REAL ESTATE

NYS Sexual Harassment Law Exposes Businesses to Claims by Independent Contractor Victims of Independent Contractor Harassers: Real Estate Brokerage Firms be Warned

By Andrew Lieb

Effective on April 12, 2018, NYS companies utilizing the services of independent contractors, such as real estate brokerage firms, became exposed to liability for the acts of their independent contractors who sexually harassed other independent contractors who were associated with the same company by way of new Executive Law §296-d, which reads as follows:

Sexual harassment relating to non-employees. It shall be an unlawful discriminatory practice for an employer to permit sexual harassment of non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to sexual harassment, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing such cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser shall be considered.

Andrew Lieb

The statute is clear that an employer is now exposed to a non-employee's claims of sexual harassment when such harassment occurred in the employer's workplace and the employer is alleged to have permitted the harassment. Further, the statute provides an available affirmative defense for the employer if the employer can allege and prove that it undertook "immediate and appropriate corrective action" concerning such known harassment. As such, and consistent with new Labor Law §201-g's mandatory sexual harassment policies and trainings rules, employers must ensure that sexual harassment is expressly known to be impermissible at the workplace and that corrective procedures are known by way of implementing compliance protocols for reporting, training and discipline.

Anti-sexual harassment compliance is now statutorily required for all New York State companies, who must provide training "for employees" by way of Labor Law §201-g(2)(c). However, such companies should also require their independent contractors to complete these sexual harassment trainings. While Executive Law §296-d does not expressly state that an employer is exposed to suit where the harasser is another independent contractor, it is likely that exposure to companies will exist for the wrongful acts of their independent contractor harassers.

To arrive at this conclusion, that companies will likely be exposed to liability stemming from the wrongful acts of their independent contractors as to other independent contractors, the starting place is the statutory text, which includes the conflicting terms "employer" and "agent." While the term employer, set forth throughout the statutory text, could be argued to limit the statutory application to only harassers who are employees, the term "agent" could be argued to expand the statute's application to cover any harassers at the workplace. With respect to the term "employer," the definition section of the Executive Law does not define the term as restricted to an employer-employee relationship, but instead, Executive Law §292(5) only limits the application of anti-discrimination laws to employers with certain numbers of employees. As such, the definition section is of no utility in defining the statute.

In contrast, rules of statutory con-

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COURT NOTES

By Ilene Sherwyn Cooper

Appellate Division-Second Department

Ilene S. Cooper

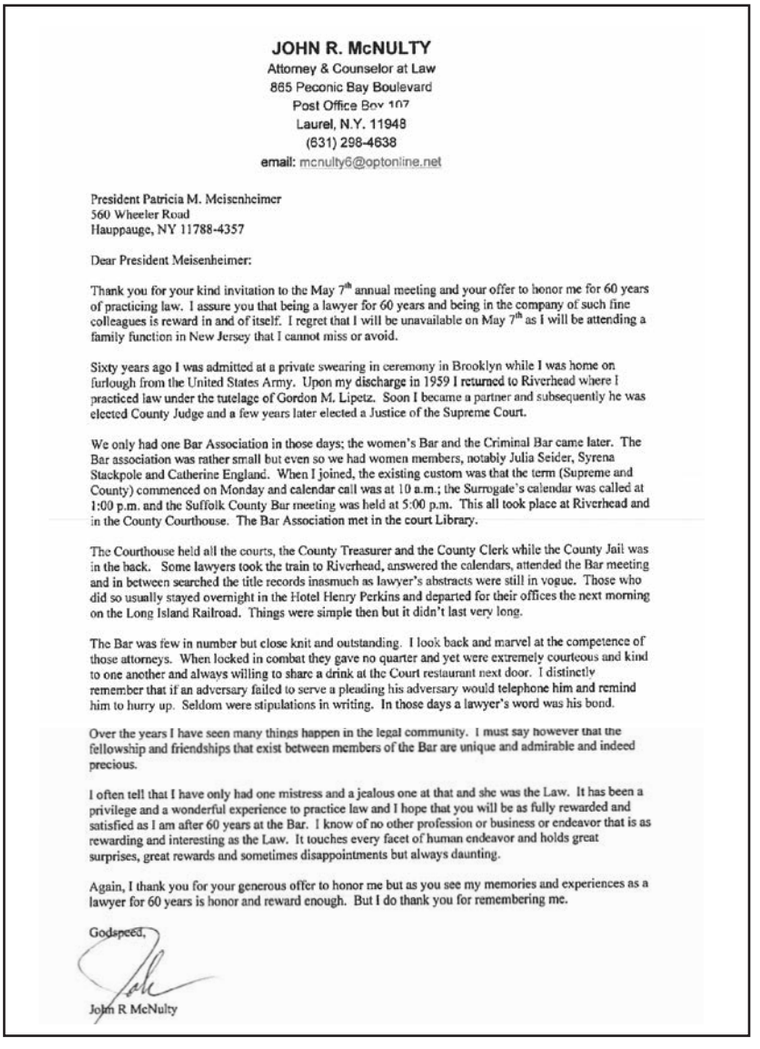
Attorneys suspended:

Ronald A. Lenowitz (admitted as Ronald Alan Lenowitz): By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a special referee, who sustained all four charges against the respondent. The Grievance Committee moved to confirm, and the respondent, by counsel, joined in the application, though requested that a public censure be imposed. The court noted that the charges against the respondent included misappropriating funds entrusted to his charge, commingled client funds with his own, and made cash withdrawals from said funds. Despite respondent's claim that the misappropriation was not intentional, the court, based on the evidence, granted the Grievance Committee's motion. Notwithstanding the respondent's arguments in mitigation, the court noted that respondent routinely commingled his personal funds with client funds, made improper withdrawals for personal and business expenses, and failed to properly reconcile his special account. Under the totality of circumstances, the respondent was suspended from the practice of law for a period of two years.

Attorneys disbarred

Nancy P. Enoksen (admitted as Nancy Patricia Enoksen): The Grievance Committee instituted a disciplinary proceeding against the respondent, and filed a petition containing 10 charges of professional misconduct, including misappropriation of client funds, failure to promptly pay funds to her client, improperly obtaining a confession of judgment in a domestic relations matter and improperly issuing checks from her attorney trust account. The notice of petition directed the respondent to serve and file her answer to the charges, but she failed to do so. The Grievance Committee, therefore, moved to deem the charges against the respondent established, and the court granted the motion. Accordingly, the respondent was disbarred from the practice of law in the State of New York.

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past President of the Suffolk County Bar Association and past Chair of the New York State Bar Association Trusts and Estates Law Section.



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President Patricia M. Meisenheimer
560 Wheeler Road
Hauppauge, NY 11788-4357

Dear President Meisenheimer:

Thank you for your kind invitation to the May 7th annual meeting and your offer to honor me for 60 years of practicing law. I assure you that being a lawyer for 60 years and being in the company of such fine colleagues is reward in and of itself. I regret that I will be unavailable on May 7th as I will be attending a family function in New Jersey that I cannot miss or avoid.

Sixty years ago I was admitted at a private swearing in ceremony in Brooklyn while I was home on furlough from the United States Army. Upon my discharge in 1959 I returned to Riverhead where I practiced law under the tutelage of Gordon M. Lipetz. Soon I became a partner and subsequently he was elected County Judge and a few years later elected a Justice of the Supreme Court.

We only had one Bar Association in those days; the women's Bar and the Criminal Bar came later. The Bar association was rather small but even so we had women members, notably Julia Seider, Syrena Stackpole and Catherine England. When I joined, the existing custom was that the term (Supreme and County) commenced on Monday and calendar call was at 10 a.m.; the Surrogate's calendar was called at 1:00 p.m. and the Suffolk County Bar meeting was held at 5:00 p.m. This all took place at Riverhead and in the County Courthouse. The Bar Association met in the court Library.

The Courthouse held all the courts, the County Treasurer and the County Clerk while the County Jail was in the back. Some lawyers took the train to Riverhead, answered the calendars, attended the Bar meeting and in between searched the title records inasmuch as lawyer's abstracts were still in vogue. Those who did so usually stayed overnight in the Hotel Henry Perkins and departed for their offices the next morning on the Long Island Railroad. Things were simple then but it didn't last very long.

The Bar was few in number but close knit and outstanding. I look back and marvel at the competence of those attorneys. When locked in combat they gave no quarter and yet were extremely courteous and kind to one another and always willing to share a drink at the Court restaurant next door. I distinctly remember that if an adversary failed to serve a pleading his adversary would telephone him and remind him to hurry up. Seldom were stipulations in writing. In those days a lawyer's word was his bond.

Over the years I have seen many things happen in the legal community. I must say however that the fellowship and friendships that exist between members of the Bar are unique and admirable and indeed precious.

I often tell that I have only had one mistress and a jealous one at that and she was the Law. It has been a privilege and a wonderful experience to practice law and I hope that you will be as fully rewarded and satisfied as I am after 60 years at the Bar. I know of no other profession or business or endeavor that is as rewarding and interesting as the Law. It touches every facet of human endeavor and holds great surprises, great rewards and sometimes disappointments but always daunting.

Again, I thank you for your generous offer to honor me but as you see my memories and experiences as a lawyer for 60 years is honor and reward enough. But I do thank you for remembering me.

Godspeed,

John R McNulty

Real Estate Brokerage Firms be Warned *(Continued from page 18)*

struction are useful with respect to the existence of the term "agent," which exists in the statutory sentence "when the employer, *its agents* or supervisors knew or should have known." *(emphasis added).* Specifically, the inclusion of such term must be deemed to be an intentional choice by the legislature, by way of rules of statutory construction because other aspects of the Executive Law which concern employment anti-discrimination laws, such as Executive Law §296(1)(a) do not include the term "agent" whatsoever.

Beyond the terms "employer" and "agent," the statutory text includes the required consideration of the "extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the harasser." The inclusion of this text in the statute must also have a purpose, pursuant to rules of statutory construction, and if the statute is restricted to only employee harassers there appears no reason for the inclusion of this text. Specifically, an employer, by definition, under tax law, workers' compensation law and otherwise, always controls and directs the details and ultimate result of an employee's work. Therefore, the only possible purpose for this text is to include categories of independent contractors who are nonetheless controlled or the responsibility of the company.

In addition to reviewing the four-corners of the statutory text under rules of statutory construction, it is helpful to determine if the statutory language has been interpreted in other similar contexts. Operatively, the statutory text, "extent of the employer's control…" is the precise language utilized by the Second Circuit in *Summa v. Hofstra University*, 708 F.3d 115 (2013), where the federal circuit imputed "employer liability for harassment by non-employees according to the same standards for non-supervisory coworkers" with respect to Title VII claims.

Therefore, it is anticipated that state courts will follow *Summa v. Hofstra University*, in defining the scope of Executive Law §296-d. As a result, exposure likely exists for companies because of the wrongful acts of their independent contractor harassers. Pursuant to the reasoning of *Summa v. Hofstra University*, exposure is heightened for the real estate brokerage industry because it utilizes the services of independent contractors who are expressly controlled and/or subject to the firm's legal responsibility. Specifically, 19 NYCRR 175.21(a) provides as follows:

> The supervision of a real estate salesperson by a licensed real estate broker, required by subdivision l(d) of §441 of the Real Property Law, shall consist of regular, frequent and consistent personal guidance, instruction, oversight and superintendence by the real estate broker with respect to the general real estate brokerage business conducted by the broker, and all matters relating thereto.

Therefore, real estate brokerage firms are now likely exposed to sexual harassment claims stemming from independent contractor harassers of independent contractor victims. To mitigate exposure, brokerage firms should immediately implement Labor Law §201-g's mandatory sexual harassment policies and trainings requirements as to their independent contractors in addition to their employees. As such, pursuant to guidance from *Summa v. Hofstra University* and with the implementation of proper compliance protocols, brokerage firms will be able to prove that there was "a reasonable avenue for complaint," which was "immediate or timely and appropriate in light of the circumstances, particularly the level of control and legal responsibility [the employer] has with respect to [the employee's] behavior" and mitigate exposure.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer.

Regulations Seek to Curb Illegal Dumping and Add Controls *(Continued from page 16)*

regulations. One example is uncontaminated wood pallets recycled to make new ones. Other BUDs, are case specific, approved pursuant to a petition by the applicant. An example is a BUD for dredged materials. Both categories of BUDs expired on May 3, 2018. New pre-determined BUD categories can be found in 6 NYCRR §360.12(c). Also, a person can still obtain a case-specific BUD. However, unlike in the past, it is subject to renewal every five years.

Arguably, the topic that has received the most attention in the new regulations is the BUD for fill, obtained from excavation and other construction activities.[8] A distinction is made between general fill, restricted-use fill and limited-use fill, depending on the degree of contamination. Special rules apply to the use of fill on Long Island, which draws its water from underground aquifers. Specifically limited-use fill, which can be applied elsewhere under foundations and pavement, is not permitted on Long Island. In order to characterize the fill, generators face new sampling and analysis requirements.

Another new feature is the regulation of mulch processing facilities,[9] coming on the heels of frequent nuisance complaints from neighbors. Generally, registration is required for a facility that stores and processes more than 10,000, but less than 25,000 cubic yards of material, and a full permit is needed for handling larger quantities.

The scope of this article is insufficient to address the many other categories of solid waste treated in the new regulations. However, practitioners whose clients are generators, transporters, recyclers or disposal facilities should carefully study these rules and urge their clients to comply with the new permitting, handling, and reporting requirements.

Note: Lilia Factor is a principal of Factor Law and the Chair of the Suffolk County Bar Association Environmental Law Committee. Her practice focuses on environmental law, land use, and civil litigation. She can be reached at (516) 659-9523 or at factoratlaw@gmail.com.

[1] 6 NYCRR Parts 360-369.
[2] Town of Islip v. Datre, Jr. et al., 2:16-CV-2156., E.D.N.Y. Bianco, J.
[3] http://www.dec.ny.gov/docs/materials_minerals_pdf/enfdisltr.pdf
[4] 6 NYCRR 360.4 Transition
[5] 6 NYCRR 360.15(f).
[6] 6 NYCRR 364-3.
[7] 6 NYCRR 364-3.1.
[8] 6 NYCRR 360-13.
[9] 6 NYCRR 361-4.