.com

Robert Sein
Mattone Family Institute
for Real Estate Law
St. John's University
School of Law
8000 Utopia Parkway
Jamaica, NY 11439
seinr@stjohns.edu

Real Estate Construction
Gavin M. Lankford
Harris Beach PLLC
99 Garnsey Rd
Pittsford, NY 14534-4532
glankford@harrisbeach.com

Brian G. Lustbader
Schiff Hardin LLP
666 5th Avenue
Suite 1700
New York, NY 10103
BLustbader@schiffhardin.com

Real Estate Financing
Richard S. Fries
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
richard.fries@sidley.com

Heather C.M. Rogers
Davidson Fink LLP
28 East Main Street, Suite 1700
Rochester, NY 14614
hrogers@davidsonfink.com

Real Estate Workouts and Bankruptcy
Garry M. Graber
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street, Suite 100
Buffalo, NY 14202-4040
ggraber@hodgsonruss.com

Daniel N. Zinman
Kriss & Feuerstein, LLP
360 Lexington Avenue
Suite 1200
New York, NY 10017
danzinmanesq@gmail.com

Sponsorship Committee
Ira S. Goldenberg
Goldenberg & Selker, LLP
399 Knollwood Rd.
Suite 112
White Plains, NY 10603-1937
igoldenberg@
goldenbergselkerlaw.com

Student Affairs Committee
Shelby D. Green
Pace University School of Law
78 North Broadway
White Plains, NY 10603-3796
sgreen@law.pace.edu

Ariel Weinstock
Katsky Korins LLP
605 3rd Avenue
16th Floor
New York, NY 10158-0180
aweinstock@katskykorins.com

Title and Transfer
Gerard G. Antetomaso
Evans Fox LLP
100 Meridian Centre Blvd.
Suite 300
Rochester, NY 14618
jerry@evansfox.com

Toni Ann Christine Barone
Law Firm of Barone & Barone,LLP
43 New Dorp Plaza
Staten Island, NY 10306
tabarone@baroneandbaronelaw.com

Gilbert M. Hoffman
Vanguard Research & Title Services, Inc.
499 South Warren Street
Suite 210
Syracuse, New York 13202
Gilbert.Hoffman@vgrti.com

Website and Electronic Communications
Susan M. Scharbach
D'Agostino, Levine, Landesman
& Lederman, LLP
345 Seventh Avenue
23rd Floor
New York, NY 10001
sscharbach@dlpartnerslaw.com

Michael P. Stevens
4-74 48th Avenue
Apt. 5G
Long Island City, NY 11109
michaelpstevens@gmail.com

Task Force on Attorney Escrow
Gilbert M. Hoffman
Vanguard Research & Title Services, Inc.
499 South Warren Street
Suite 210
Syracuse, New York 13202
Gilbert.Hoffman@vgrti.com

Benjamin Weinstock
Ruskin Moscou Faltischek, P.C.
1425 RXR Plaza
East Tower
15th Floor
Uniondale, NY 11556-1425
bweinstock@rmfpc.com

Task Force on Bylaws
Karl B. Holtzschue
Law Office of Karl B. Holtzschue
122 East 82nd Street
New York, NY 10028
kbholt@gmail.com

Task Force on Draft Department of Financial Services Title Insurance Regulations
Gerard G. Antetomaso
Evans Fox LLP
100 Meridian Centre Blvd.
Suite 300
Rochester, NY 14618
jerry@evansfox.com

Thomas J. Hall
The Law Firm of Hall & Hall, LLP
57 Beach Street
Staten Island, NY 10304-0002
hallt@hallandhalllaw.com

Task Force on Zombie Houses
Joel H. Sachs
Keane & Beane PC
445 Hamilton Ave
White Plains, NY 10601
jsachs@kblaw.com

Leon T. Sawyko
Harris Beach PLLC
99 Garnsey Road
Pittsford, NY 14534
lsawyko@harrisbeach.

Section District Representatives

First District
Joel I. Binstok
The York Group LLC
5557 Fifth Avenue
14th Floor
New York, NY 10017
JBinstok@yorkleaseaudit.com

Second District
Lawrence F. DiGiovanna
Abrams Fensterman
1 MetroTech Centre
Suite 1701
Brooklyn, NY 11201
LDiGiovanna@abramslaw.com

Third District
Christina Watson Meier
Meier Law Firm, PLLC
10 Utica Avenue
Latham, NY 12110
christina@meierlawpllc.com

Fourth District
Alice M. Breding
Law Office of Alice M Breding, Esq., PLLC
632 Plank Road
Suite 201
Clifton Park , NY 12065-6588
alice@bredinglaw.com

Fifth District
Ann Marie McGrath
Law Office of Ann McGrath
8196 Oswego Rd.
Liverpool, NY 13090
annmcgrathesq@msn.com

Sixth District
John E. Jones
Hinman Howard & Kattell, LLP
700 Security Mutual
80 Exchange Street
Binghamton, NY 13901-3400
jonesje@hhk.com

Seventh District
Megan J. Lyle
Davidson Fink LLP
28 East Main Street, Ste. 1700
Rochester, NY 14614-1900
mlyle@davidsonfink.com

Eighth District
David C. Mineo
Associate Counsel
6405 Landstone Drive
Clarence Center, NY 14032
Buffalo, NY 14203
lawmineo@aol.com

Ninth District
Lisa M. Stenson Desamours
MTA Metro-North Railroad
420 Lexington Ave, 11th floor
New York, NY 10170
ldesamours@mnr.org

Tenth District
Daniel J. Baker
Cerliman Balin Adler & Hyman, LLP
9th floor
90 Merrick Avenue
East Meadow, NY 11554
dbaker@certilmanbalin.com

Sanford A. Pomerantz
Of Counsel
7 Jodi Court
Glen Cove, NY 11542
sandyslaw@optonline.net

Eleventh District
Steven Wimpfheimer
166-25 Powells Cove Blvd.
Whitestone, NY 11357-1522
wimpf1@gmail.com

Twelfth District
Vacant

Thirteenth District
Toni Ann Christine Barone
Law Firm of Barone & Barone, LLP
623 North Railroad Ave.
Staten Island, NY 10304
tabarone@baroneandbaronelaw.com

Out of State District
Lawrence J. Wolk
4701 Willard Avenue
Apt. 634
Chevy Chase, MD 20815
lawrence.wolk@dc.gov

N.Y. Real Property Law Journal

Submission Guidelines

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.

For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors. Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Co-Editors request that all submissions for consideration to be published in this *Journal* use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Co-Editors regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Co-Editors, Board of Editors or the Section or substantive approval of the contents therein.

Accommodations for Persons with Disabilities:

NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

ISSN 1530-3919 (print) ISSN 1933-8465 (online)

Cite as: ***N.Y. Real Prop. L.J.***

"Fifty-Third and Third"— The intersection as seen from the fourth floor window of 885 Third Avenue, painted by Sherman K. Stein, the father of former Section Chair Joshua Stein and a retired professor of mathematics. The large computer monitor gives a clue about when this painting was made. There is no connection between this painting and the famous Ramones song about the same intersection.

This *Journal* is published for members of the Real Property Law Section of the New York State Bar Association.

NEW YORK STATE BAR ASSOCIATION
REAL PROPERTY LAW SECTION
One Elk Street, Albany, New York 12207-1002

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155