

Top 12 Real Estate Laws of 2012

By Andrew Lieb

Now that 2013 is here it is important to be aware of changes in the law in order to properly represent our clients. This is not a list about the best events from 2012, but, instead, a list that highlights the new legal landscape that you face as real estate practitioners. Being familiar with these laws, regulations and opinions may help you to better address your clients' matters, save your license and make you money.

Extension of Tax Relief for Mortgage Forgiveness

The Mortgage Forgiveness Debt Relief Act of 2007 (the Act) allows taxpayers avoid cancellation of debt income with respect to their principal residence should the debt relief be from mortgage restructuring or in connection with a foreclosure. The Act was set to expire in December of 2012, but has now been extended through January of 2014 by The American Taxpayer Relief Act of 2012 (better known as the "Fiscal Cliff Bill"). The Mortgage Forgiveness Debt Relief Act provides a great advantage to struggling homeowners who have caught a break by means of mortgage modification, or those who have lost their home due to foreclosure, short sale, or deed-in-lieu of foreclosure, as the cancellation of debt income from such now remains non-taxable.

Prejudgment Interest in Breach of Contract Suit

The Court of Appeals in *J. D'Addario & Co., Inc. v. Embassy Industries, Inc.* clarified if a vendor was entitled to statutory prejudgment interest pursuant to CPLR §5001(a) when a purchaser defaulted by failing to appear at a closing while the contract of sale had a liquidated damages provision that was the "sole remedy" and did not reference the CPLR section. The court suggested that a contractual clause expressly addressing statutory interest would have prevented the entire lawsuit, but found the fact that the deposit was placed in an interest-bearing account cou-

pled with the "sole remedy" language to prevent statutory prejudgment interest under principles of freedom of contract.

Real Estate Broker's Duty at an Open House

The Court of Appeals in *Douglas Elliman LLC v. Tretter* defines the scope of a real estate broker's fiduciary duty of undivided loyalty to its client when acting as an exclusive seller's agent. The case involved a real estate broker suing for its commission in breach of contract and its client's counterclaim for breach of its fiduciary duties. The court held that the broker had no duty to refrain from offering to show other properties to buyers who the broker met while at an open house for its current client. The court expressly stated that absent an agreement to the contrary between the parties, a broker is free to cultivate other clients at its client's open house.

Mortgage Loans Licensing Exemption

Banking Law §590(2)(a) is amended from permitting four private loans without licensing within a given year to three in a given year and no more than five in a two year period. Additionally, the amendment also provides that an entity shall not be exempt if any loan is made which was solicited, processed, placed or negotiated by a mortgage broker, mortgage banker or exempt organization. This aspect of the amendment is designed to prevent brokers from working with unregulated hard money private lenders because of their noncompliance with consumer protections, disclosure requirements and regulatory structures established by the Banking Law.

Real Estate Broker's Due Diligence Report & Commissions

The Court of Appeals in *Georgia Malone & Co., Inc. v. Rieder* clarifies when a real estate broker earns a commission by holding that merely creating due diligence reports for a buyer does not give rise to earning a brokerage commission. In fact,



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the case states that the procuring broker who utilized said reports in earning its commission does not owe a share of the commission in unjust enrichment to another broker who created due diligence reports on the property that were utilized in the brokered deal.

Partial Eviction, Trivial Interference and Rent Abatements

The Court of Appeals in *Eastside Exhibition Corp. v. 210 East 86th Street Corp.* reiterated that the remedy for a partial eviction is a full rent abatement before stating that a landlord's placement of cross-bracing between two steel support columns, which minimally impeded the flow of foot traffic and created a slight diminution in a waiting area, was not a partial eviction. Instead, the court held that a trivial interference only gives rise to actual damages to be determined under the circumstances.

Purchaser's Burden in Vendor's Repudiation Damages Suit

The Court of Appeals in *Pesa v. Yoma Development Group, Inc.* emphatically declared that a purchaser has the burden to demonstrate that they were ready, willing and able to close in order to prevail in a damages lawsuit where they alleged that the vendor repudiated the contract of sale.

Green Guides for Marketing

The Federal Trade Commission has promulgated regulations to "help marketers avoid making environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. [section] 45." These guides are especially important for developers, landlords and brokers promoting both the benefits of their buildings and compliance with certifications.

Government Induced Flooding and the Takings Clause

The United States Supreme Court in *Arkansas Game and Fish Com'n v. U.S.* held that there is no automatic rule that a government induced flooding of limited duration is exempt from the Takings Clause of the Fifth Amendment and that instead such a flooding may be compensable dependent on the facts of a given situation. The Supreme Court then laid forth factors relevant to the issue of compensation, including: time; degree to which the invasion is intended or is the

foreseeable result of authorized government action; character of the land at issue; owner's reasonable investment-backed expectations regarding the land's use; and severity of the interference.

LEED Real Property Tax Exemption

The Real Property Tax Law added a new §470 to authorize a municipal corporation to provide a real property tax exemption for improvements to real property meeting LEED certification standards for green buildings, the green building initiative's green globes rating system, the American National Standards Institute, or substantially equivalent standards for certification using a similar program for green buildings as determined by the municipal corporation. In accordance therewith, Suffolk County amended Chapter 775 of its County Code by adding new Article XIII to provide a real property tax exemption for improvements to real property which meets LEED certification standards.

Compensation of Mortgage Bankers

Banking Law § 590-b is amended with a new subdivision to ban yield spread premiums which will help prevent the abuse of steering or directing a consumer to rates or payment terms that are more expensive than that for which the consumer qualifies. The purpose is to prevent mortgage lenders and brokers from receiving compensation that is based on or varies with the terms of any home loan.

Attorney Advertising for Foreclosures

In Opinion 921, the New York State Bar Association's Committee on Professional Ethics advised that an advertisement that an attorney can "stop" a foreclosure proceeding is prohibited as false, misleading and deceptive. If the advertisement were modified to make it accurate, it would have to be accompanied by a disclaimer that prior results do not guarantee a similar outcome.

This list only provides a small blurb on each new law, regulation and opinion. There may be further discussion on these topics going forward as they get fleshed out in the courts. So stay tuned.

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 serves as Co-Chair to the Real Property Committee of the Suffolk Bar Association and served as this year's Special Section Editor for Real Property in The Suffolk Lawyer.

RECENT RULING

A brief "last word" on the Medicare Lien trumping GOL 5-335

By James G. Fouassier

There was an endnote regarding *Trezza v. Trezza* (32 Misc.3d 1209; 934 NYS 2d 37 (Sup Ct Kings Co 2011)) in my recent article, "The Medicare Lien Trumps GOL 5-335" (*The Suffolk Lawyer*, December 2012, Vol 28 No 3), that said:



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Trezza was the subject of my article in the *Suffolk Lawyer's* February, 2012, edition: "Medicare HMO May Not Assert Lien Against Personal Injury Settlement." In light of the federal case which is the subject of this article, the finding in *Trezza* obviously no longer applies.

The Second Department ruled on the appeal in *Trezza* on Dec. 12, 2012 "that General Obligations Law § 5-335, insofar as applied to Medicare Advantage organizations under Part C, is preempted by federal law since it would impermissibly constrain contractual reimbursement rights authorized under the "Organization as secondary

payer" provisions of the Medicare Act (*citations omitted*). Moreover, we agree with the conclusion expressed most recently in a case from the United States District Court for the Southern District of New York that this is so "[w]hether or not there is a private right of action for [Medicare Advantage] organizations" (*Potts v. Rawlings Co., LLC*, 2012 WL 4364451, *10, 2012 US Dist LEXIS 137802, *36)." Thus, because General

Obligations Law § 5-335 is expressly preempted by the Medicare Act, the Supreme Court erred in granting the plaintiff's motion to extinguish the purported lien and/or claim for reimbursement based on that section. (2011-07772; http://www.ny.courts.gov/reporter/3dseries/2012/2012_09048.htm)

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President's message (Continued from page 1)

On January 17th, the SCBA conducted a free three hour CLE seminar to train attorneys in a "how-to" represent our returning military veterans on a pro bono basis in the various areas of law that these veterans face on a daily basis in dealing with our legal system. Everyday the SCBA gets numerous requests from veteran's organizations seeking our help in providing these brave men and women with the legal assistance that they desperately need. Although the SCBA has for some time maintained a panel of volunteer attorneys who have agreed to assist veterans on a pro bono basis, this panel is being overwhelmed with requests for assistance and needs additional volunteers to assist in this worthy effort. I hope that everyone who takes advantage of this free CLE program will offer their services. SCBA Executive Director, Jane LaCova (631) 234-5511,

is our coordinator in matching our volunteers with the various veterans who need help. Please give us your support and volunteer.

I also ask for your support of the 2nd Annual Cohalan Cares for Kids to benefit the Cohalan Children's Center to be hosted at the SCBA on February 7, 2013. See further details elsewhere in this paper.

Finally, by the time you read this article, the SCBA's Nominating Committee will be in the process of interviewing many of our members for the various positions of leadership on our Board of Directors and Executive Committee. To all of you who step forward to give of your time to the SCBA, thank you and good luck in the final selection process leading up to nomination and eventual election at the SCBA Annual Meeting to be held on the first Monday in May.