REAL ESTATE

Backyard Videos Cause Lawsuits

By Andrew Lieb

Effective September 15, 2017, Civil Rights Law §52-a establishes a new private right of action for unwarranted video imaging of residential premises.

The statute reads as follows:

1. Any owner or tenant of residential real property shall have a private right of action for damages against any person who installs or affixes a video imaging device on property adjoining such residential real property for the purpose of video taping or taking moving digital images of the recreational activities which occur in the backyard of the residential real property without the written consent thereto of such owner and/or tenant with intent to harass, annoy or alarm another person, or with intent to threaten the person or property of another person. The provisions of this section shall not apply to any law enforcement personnel engaged in the conduct of their authorized duties.

2. For the purposes of this section, "Backyard" shall mean that portion of the parcel on which residential real property is located which extends beyond the rear footprint of the residential dwelling situated thereon, and to the side and rear boundaries of such parcel extending beyond the rear footprint of such residential dwelling.

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As such, the following elements must be pled in order to set forth a cognizable cause of action pursuant to Civil Rights Law §52-a: (a) Plaintiff is the owner or tenant of residential real property (hereinafter "Plaintiff's Property"); (b) Defendant installed or affixed a video imaging device on property adjoining Plaintiff's Property (hereinafter "Act"); (c) Defendant's Act was for the purpose of videotaping and/or taking moving digital images of recreational activities which occur in the backyard of Plaintiff's Property; (d) Plaintiff did not provide written consent to Defendant for such Act; (e) Defendant's Act was undertaken with the intent to harass, annoy and/or alarm another person, and/or with intent to threaten the person or property of another person; and (f) Plaintiff was damaged as a result thereof.

As can easily be discerned, pleading such a cause of action is an exciting new tool in counsel's arsenal for neighbor disputes. However, the damages element renders the use of such a cause of action functionally problematic. Specifically, it's hard to imagine a situation where a cost / benefit analysis would provide suitable damages to justify the cost of prosecuting this new cause of action. Key to this analysis is the fact that this statutory cause of action provides no statutory damages nor does it offer attorneys' fees incident to prosecution. Therefore, only actual damages or nominal damages can be recovered in a lawsuit. As such, it is anticipated that this new cause of action will not be readily utilized by plaintiff's counsel. Nonetheless defense counsel may find a viable use for this new statutory cause of action because a defendant's cost-benefit analysis in bringing a counterclaim enjoys a much lower cost than that realized by a plaintiff who must determine if it's viable to commence an action in the first instance. As such, a §52-a cause of action is anticipated to serve as a useful offset to a neighbor dispute when considering the adage, "the best defense is a good offense."

Setting aside the anticipated utilization of §52-a in an actual lawsuit, all real estate practitioners must be conscious of this new legislation when advising clients with respect to establishing claims for trespass, conversion of property, nuisance and the like, because §52-a creates exposure to the unknowing client who installs a video camera, at the beckoning of his attorney or otherwise, when asked for proof of these claims. As such, all real estate practitioners, who advise clients concerning the requisite evidence to establish claims of trespass, conversion of proper, or nuisance, should provide an informed consent letter about §52-a at the time of advising such clients concerning videoing their property. While it is acknowledged that the intent element, delineated at "c" *supra*, would fail in this scenario, trained litigation counsel should always be mindful of the evidentiary threshold necessary to prove a want of intent and the cost that their client will realize in defending such a lawsuit before it could be dismissed on such grounds. As a result, an informed consent letter is the best practice.

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CORPORATE

Is a Contract Repudiated When a Party Brings Suit for Rescission and Reformation?

By Gisella Rivera

"No," holds the New York Court of Appeals under *Princes Point LLC v Muss Development LLC*., 2017 NY Slip Op 07298 (N.Y. Oct. 19, 2017), reversing the New York Appellate Division, First Department in *Princes Point LLC v Muss Development LLC*, 138 AD3d 112, (1st Dept, 2016).

In 2004, Princes Point agreed to buy from Muss Development a 23-acre site of waterfront land in Staten Island, subject to the delivery by Muss Development of all municipal approvals for land development. The property was previously listed as a hazardous waste site by the New York State Department of Environmental Conservation ("DEC"). Muss Development had successfully delisted the property in 2001 after performing work at the property, which included building a revetment seawall along the shoreline. If municipal approvals were not obtained by a certain date, either party can terminate the contract and the deposit of $1.9 million would be returned to Princes Point. However, if Muss elected to terminate the contract, Princes Point could waive the municipal approval and close with a reduced purchase price, or Princes Point could choose to extend the closing date, provided that it pays an additional deposit.

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In 2005, Muss Development informed Princes Point that it was unable to obtain the municipal approvals since the DEC required additional work on the revetment walls, and that it could terminate the contract or extend the closing date if Princes Point was willing to increase the purchase price, increase the deposit, reimburse Muss Development for half of the costs to obtain the municipal approval and waive any legal action if Muss Development was not able to obtain the municipal approval or the work required to obtain the municipal approval were not completed by the extended closing date. Princes Point agreed and the purchase agreement was amended on 2006.

The revetment walls required more work than was anticipated and the closing date was extended several more times. Prior to the most recent extended closing date, Princes Point brought a claim for fraud and misrepresentation against Muss Development and requested the court for rescission of the 2006 amendment and specific performance on the 2004 contract.

The Supreme Court, New York County ruled that, by seeking rescission of the 2006 amendment, Princes Point "anticipatorily breached" the contract, thus allowing Muss Development to terminate the contract and be entitled to a return of the full amount of the deposit plus the payment of fees. The court's ruling was appealed to the Appellate Division, 1st Department, who affirmed the Supreme Court's decision, but gave leave to Princes Point to appeal to the N.Y. Court of Appeals, certifying the question "whether the mere commencement of an action seeking "rescission and/or reformation" of a contract constitutes an anticipatory breach of such agreement." On the facts of the case, the N.Y. Court of Appeals held that "*it does not.*"

In an action for non-performance of a contract, courts traditionally look to protect the injured party's expectations of performance by the other party of its obligations and promises. "When parties make a bilateral contract, they exchange promises in the expectation of a subsequent exchange of performances." (*see* E. Allan Farnsworth, Contracts). One of the court-developed remedies available to an injured party is the right of such injured party to suspend its performance and ultimately refuse to perform if the other party fails to perform. The foregoing right, however, is generally exercised only upon the occurrence of a material or total breach by the breaching party (i.e. the breaching party's failure to perform a material obligation under the contract).

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