BENCH BRIEFS

By Elaine Colavito

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Suffolk County Supreme Court

Honorable Sanford Neil Berland

Motion to dismiss complaint granted; single cause of action alleging breach of the settlement agreement insofar as asserted against it accrued 30 days after November 6, 2006, the date of the signing of the settlement agreement, when the Long Island railroad was to send the agreed upon settlement checks to plaintiff's then-counsel.

In *Andre Rubin Holder v. Long Island Rail Road,* Index No.: 6228/2017, decided on February 23, 2018, the court granted the motion of the defendant pursuant to CPLR §3211, dismissing plaintiff's complaint.

The action was commenced by plaintiff on or about December 4, 2017 by filing of a Summons and Complaint against the Long Island Railroad alleging a breach of a settlement agreement dated November 6, 2006. Defendant moved to dismiss the action claiming that it was barred by the applicable statute of limitations. In granting the motion, the court noted that the defendant demonstrated that the single cause of action alleging breach of the settlement agreement insofar as asserted against it accrued 30 days after November 6, 2006, the date of the signing of the settlement agreement, when the Long Island Rail Road was to send the agreed upon settlement checks to plaintiff's then-counsel. Thus, the statute of limitations for that cause of action expired on or about December of 2012, approximately five years before the commencement of this action. As such, the complaint was dismissed.

Honorable Martha L. Luft

Matter set down for Traverse hearing; defendant denied residing at the premises where service allegedly was made; sworn denial, combined with documentary and other evidence supporting such claim sufficient to rebut prima facie showing of proper service.

In *Bayview Loan Servicing v. Laurie Valenzuela, George C. Valenzuela, Citibank, NA, Brookhaven Memorial Hospital, People of the State of New York, "John Doe" and "Jane Doe," said names being fictitious, parties intended being possible tenants or occupants of premises,* Index No.: 27607/2008, decided on January 12, 2018, the court granted the motion of defendant, George C. Valenzuela, to the extent that the matter was set down for a traverse hearing to determine the jurisdiction of the court.

In granting the application, the court noted that a defendant can rebut a process server's affidavit by a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations contained in the process server's affidavit. Where there is a sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence. Here, the defendant denied residing at the premises where service allegedly was made, the sworn denial, combined with documentary and other evidence supporting such claim, was sufficient to rebut the plaintiff's sworn prima facie showing of proper service and to necessitate an evidentiary hearing. Accordingly, the court granted the motion to the extent that the matter was set down for a traverse hearing.

Motion to substitute party denied; in order for a plaintiff mortgagee to establish standing in a foreclosure it was the mortgage note that was the dispositive instrument, not the mortgage indenture.

In *JP Morgan Chase Bank, National Association, as purchaser of the loans and other assets of Washington Mutual Bank, formerly known as Washington Mutual Bank, FA v. Jane A. Grimm, New York State Department of taxation and Finance, Steve Glazer,* Index No.: 318181/2009, decided on November 13, 2017, the court denied plaintiff's motion to substitute PennyMac Corp. as the plaintiff herein without prejudice to renew upon the submission of proper papers.

In support, plaintiff argued that the language in the mortgage assignment, which stated that the mortgage was assigned to PennyMac Corp. "with all interest, all liens, any rights due or to become due thereon" also sufficed to assign the note. Defendant's opposition to the motion was based upon the assertion that the mortgage note had not been properly assigned to PennyMac Corp. and that the plaintiff had not demonstrated that the note was in PennyMac Corp.'s possession. In denying the motion, the court noted that in order

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CIVIL RIGHTS

Americans with Disabilities Act and Commercial Website Compliance

By Cory Morris

Cory Morris

At the end of 2017, Southern District of New York Judge Paul A. Engelmayer refused to grant defendant's motion to dismiss in *Del-Orden v. Bonobos, Inc.*, holding that "the term 'public accommodation' in Title III extends to private commercial websites that affect interstate commerce."[1] Congress intended that the application of the Americans with Disabilities Act ("ADA") "should keep pace with the rapidly changing technology of the times…"[2] Rapidly changing technology utilized by the public, from finding lawyers, hailing cabs or even hosting a bed-and-breakfast stay, are likely subject to the ADA and may result in increased litigation in the future.

The ADA "as a whole is intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' "[3] Title III of the ADA (42 U.S.C. § 12182(a)) provides that, as a general rule, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." In some instances, brick and mortar business "website[s] act[] as an asset or channel to the physical stores by allowing customers to find store locations . . . and access digital coupons via the website."[4] As we move forward into the 21st century, places of public accommodation are being redefined and are largely found, utilized and survive solely via the world wide web.

To state a claim under Title III of the ADA, a plaintiff must allege that: plaintiff is disabled within the meaning of the ADA; defendants own, lease, or operate a place of public accommodation; and defendants discriminated against the plaintiff by denying a full and equal opportunity to enjoy the services defendants provide. The statute expressly states that the denial of equal "participation" or the provision of "separate benefit[s]" are actionable under Title III. Section 12181 of the ADA defines a "place of public accommodation" as an entity whose operations affect commerce and falls within one of 12 enumerated categories. Still, substantial businesses operate wholly on the internet without the slightest concern about ADA compliance. By doing so, blind, deaf or otherwise disabled (within the meaning of the ADA) persons are denied a full and equal opportunity to enjoy services provided through commercial websites. As a result, sizable lawsuit victories and settlements hallmark what is obvious to many if not most businesses already, that the internet is a market place and should ensure its patrons a "full and equal opportunity to enjoy the services" provided.

"The statute applies to the services of a place of public accommodation, not services in a place of public accommodation." Indeed, "[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute."[v] "Disabled plaintiffs, many of them represented by the same handful of firms, filed 240 suits in 2015 and 2016, according to a Wall Street Journal report on the trend last November."[6] 42 U.S.C. § 12182(a)(2)(A)(iii) defines discrimination to include:

> a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the goods, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

One might ask where does a business draw the line? "This section explicitly exempts public accommodations from the obligation to provide auxiliary aids or services if doing so would fundamentally change the nature of the good or service, or result in an undue burden."[7] Regulations (28 C.F.R. § 36.303(b)(2)) provide "examples" of "auxiliary aids and services," including "screen reader software" and "other effective methods of making visually delivered materials available to individuals who are blind or have low vision[.]" Businesses and entrepreneurs are addressing the need for creating such aides and services. Website design companies are cognizant of this blossoming opportunity to create and design ADA compliant websites or adapt preexisting websites for those who are considered disabled within the meaning of the ADA.

While the internet is still evolving, the applicability of the ADA to commercial websites seems clear; however, "[t]he Justice Department that vigorously supported disabled plaintiffs in ADA website accessibility litigation, in other words, was not the same DOJ that exists today." The DOJ consistently stated its view that the ADA's accessibility requirements apply to websites belonging to private companies.[8] The Department of Justice,[9] however, has repeatedly noted the need to act and for

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Effect of a Discontinuance on the Mortgage Foreclosure Statute of Limitations

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to revoke its acceleration. The Appellate Division, Second Department rejected this argument, concluding that "[t]he Supreme Court properly found that the mortgagors' conclusory statements that the 'Order of Discontinuance was the result of procedural deficiencies in the proceedings,' . . . do not disprove an affirmative act of revocation."

Impact of the NMNT Realty decision

Respectfully, the decision of the Appellate Division can, at best, be described as somewhat awkward. It appears that what the Appellate Division did is allow borrowers to "re-litigate" the prior foreclosure action to ascertain what the lender's intent may have been in discontinuing the action. *NMNT Realty* left open the question of whether and under what circumstances a court can conclude that the lender's true intention in seeking to discontinue the prior foreclosure action stemmed from a procedural irregularity that was discovered in the prior proceeding and not from any intention on the part of the lender to actually revoke the acceleration of the debt.

Based upon *NMNT Realty*, one can expect that lenders, in moving to voluntarily discontinue foreclosure actions, will include a statement in their motion papers indicating that the motion to discontinue constitutes a revocation of the acceleration of the debt. However, such statements may not necessarily be dispositive of a lender's true intention in seeking to discontinue. Thus, the unintended consequence of the *NMNT Realty* decision may be that there ends up being discovery in mortgage foreclosure cases into a lender's true intentions where the question is raised regarding why a lender may have filed a motion seeking to discontinue a prior foreclosure action.

For instance, it is possible that deposition discovery or interrogatories can reveal that the lender discovered a procedural irregularity in the prior foreclosure proceeding, and that fact weighed in to some degree on the predecessor lender's decision to discontinue the prior foreclosure action. *NMNT Realty* does not explain how lower courts should address such a factual scenario – *i.e.*, where the lender may have had the intention of trying to discontinue a procedurally improper case. *NMNT Realty*, therefore, may engender a great deal of discovery and motion practice in mortgage foreclosure litigation where statute of limitations issues are raised by the borrowers and the intention of discontinuing prior foreclosure litigation is put at issue.

Note: Christopher A. Gorman is a partner at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, and Director of the firm's Real Estate and Construction Litigation Practice Group.

Note James Wighaus is a law clerk at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP.

Discoverability of Condemnor's Pre-Vesting Appraisal

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what condemnee is representing to such third party as the amount of "just compensation" it will have to pay for acquisition of the subject property.

Absent either of the circumstances above described, the court will be unaware of what the condemnor has previously adopted as its "highest approved appraisal." But then the effects of the body of case law which otherwise excludes discovery and/or use by condemnee against condemnor of an appraisal despite its adoption by condemnor as its "highest approved appraisal as required by both Sections 303 and 304 of the EDPL is an open invitation to condemnors to avoid the constitutional mandate of just compensation in the name of budget economy or to seek to "punish" the condemnee who would contest its original offer. We do not submit here that an offer of settlement by either party is admissible or should in any way be before the court at the time of trial and certainly condemnor is not restrained by the Eminent Domain Procedure Law or any other statute for making an offer of settlement which may exceed its "highest approved appraisal" and certainly that offer of settlement should not be before the trial court. But the case law as it now stands is an inducement to condemnor to seek out appraisers for purposes of trial who had not been involved in preparation of what has been previously represented by condemnor as its "highest approved appraisal," which are substantially below the appraisals mandated by Section 303 and, thus, creating a threat to condemnee that if it challenges the offer made by condemnor pursuant to Section 303, condemnee will run the risk (litigation is always a risk) of having to return with interest a portion of the advance payment made pursuant to EDPL § 304. Is that just compensation?

If a criminal prosecutor were to suppress evidence that might favor the position of a defendant in the hope of securing either a conviction or a confession, he would be removed from office. He who litigates with the state or challenges the state is entitled to the benefit of all that is in support of his position. The state should not be allowed to suppress anything. Should the constitutional right to "just compensation" be subject to a lesser standard? We respectfully submit that to require a condemnor at the very outset to prepare an appraisal of the damages that it will inflict and that such appraisal is required to be the "highest approved appraiser" and, thus, represents condemnor's opinion of what represents "just compensation" and then in the event of a contest to permit the condemnor to submit a lesser appraisal and suppress the content of that "highest approved appraisal," is in effect a denial of just compensation and a violation of the constitutional rights of the owner whose property has been appropriated or condemned for a public purpose. It, in effect, turns the quest for just compensation into a game of chance, in which the "house" is the condemnor.

To sum up: Both the State and Federal constitutions requires that when private property is acquired by eminent domain, that the owner thereof receive just compensation. New York Eminent Domain Procedure Law requires that condemnor obtain an appraisal and offer to the owner the amount of its "highest approved appraisal," which is then what the condemnor at that point represents to be just compensation. But if the owner does not believe that this represents just compensation, condemnor must nevertheless pay the sum represented by the highest approval appraisal as an advance payment. The condemnor is then permitted to suppress knowledge of that "highest approved appraisal" and file with the court for purposes of trial an appraisal of a lesser sum than its "highest approved appraisal;" thus threatening the property owner with the prospect of having to return some portion with interest of what has been previously represented as condemnor's highest approval appraisal and the just compensation to which the owner is entitled. Can this possibly represent just compensation?

Note: Edward Flower was admitted to the practice of law in New York State in April 1956 and has practiced since that time (62 years). He served as an Assistant County Attorney specializing in eminent domain matters and upon leaving that office in 1966, he has continued in that field to the present. Although he is 88 years of age, he continues to try eminent domain matters both in the New York State Court of Claims and the Supreme Court.

Pro Bono Attorney of the Month

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ing clients with minor children, given the toll divorce trials often have on young children.

Looking back on her earlier Pro Bono Project referrals, Ms. Brown is grateful for the opportunity they created for her to become acquainted with judges she had not yet appeared before. She finds the Project referrals to be a good way to build relationships with judges because they appreciate the pro bono service she is providing. Ms. Brown encourages other attorneys not currently accepting Project referrals to do so, commenting, "Lawyers who don't do pro bono are missing out on the complete calling of our profession."

Debra Brown and her wife Sherry Mederos have a large family consisting of three sons and ten grandchildren. In her spare time, Ms. Brown can be found boating and fishing off the South Shore.

The Pro Bono Project is extremely pleased to honor Debra Brown as the Pro Bono Attorney of the Month in light of the generous services she has provided to her pro bono clients over the years. We look forward to our continued work together on behalf of those in need for many years to come.

The Suffolk Pro Bono Project is a joint effort of Nassau Suffolk Law Services, the Suffolk County Bar Association and the Suffolk County Pro Bono Foundation, who, for many years, have joined resources toward the goal of providing free legal assistance to Suffolk County residents who are dealing with economic hardship. Nassau Suffolk Law Services is a nonprofit civil legal services agency, providing free legal assistance to Long Islanders, primarily in the areas of benefits advocacy, homelessness prevention (foreclosure and eviction defense), access to health care, and services to special populations such as domestic violence victims, disabled, and adult home resident. The provision of free services is prioritized based on financial need and funding is often inadequate in these areas. Furthermore, there is no funding for the general provision of matrimonial or bankruptcy representation, therefore the demand for pro bono assistance is the greatest in these areas. If you would like to volunteer, please contact Ellen Krakow, Esq. 631 232-2400 x 3323.

Note: Ellen Krakow is the Suffolk Pro Bono Project Coordinator for Nassau Suffolk Law Services.