REAL ESTATE

Top 10 Real Estate Laws of 2016

By Andrew Lieb

Now that 2017 is here it is important to be aware of the changes in the law for our industry. This is not a list about the best events from 2016, but, instead, a list that highlights the new legal landscape that you face as real estate attorneys in 2017. Being familiar with these laws, regulations and opinions may help you to better address your client's goals and to make you money while helping you to avoid malpractice.

Defaults waived in foreclosures

On June 23, 2016, the RPAPL and CPLR were amended in relation to foreclosure proceedings and pre-foreclosure notices. Amongst the many changes to foreclosure practice that were brought about by this robust legislation, the key changes are an obligation on servicers to maintain abandoned residential property, clarified rules and penalties for negotiations at foreclosure settlement conferences, an avenue for expedited foreclosure judgments with respect to abandoned properties, a registry of abandoned properties, a consumer bill of rights with notice protocols, and updated 1303 and 1304 foreclosure notices.

Most importantly, the changes effectively eliminated defaults in foreclosure actions by permitting defendants who appear at their initial foreclosure settlement conferences to serve and file late answers within 30 days of such initial appearance and rendered such appearance, alone, the basis of an excused default. The amendments took effect on December 20, 2016.

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Real Estate broker continuing education changes

On September 9, 2016, the law of agency became a required topic in continuing education for real estate brokers, associate real estate brokers, and real estate salespersons by way of an amendment to RPL §441(3)(a). Interestingly, the amended statutory text states that the instruction must be "one hour" on the topic, but the then existing regulations concerning continuing education in the real estate brokerage field had only permitted "each course module containing at least three hours of instruction," at 19 NYCRR 177.3(g). So, the Department of State promptly amended such regulation, on January 4, 2017, to provide for the statute's functional effectiveness. As a result, now all of real estate brokerage continuing education may be in one hour modules rather than three. The amendment to RPL §441(3)(a) was effective on January 1, 2017.

Premises liability for neighboring properties to the situs of trip and fall expanded

The Court of Appeals, in *Sangaray v. West River Associates, LLC*, set the summary judgment burden for neighboring property owners to the situs of a trip and fall. While the case before the court addressed the statutory duty to maintain abutting sidewalks in New York City, as set forth in Administrative Code of the City of New York §7-210, it is anticipated to have far broader applicability throughout the state due to the way the court justified its holding. As the court explained, not having a duty to maintain the situs of the injury does not "foreclose the possibility that a neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained."

Moving forward, plaintiffs' counsel should carefully craft their pleadings in order to allege that neighboring property owners, to the situs of a trip and fall, independently failed to comply with their own duty to maintain such abutting property in a reasonably safe condition and, as a result, such failure was the proximate cause of the injury. Further, defendants seeking to escape liability on summary judgment must now not only prove "that the alleged defect was on another landowner's property," but, also, that such neighbor "complied with its own duty to maintain . . . its property in a reasonably safe condition and/or that it was not a proximate cause of plaintiff's injuries."

Storm in Progress Doctrine includes wintery mix

The Court of Appeals, in *Sherman v. New York State Thruway Authority*, broadened the bar's understanding of when a storm ends pursuant to the Storm in Progress Doctrine. The doctrine provides a landowner with a complete defense to "injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time

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thereafter," as the court had previously held in *Solazzo v. New York City Tr. Auth.*

Therefore, the precise time when the storm ends is of great import to the doctrine's applicability. According to the court, when "precipitation was falling at the time of claimant's accident and had done so for a substantial time prior thereto, while temperatures remained near freezing," the doctrine applied irrespective if it was only "raining" at the moment of the fall so long as there was a "wintery mix" still existing at such time. Moving forward, temperature is no longer the only dispositive factor to apply the doctrine. Instead, a totality of the weather circumstances is the standard.

Vested right to develop requires reasonable reliance

The Court of Appeals, in *Exeter Building Corp. v. Town of Newburgh*, clarified the reliance element to obtain "a common law vested right to develop the property in accordance with prior zoning regulations." The court clarified that the reliance element from the "*Magee* test," which the court set in its 1996 holding *Town of Orangetown v. Magee*, must be reasonable. With respect to the reliance element, the *Magee* holding had only stated that "[t]he landowner's actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless."

Now, practitioners must also focus on whether such reliance was reasonable under the circumstances when seeking a common law vested right to develop. As an illustration of reliance being unreasonable, the dispositive factor in *Exeter Building Corp.* was that "the Town Planning board had repeatedly warned petitioners of the proposed rezoning." Moving forward, land use counsel must hear what the Town Planning Board is saying, rather than just focusing on the written approvals obtained.

Vested right to develop requires legally issued permit

The Court of Appeals, in *Perlbinder Holdings, LLC v. Srinivasan*, again analyzed the Magee test with respect to establishing a common law vested right to develop property in accordance with prior zoning regulations, but this time addressed the test's valid permit element. The court held that "[v]ested rights cannot be acquired . . . on an invalid permit." The facts before the court concerned a permit for a non-conforming "grandfathered" sign, which was erroneously issued because the "non-conforming use had been lost since that use had been discontinued for more than two years," which was the applicable grandfathering limitations period to the facts. As the court explained, wrongfully issued permits can be revoked by the municipality at any time. Moving forward, counsel needs to independently confirm and perhaps litigate whether the permit that is relied upon for a vested right was legally issued in the first instance.

Justiciability of positive declaration pursuant to SEQRA

The Court of Appeals, in *Ranco Sand and Stone Corp. v. Vecchio*, addressed whether a lead agency's positive declaration, under SEQRA, requiring an applicant for rezoning to prepare a Draft Environmental Impact Statement (DEIS), is justiciable in an Article 78 Proceeding. In reaching its determination, the court first looked to its 2003 holding in *Gordon v. Rush*, which set forth the "two requirements," for ripeness, including: "whether the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury;" and whether the harm "may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." Next, the court differentiated the requirements by stating that the second requirement requires more than an inability to "recoup the costs incurred and time spent on conducting a DEIS." Then, the court gave illustrations of ways to satisfy the second requirement, including by claiming that "the declaration is unauthorized or that the property is not subject to SEQRA" or the "Town Board acted outside the scope of its authority." Simply stated, the court reminded practitioners that "a positive declaration imposing a DEIS requirement is usually" not ripe for review. Moving forward, counsel must advise clients of the cost-benefit analysis to bringing an Article 78 based upon a positive declaration given the limited window to obtain justiciability of the issue.

Condominium lien priority

The Court of Appeals, in *Plotch v. Citibank*, clarified lien priority issues between a consolidated mortgage and a condominium's common charge lien. The court held that a consolidated mortgage constitutes only one first mortgage of record, for purposes of lien priority under the Condominium Act, if it is filed prior to the common charge lien. It is unknown how lien priority will be decided in the future if a common charge lien is filed prior to the consolidated mortgage, but it is likely to lose priority based on the holding's justification.

Moving forward, practitioners must race to file their liens to preserve priority.

End of anonymous LLC members in NYC

The Financial Crimes Enforcement Network (FinCEN) of the U.S. Department of the Treasury issued a Geographic Targeting Order, on July 22, 2016, "requiring [title insurance company] to collect and report information about the persons involved in certain residential real estate transactions" that do not involve "a bank loan or other . . . external financing." It being noted that FinCEN's final rule, effective July 11, 2016, which promulgated 31 CFR 1010.230(a), requires similar disclosures by banks (effecting deals with mortgage loans). Irrespective, under the GTO, title insurance companies must report "within 30 days of the closing," on Form 8300, *inter alia*, "the name, address, and taxpayer identification number of all [] members" of any limited liability company involved in a real estate transaction.

In New York, the GTO applies to "total purchase price[s] of $1,500,000 or more in the Borough[s] of Brooklyn, Queens, Bronx, or Staten Island" and "a total purchase price of $3,000,000 or more in the Borough of Manhattan." The GTO was effective on August 28, 2016. As a result, there are no more anonymous high-end purchases in the five boroughs.

Citizenship for real estate investment trusts

The U.S. Supreme Court, in *Americold Realty Trust v. Conagra Foods*, determined the citizenship of a REIT for purposes of diversity jurisdiction in Article III Courts. The court held that "citizenship is based on the citizenship of its members, which include its shareholders," not the "citizenship of its trustees alone." In rendering its holding, the court differentiated a REIT from a "traditional trust," which would only have the citizenship of its trustees, and a corporation, which has citizenship "where they were chartered and had their principal places of business." Moving forward, diversity jurisdiction will be difficult to obtain for REITS as they will need to demonstrate that no shareholder shares citizenship with the adverse party.

Practitioners should therefore carefully consider the costs of an application to remove a claim to federal courts on diversity grounds, in proving the citizenship of each shareholder, and the potentiality that such removal will be unsuccessful when crafting their litigation strategy.

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similar circumstances.

The *JFD* Court likened discovery to Rosario discovery in criminal cases, such as police officer's memo book notes, which are discoverable, but ultimately in possession of the prosecution. In 2015, in *KC v. JC*, 50 Misc. 3d 892 (Sup. Ct. Westchester County, 2015), the court aptly turned *Ochs* on its head, stating that it was hard pressed to see how disclosing the underlying data could possibly further fracture the alleged frail relationships the children already had with their parents:

"The degree to which any damage may occur to these already fraught relationships is dwarfed by the substantial benefit to the Court in obtaining a full understanding of the forensic report and the process used by the evaluator to reach its conclusions, so that the Court may determine the best interests of the children."

Thus, the recent persuasive authority (congruent with the CPLR) is that discovery of the entire forensic file is and should be permitted, unless it can somehow be shown that releasing same would result in substantial prejudice.

What access does the court have prior to trial regarding the contents of the report? First, the report is entirely hearsay (sometimes double, triple, quadruple hearsay) and thus per se inadmissible absent an agreement of the parties to let portions of the report (or the entire report) into evidence, subject to cross-examination. A strict reading of the rules, then, appears to prohibit any access into the contents or conclusions of the report, prior to the moment it is handed up to the expert witness to be verified as made under oath, at trial.

Conflicting duties and responsibilities come into play, however, if the report contains, for example, severe allegations of parental misbehavior that would serve as grounds for an immediate change of custody. In that event, excerpts from the report could and should freely be cited by the movant, insofar as the rubric concerns the best interest of the child and the hearsay exception can be overcome in that the contents are not being offered for the truth but under the state of mind exception, or as dealing with a party's mental, emotional, physical state, which is never hearsay.

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