THE SARATOGA COUNTY BAR ASSOCIATION

*Serving the Interests of Justice*


LAW NOTES VOL. XI, ISSUE II APRIL-JUNE 2017

**INSIDE THIS ISSUE:**



SARATOGA COUNTY BAR ASSOCIATION
P.O. BOX 994
SARATOGA SPRINGS,
NEW YORK 12866
TEL & FAX:
(518) 280-1974
PATRICIA CLUTE
EXECUTIVE COORDINATOR
PCLUTE@SARATOGACOUNTYBAR.ORG

M. ELIZABETH CORENO, ESQ.
EDITOR-IN-CHIEF
CHRISTOPHER MARNEY
MANAGING EDITOR



# TORTS AND CIVIL PRACTICE: SELECTED CASES FROM THE APPELLATE DIVISION, 3RD DEPARTMENT

TIMOTHY J. HIGGINS, ESQ.

## "TREATING" DOCTOR MUST BE IDENTIFIED IN CPLR § 3101 EXPERT DISCLOURE

**Schmitt v. Oneonta City School Dist.**
**(Egan Jr., J., 6/8/17)**

Plaintiff, who claimed injury after a slip and fall in defendant's parking lot, served an expert witness disclosure that made no mention of a medical expert. When the videotaped testimony of plaintiff's treating orthopedist was taken for use at trial, defendant objected to any offer of "expert" testimony due to the failure to identify the doctor in a CPLR § 3101 disclosure. Supreme Court (Coccoma, J., Otsego Co.) deemed plaintiff in compliance with expert disclosure requirements but the Third Department reversed, pointedly noting that unlike the 1st, 2nd and 4th Departments, "this Court interprets [the statute] as requiring disclosure to any medical professional, even a treating physician or nurse, who is expected to give expert testimony".

## MEDICAL MALPRACTICE "CERTIFICATE OF MERIT"

**Calcagno v. Ortho. Assoc. of Dutchess County**
**(Garry, J., 3/2/17)**

Plaintiff's counsel filed a complaint alleging medical malpractice by the defendants in treatment of the plaintiff's fractured ankle but upon filing did not submit the Certificate of Merit required by CPLR § 3012-a; nor was the certificate filed within the permissible 90-day extension afforded by CPLR § 3012-a(a)(2). In March 2015, some 19 months after suit was filed, with the Certificate still outstanding, Supreme Court (Cahill, J., Ulster Co.) granted defendants' motion to dismiss the complaint (declining to grant plaintiff's cross-motion to permit late service of the Certificate). Affirming, the Third Department found plaintiff's Certificate inadequate, as it was based on an affidavit by plaintiff's physical therapist, who was "incompetent to attest to the standard of care applicable to physicians and surgeons".

## "HEAD INJURY/POST-CONCUSSIVE SYMPTOMS A "SERIOUS INJURY"

**Rodman v. Deangeles**
**(Clark, J., 2/16/17)**

Defendant conceded liability and went to trial solely on the issue of whether plaintiff sustained a "serious injury" as defined in New York Insurance Law § 5102(d). The jury found plaintiff's evidence; a severe head wound, concussion and post-concussive symptoms including dizziness, chronic headaches, vision dysfunction, and impaired balance, memory and concentration; sufficient to show both a permanent consequential limitation and significant limitation of use of his brain. However, Supreme Court (Rumsey, J., Cortland Co.) granted defendant's motion to set aside the plaintiff's verdict and dismissed the complaint. The Third Department reversed and reinstated the verdict, crediting the testimony of plaintiff's medical experts, one of whom opined that a concussion "is an alteration in the normal brain function due to trauma". Considering that plaintiff's symptoms, although largely subjective, persisted a full four years after the accident, the jury had "a valid line of reasoning and permissible inferences" that supported its conclusion.

## DISCOVERABILITY OF DEFENDANT'S INSURANCE FILE MATERIALS

**Curci v. Foley**
**(Lynch, J., 4/20/17)**

*(Continued on page 2)*

## TORTS AND CIVIL PRACTICE, CONTINUED...

*(Continued from page 1)*

Plaintiff was injured while using a log splitter on defendant's (his father-in-law) property. Defendant, in his Answer to the Complaint, denied ownership of the log splitter; which apparently contradicted a telephone statement provided by defendant to his insurer (information known to plaintiff because he was in possession of a transcript of the statement). Supreme Court (Mott, J., Ulster Co.) granted plaintiff's cross-motion to compel disclosure of an audio recording of the statement (given five days after the subject accident). The Third Department reversed, concluding that defendant sufficiently showed the statement was entitled to conditional immunity as "material prepared for litigation" and that plaintiff failed to establish undue hardship if the recording is not produced. However, the Appellate Division also directed the trial court to conduct a hearing to determine if the defendant waived the confidentiality of the statement by giving the transcript to plaintiff.

**Hewitt v. Palmer Vet. Clinic, PC**
**(Devine, J., 12/29/16)**

While at the defendant veterinary clinic with her cat, plaintiff was attacked and injured by a dog. Nine days later, plaintiff's counsel informed the clinic of a pending claim and urged it to notify its liability insurance carrier. Suit was filed about four months later, and plaintiff sought disclosure of documents in the defendant insurance adjuster's file prepared prior to the service of the summons and complaint. The clinic refused (relying on the "prepared for litigation" privilege) and Supreme Court (Ellis, J., Clinton Co.) denied plaintiff's motion to compel discovery. Reversing, the Third Department found the defendant didn't make a sufficient showing of what insurance company documents were encompassed by the demand or how any such materials "were prepared solely for litigation purposes". Supreme Court was also directed to perform an *in camera* review of the challenged documents for a ruling on whether they are entitled to immunity from

*(Continued on page 4)*

*Timothy J. Higgins is a partner at Lemire, Johnson & Higgins, LLC in Malta, New York. His litigation practice includes all types of personal injury and wrongful death litigation, including representation of persons hurt in automobile and workplace (construction site) accidents, and medical malpractice. Mr. Higgins also represents and litigates on behalf of employers and municipalities in matters involving claims of employment discrimination and civil rights violations.*

# INSIGHT INTO IMMIGRATION

IMMIGRATION NEWS FROM MEYERS & MEYERS, LLP

### U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT ROLES INTO SARATOGA—TWICE!

I suppose I shouldn't be surprised that U.S. Immigration and Customs Enforcement ("ICE") has now conducted two (2) sweeps in my hometown of Saratoga Springs, New York. "If you're in this country illegally and you committed a crime by entering this country, you should be uncomfortable," Acting ICE Director Thomas Homan recently told the House Appropriations Committee's Homeland Security Subcommittee. "You should look over your shoulder, and you need to be worried." Nice, right? No, not really. Not at all.

*David W. Meyers, who joined his father at Meyers and Meyers, LLP in 1997 after a decade as an executive assistant to United States Senator Alfonse M. D'Amato, focuses primarily on family- and business-related immigration matters, commercial litigation, residential and commercial real estate transactions, trusts and estates, and general and appellate practice.*

The result? According to reports, twenty six (26) men have been picked up off the streets of their (and my) community and detained, initially at the Albany County Jail and thereafter at the Buffalo Federal Detention Facility in Batavia, New York. Some of them will be placed in removal (i.e., deportation") proceedings. Others may already be in removal proceedings. Yet others may have previously been removed and later came back to the United States, presumably unlawfully. Those individuals will have their prior removal orders reinstated and will be removed again. There may be other scenarios too. I know. Some were my clients. Some are now my clients.

Public opinion is mixed as to what happened. Some good, some not so good. Here's my take.

These individuals were fathers, husbands, brothers, cousins, and perhaps sons too. Some and perhaps all of them played very important roles in our community. In some respects, they were the backbone of our community. That is, some, and perhaps all of them, worked for businesses that we frequent. And some, although I am sure not all, worked for those

*(Continued on page 6)*

## OCA YOGA AND ZUMBA GOLD

**MICHAEL FRIEDMAN, ESQ.**

"Each year nearly four million new cases are filed in the New York State Courts." New York State Division of the Budget Website for the 2017-2018 Budget

No there aren't. There haven't been 4 million filings since 2010 and it certainly isn't "nearly" unless you consider 3.5 million "nearly" 4 million. I don't. As for the numbers, New York State cheats at that too by counting each child in a Family Court petition as a separate filing. About a million of these "filings" are traffic or parking citations. New York ranks third in the country in issuing traffic citations. So, with about a 25% decrease in filings since 2010, how do you justify the highest budget in New York State history every year? It is currently over $2.4 billion with the state's General Operating Fund contributing $2.18 billion, an increase of $42.7 million from the year before. I know that the salaries of the judges went way up because "adjusting for inflation" gave New York the second highest paid judges behind Hawaii although it is not even in the top four in cost of living. And I know that New York hands out $100 million per year to not for profit organizations for "civil legal services" which to me is contrary to New York's Constitution. But really, how do you spend that much money?

One way is to pay a judge even though he doesn't show up. Acting Supreme Court Judge David McCullough didn't show up for nearly three years. Not that the Commission on Judicial Conduct gave a damn as they failed to file charges or seek suspension or removal for over three years. Instead they signed an agreement allowing him to stay on the bench for about another month and then to retire at a cool $143,000 per year plus health insurance. He'll need it as he weighs about 300 pounds.

So, given the lack of cases, how does the Office of Confused Adults find ways to spend all the cash? For one thing, the

*(Continued on page 5)*

*Michael Friedman has been practicing law for over 30 years and has maintained a private practice since 1981. Mr. Friedman is the author of numerous articles on matrimonial practice including The Case for Parental Access Guidelines in New York and the Case for Joint Custody in New York for the New York State Bar Association's Family Law Review, Pensions and Retirement Plans: Valuation Strategies for the New York Domestic Relations Reporter and a monthly matrimonial article for the Albany County Bar Association.*

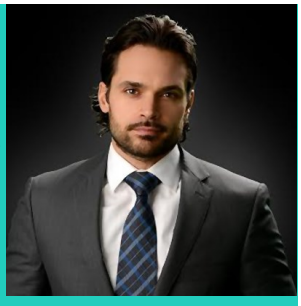
## EMPLOYMENT LITIGATION UPDATE

**SCOTT PETERSON, ESQ.**

### FMLA

**Pollard v. The New York Methodist Hospital**
**(2nd Cir. 6/30/17)**

Plaintiff was employed by the Hospital as a medical records clerk for nearly 13 years. In that position, Plaintiff was required to stand and walk for most of the day. In 2013, she noticed a painful growth on her foot, which limited her ability to perform her job.



*Scott Peterson is the founding partner at D'Orazio Peterson, which was opened to provide representation to individuals in employment and serious injury matters.*

*Mr. Peterson has represented clients in State and Federal courts throughout New York State, has been published in several publications including the New York Law Journal, and has frequently provided commentary for local and national media outlets. He currently serves on the Executive Committee of the New York State Bar Association Trial Lawyers Section.*

Plaintiff visited a podiatrist, who concluded that the growth was a benign mass, and recommended either surgery or conservative treatment. Plaintiff opted for surgery, and requested that the doctor provide her with a note to her employer. The doctor's note indicated that the need for surgery was "immediate," which he later confirmed was the result of Plaintiff's increasing pain, obstruction of her ability to function, as well as the possibility that the growth could be precancerous. As a result of these factors, the doctor wanted to perform the surgery immediately.

Plaintiff returned to work following the appointment and immediately requested FMLA leave for the surgery and post-operative recovery. The hospital responded by indicating that the FMLA required thirty days' notice of a foreseeable leave. The doctor followed up with the hospital, indicating that the growth was a "serious health condition", which required a medical leave. The hospital, in response, asked that the surgery be delayed in order to comply with the thirty-day notice period. The doctor initially cancelled the surgery to reschedule, but at the request of the Plaintiff reinstated it to the original date. When the Plaintiff failed to report to work on the date of the surgery, the hospital terminated her employment.

Post-operatively the Plaintiff was required to visit the doctor approximately one week after surgery, as well as one week later. He authorized the Plaintiff to return to work shortly after.

*(Continued on page 6)*

# CONSUMER BANKRUPTCY

STEPHEN RODRIGUEZ , ESQ.

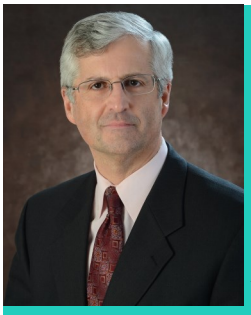
## LIEN STRIPPING: NOT AS SEXY AS IT SOUNDS

An important benefit of a bankruptcy filing is the ability to nullify certain liens. For this column, the focus will be on liens attaching to homestead real estate. Liens attached to non-homestead real estate may be susceptible to removal or modification in a chapter 13 bankruptcy.

The most common situation is a typical judicial lien for a monetary judgment acquired by a creditor and filed in the county within which the bankruptcy debtor owns his or her home. For judicial liens, the applicable statute is 11 USC §522 (f)(1)(A). The fundamental basis to be able to remove a judicial lien is demonstrating that the debtor's equity in their homestead is less than the permissible bankruptcy homestead exemption. The debtor's equity is determined simply by calculating the sum of the market value of the homestead, less the current balance on any mortgages and outstanding property taxes. If the amount of the equity is less than the applicable exemption, then any judicial lien is almost universally susceptible to being removed ("stripped off") by motion in the bankruptcy proceeding. The applicable homestead exemption in New York ranges from a low of approximately $80,000 in certain counties, to over $130,000 in Saratoga County per debtor. The amounts are periodically adjusted. In most instances the debtor's equity is within the exemption level, and removal of the liens will be successful. Note that judicial liens fall within the type of lien that can be removed, but nonjudicial liens, such as IRS liens and those filed by DSS, are not susceptible to be removed. Also, judicial liens for child support and maintenance cannot be removed (11 USC §522(f)(1)(A) excludes debts under §523(a)(5) that are Domestic Support Obligations). While I have read one bankruptcy court decision outside New York that removed a nonjudicial lien, to my knowledge the practice is not currently being allowed in the Northern District of New York.

The removal of judicial liens can be done in either a

*(Continued on page 8)*



*Stephen T. Rodriguez concentrates his practice on consumer bankruptcy, and on social security disability claims. His bankruptcy work covers cases filed in both the Albany and Utica divisions of the Northern District of New York. He is a member of the Capital Region Bankruptcy Bar Association, and served as its President.*

*When not practicing law, he tries to be outside, preferably on some trail. His office is located at 100 West Avenue in Saratoga Springs, and he can be reached by phone at 581-8441, or email at str@srodlaw.com*

# TORTS AND CIVIL PRACTICE, CONTINUED...

*(Continued from page 2)*

disclosure.

## "EXCLUSIVE REMEDY" (WORKERS' COMP) DEFENSE FAILS

**Montgomery v. Hackenburg**
**(Lynch, J., 3/9/17)**

Workers' Compensation benefits (per WCL § 29(6)) are the exclusive remedy for an employee injured by the negligence or conduct "of another in the same employ". But the shield from liability does not apply if the defendant (co-worker) was acting outside the scope of employment and engaged in a willful or intentional tort. Supreme Court (Krogmann, J., Warren Co.) found that exclusion applicable here in denying the defendant's summary judgment motion. Plaintiff, working as a golf club's locker room attendant, alleged that the defendant (general manager of the golf course) struck him in the groin area with a golf club shaft, the result of which was surgical removal of the plaintiff's left testicle. The Third Department affirmed the lower court ruling, finding no evidence that plaintiff was involved in horseplay and other evidence creating a questions of fact whether the defendant acted in a "grossly negligent and/or reckless manner" when he swung the shaft and struck plaintiff.

*(Continued on page 5)*

## TORTS AND CIVIL PRACTICE, CONTINUED...

*(Continued from page 4)*

### REVERSAL IN SLIP-AND-FALL DEATH CLAIM

**Acton v. 1906 Rest. Corp.**
**(McCarthy, J., 2/23/17)**

Supreme Court (Meddaugh, J., Sullivan Co.) granted summary judgment to the defendant restaurant upon concluding that the plaintiff's inability to explain the cause of decedent's (his wife) unwitnessed fall would require a jury to impermissibly speculate as to proximate cause. The fatal fall occurred down an interior staircase; in the dining area where an unlocked and unmarked door opened over the stairs which led to the basement. The restaurant owner acknowledged that the stairs were original (installed in 1906); were worn; and did not have non-slip adhesive tops. The Third Department reversed and reinstated the complaint, noting that "proximate cause can be based on logical inferences from circumstantial evidence" and that "simple logic" implies that a door swinging over a staircase may create a hazardous condition.

### LABOR LAW § 240 HOMEOWNERS' EXEMPTION

**Vogler v. Perrault**
**(McCarthy, J., 4/13/17)**

Plaintiff was hurt in a fall from a ladder while working on the exterior of a house owned by defendant. Defendant's motion to dismiss plaintiff's claims under Labor Law § 240, relying on the exemption given to owners of one and two-family homes "who contract for but do not direct or control the work" was denied by Supreme Court (Meddaugh, J., Sullivan Co.), and affirmed by the Third Department. The exemption does not apply if the residence is used "entirely and solely for commercial purposes", with the focus being the intentions of the homeowner "at the time of the injury underlying the action". Here, although defendant contended he planned to use the house, in part, as his own residence, plaintiff testified that the defendant told him he planned to rent both halves of the two-family home. As such, the Appellate Division found defendant failed to meet his *prima facie* burden showing he was entitled to the homeowner's exemption.

### COURT OF APPEALS: CPLR ARTICLE 16 LIABILITY RELIEF

**Artibee v. Home Place Corp.**
**(2/14/17)**

Plaintiff was injured when a large branch broke off defendant's tree, fell through her Jeep and struck her in the head. The tree bordered a New York State highway, and plaintiff separately (in the Court of Claims) sued the State for failing to monitor and maintain the tree and warn drivers of the hazard. At trial in Supreme Court, the defendant property owner was allowed to show evidence of negligence by the State, but was precluded from having the jury consider apportionment of liability (for noneconomic losses) between it and the State. After that determination was reversed in the Appellate Division, the Court of Appeals (with two dissenters) reversed, concluding that since "no claimant can obtain jurisdiction over the State in Supreme Court…defendant was not entitled to a jury charge on apportionment in this action".

## OCA YOGA, CONTINUED...

*(Continued from page 3)*

Chief Judge *et alia* have decided to boldly go where no one has gone before: management, diversity and bias sensitivity training for judges. Putting aside that there is no known statistical need for such nonsense in New York's judiciary, why not? The New York State Bar Association even has a Judicial Wellness Committee chaired by the Third Department's Presiding Justice Karen Peters. They even provide resources for judicial eating disorders. Too bad Judge McCullough didn't sign up. If you feel the need, call their 1-800 Helpline.

This year the Office of Court Administration handed over $3 million for summer camp for judges. It had not been funded for eight years, but what the heck. It is being run by the New York Judicial Institute which, although it has space at Pace Law School, will be holding these four day programs at some hotel in the Hudson Valley. Nice. About 450 judges have signed up, and why not? By my feeble math, that works out to $6,667 per judge or $1,667 per judge per day. For that money, I could have held the thing in Switzerland including airfare and drinks, but who's counting? The program is overseen by the Judicial Institute's Dean, Judge Juanita Bing Newton. She has described the program as seeking to help judges improve not only decision-making abilities but also their managerial skills. Last I looked, most Supreme Court judges manage two people, a secretary and a law clerk, but who's counting? The Hon. Douglas McKeon, Administrative Judge for the 12th Judicial District, described it this way, "You got almost a decade of judges who have never gone to one of these things — they joined the bench when money was tight. From that perspective alone, it's going to be very, very interesting because they really don't know what to expect, and it's going to be worthwhile." Sure it is Judge McKeon, now that the money is flowing again.

One of this year's attendees was Acting Manhattan Supreme Court Justice Gerald Lebovits. In an interview with the New York Law Journal, he was asked if anyone from the Office of Court Administration advises judges on how to deal with stress. His response? "The New York state court system, through its Judicial Institute, has just this week re-started its four-day Summer Judicial Seminars. There were three wellness programs this past week and scheduled for the week of July 24: 60 minutes of yoga and Zumba Gold every morning before the seminars begin; one 80-minute session of 'Overruling Judicial Stress: Pearls From 20 Years Counseling Judges…'"

So, there you have it. The Office of Court Administration is now spending money on yoga and Zumba Gold programs for judges. In case you didn't know it (I didn't), Wikipedia

*(Continued on page 7)*

## INSIGHT INTO IMMIGRATION, CONTINUED...

*(Continued from page 2)*

business legally (e.g., pursuant to valid Employment Authorization Documents that our government issued to them while their applications for political asylum are being adjudicated by U.S. Citizenship and Immigration Services). It's ironic, isn't it? On the one hand, our government issues these individuals Employment Authorization Documents so they can lawfully work in the United States while they wait for USCIS to adjudicate their asylum applications. On the other hand, ICE picks them up off the streets and then detains them.

And what of the employers who employ these workers, and particularly those who were lawfully working for them? Summer has officially started, and opening day of the Saratoga Race Course is now only weeks away. Employers in service-based industries, and particularly the restaurant and hospitality fields, are particularly affected. Quite candidly, these individuals work in jobs that the very vast majority of American workers do not want. (Trust me, it's true.)

Is the Saratoga Race Course next? This is the time of year you see long lines in front of the race track. These are not fans going to see the races. That's for next month. No, these are lines filled with hundreds of people hoping to get summer jobs at the track. Those jobs are for what I will call "front of the house" positions, like gate attendants who take your money, people who sell programs, and food and beverage providers. Of course there are many more.

The "many more" include the back stretch workers who are absolutely essential and who do all of the little things to make our track experience enjoyable. These are the trainers, exercise riders, jockeys, grooms, farriers, veterinarians, muckers, jockey agents, and all the other positions associated with horse racing. A great many of these workers are foreign workers. And although many of these workers are no doubt here lawfully, dare I say that some are not? Will ICE be on the race track's doorstep next?

There are three issues that we're dealing with here. On the one hand, what's happening to the foreign workers who have been picked up? What about their families, some of whom are U.S. citizens? Each of their situations will be different. Each one may (or may not) have relief to stay in the United States long-term. Time will tell.

On the other hand, we've got the employers. Track season is the biggest part of their year, and right now those in the restaurant and hospitality industry are dealing with unexpected (and unwanted) labor issues.

And on the "third" hand, we're in a very tight labor market right now. Saratoga Springs is fortunate to have very low unemployment. But with that comes issues associated with hiring enough workers to fill year-round labor needs, including the bump that employers need during track season.

The solution? How about an immigration system that works? One that is responsive to the legitimate needs of our business community. Unfortunately, our immigration system is broken,

*(Continued on page 7)*

## EMPLOYMENT LITIGATION UPDATE, CONTINUED...

*(Continued from page 3)*

Plaintiff brought suit for interference under the FMLA, and at the district court the hospital moved for summary judgment arguing that 1) the growth on Plaintiff's foot did not constitute a serious health condition; and 2) that Plaintiff failed to provide adequate notice under the FMLA. The district court granted the hospital's motion and dismissed the case on the ground that the Plaintiff's condition did not constitute a serious health condition under the FMLA in that it did not require or occasion "multiple treatments" (considering the surgery the only "treatment", and not considering the post-operative care).

On appeal, the Second Circuit reversed, noting that the district court's concept of "treatment" was "excessively narrow." The court could not conceive of a reason why post-surgical care including change of dressing and removal of sutures did not qualify as part of the treatment of the condition that occasioned the surgery – particularly where that post-operative treatment was medically predictable from the outset. As a result, the Plaintiff's course of treatment qualified as a "serious health condition" if it would likely have resulted in a period of incapacity of more than three consecutive days in the absence of medical intervention. Given the expanding nature of Plaintiff's condition, the court reasoned, Plaintiff made a sufficient showing that a genuine issue of fact existed as to whether her condition, if untreated, would have resulted in the necessary incapacity. The district court did not consider the issue of notice under the FMLA, and the Second Circuit remanded for further consideration.

### PLEADING STANDARD

**Franchino v. Terence Cardinal Cook Health Care Ctr., Inc. (2nd Cir. 6/2/17)**

Plaintiff was a Caucasian US-born male who worked for defendant in HR. Plaintiff, was 67 when his employment was terminated. He thereafter brought suit, alleging discrimination based upon age, sex and national origin/ethnicity, as well as for retaliation. Plaintiff alleged that his co-workers and supervisors frequently made comments that intimated age-based animus, that he was terminated on the basis of untrue allegations of misconduct because his supervisors "sided with a younger Hispanic female employee" who wanted him fired, and that he was replaced by a younger female employee.

District court granted defendants' motion to dismiss on the basis that the complaint did not "plausibly allege any discrimination claims."

In a summary order, the Second Circuit restated the standard for *de novo* review of Plaintiff's claims in the complaint, noting that all factual allegations must be accepted as true, and all inferences drawn in Plaintiff's favor at the pleading stage, where "a plaintiff alleging discrimination bears only a minimal burden to show discriminatory intent."

*(Continued on page 7)*

## INSIGHT INTO IMMIGRATION, CONTINUED...

*(Continued from page 6)*

and it's been broken for a very long time. But that doesn't mean that federal law enforcement officials should be coming into our community and creating unnecessary fear among our friends, families and neighbors. What we need are meaningful and compassionate solutions from our "friends" in Washington, D.C. What's the over - under that that will happen anytime soon?

## OCA YOGA, CONTINUED...

*(Continued from page 5)*

describes Zumba Gold as "a program designed for beginners and elderly people."

I have discussed this shift in the court system with many practicing and former trial judges. I am not alone in my opinion that New York's Court System has fallen far from its stated purpose. The New York State Division of the Budget describes the court system like this: "The mission of the Judiciary is to provide a forum for the fair and prompt resolution of civil and family disputes, criminal charges, disputes between citizens and the state, and challenges to government action." Amen. I don't think that includes yoga and Zumba Gold lessons for its judges.



## EMPLOYMENT LIT. UPDATE, CONTINUED...

*(Continued from page 6)*

Under the well-established Littlejohn case, in order to survive a motion to dismiss under FRCP 12(b)(6), a complaint must allege, by plausibly supported facts, "that the plaintiff is a member of a protected class, was qualified, suffered an adverse employment action, and has a least minimal support for the proposition that the employer was motivated by discriminatory intent." These allegations "need only give plausible support to a minimal inference of discriminatory motivation."

The court noted that an inference of discrimination can arise from a number of different circumstances, including the employer's criticism of the plaintiff's performance in "ethnically degrading terms"; "invidious comments" about others in the protected class; or more favorable treatment of employees not in the protected class. An inference may also arise where the employer replaces the terminated employee with an individual outside of the protected class.

Under the circumstances, the court found that the complaint had adequately alleged age discrimination by pleading that the plaintiff was a member of the protected class, was replaced by a significantly younger employee, and was the subject of derogatory comments. Notably, the court observed that the "but-for" causation standard governing ADEA cases did not support dismissal at the pleading stage.

On the contrary, however, the court found that the Plaintiff had not adequately alleged sex or national origin discrimination, as the allegations related instead to animus based upon a perceived threat to the status of another employee, rather than illegal reasons.

Vacated in part and affirmed in part.

**Law Notes has moved to a quarterly release schedule. We are always looking to improve our newsletter for the benefit of our members and would love to add you to our list of columnists.**

**If you're interested in submitting articles, or advertising in the newsletter, please contact Christopher Marney at cmarney@carterconboy.com.**

## CONSUMER BANKRUPTCY, CONTINUED...

*(Continued from page 4)*

chapter 7 or a chapter 13 bankruptcy. Ideally, the application to remove the lien is made while the bankruptcy case is still open. Nonetheless, if someone had filed bankruptcy, but had not made the specific motion to remove liens that were against their homestead at the time of the bankruptcy filing, the bankruptcy case usually can be reopened even years after discharge, to have the liens stripped. Removal of judgment liens is only relevant to homestead property that is owned by the debtor as of the date of the bankruptcy filing. As most attorneys know, judgment liens that were filed prior to the bankruptcy do not attach to real estate that is acquired subsequent to the bankruptcy filing.

The other aspect of lien stripping pertains to second and subsequent mortgages. The applicable statutes are 11 USC §506 (a) and 11 USC§1322(b)(2). The primary issue is whether the balance owed on the first mortgage at the time of the bankruptcy filing exceeds the market value of the real estate. If so, the theory is that there is no equity to which a subsequent mortgage can attach, and therefore the second mortgage can be deemed an unsecured debt. In this situation, unlike that described with judgments above, the homestead exemption is irrelevant. If the home value exceeds the balance on the first mortgage by merely a dollar, the subsequent mortgages cannot be removed. Also, removal of a second or third mortgage can only be done within a chapter 13 bankruptcy, not within a chapter 7 case.

Procedurally, in a chapter 13, the application to remove the second mortgage is done early in the case. However, if the motion is successful, the order striking the second mortgage requires that the debtor successfully complete their bankruptcy plan. Therefore, the debtor will have to complete a three to five-year plan to obtain the benefit of the removal of the subsequent mortgage. Being able to come out of bankruptcy without a second mortgage is quite an incentive to finish the bankruptcy plan.

The amount of applications to strip off second mortgages is notably less in the last couple of years. In the "free-for-all lending" days before the crash, when lenders were giving out second mortgages with what appeared to be little if any processing, and real estate values were seemingly based on fantasy, second mortgages were routinely being thrown out, including six figure equity loans.

To remove second mortgages and judgments, proof of home value is needed. Depending on the nature of the debt, the particular creditor involved, and the amount of apparent equity, proof may be as simple as using a service such as Zillow, a comparative market analysis, or an estimate by a realtor. In certain situations a more formal appraisal may be necessary.

The application to remove judgment liens is rarely if ever challenged. For second mortgages, the applications also are rarely challenged, with the exception being where the creditor is a locally based lender, and there may be a real dispute on the current market value of the property.

For nonjudicial liens, and liens against non-homestead property, in a chapter 13 plan you may be able to strip the lien, or pay less than the full lien amount, and have the amount paid as part of the plan payment. Such provision would to allow the lien to be deemed fully satisfied at the end of the plan and allow the debtor to emerge with clear title on his or her assets. Whether or not such lien adjustment is feasible in a chapter 13 context depends on many factors including the amount of the lien, the value of equity in property sought to be protected, the nature of the lien, the treatment of other creditors within the plan, and the amount of income available to the debtor to make such payments on top of what else will be required by the bankruptcy plan.

Stripping liens may not be sexy, but it is a powerful remedy.

### DEBTOR'S PRISON

I am often asked by clients, "Can I go to jail?" The reassuring answer is, "Absolutely not. There are no more debtor's prisons." But, for someone who is dishonest in their petition, jail is an option. Here is this column's teaching moment showing what not to do when seeking relief under the bankruptcy laws.

Mr. East had his company file bankruptcy the day before a scheduled foreclosure auction on company property. The property had a value exceeding one million dollars. The bankruptcy court ordered him to sell the property and remit $1.2 million to the mortgage holder. Instead of complying, Mr. East retained $800,000.00. That act led to an indictment, which led to a guilty plea to embezzling from a bankruptcy estate. Thou shall not steal.

## SAVE THE DATES
## SARATOGA COUNTY BAR ASSOCIATION

- **September 14, 2017—Member Mixer at The Thirsty Owl**
- **October 11, 2017—Board Meeting at Saratoga Springs City Hall, 3rd Floor**
- **October 25, 2017—Bar Dinner at The Wishing Well**
- **November 13, 2017—Board Meeting at Saratoga Springs City Hall, 3rd Floor**
- **December 7, 2017—Holiday Party and Board Meeting at Saratoga National**
- **February 7, 2018—Board Meeting at Saratoga Springs City Hall, 3rd Floor**
- **February 8, 2018—Bar Dinner and Bowling at Saratoga Strike Zone**
- **March 7, 2018—Board Meeting at Saratoga Springs City Hall, 3rd Floor**
- **March 22, 2018—Bar Dinner at Wheatfields, Clifton Park**
- **April 11, 2018—Board Meeting at Saratoga Springs City Hall, 3rd Floor**

## PRESS RELEASES/CLASSIFIEDS

### STEPHEN M. DORSEY, ESQ. RECENTLY ELECTED PRESIDENT OF COUNTY ATTORNEYS' ASSOCIATION

Saratoga County Attorney Stephen M. Dorsey was recently elected President of the County Attorneys' Association of the State of New York (CAASNY) at the Association's Annual Meeting on May 22-23, 2017 in Cooperstown, New York. CAASNY is comprised of County Attorneys and their Assistant County Attorneys throughout New York State, as well as the attorneys of the New York City Corporation Counsel's Office.

CAASNY is dedicated to promoting more efficient county government; advancing closer professional relationships among county and NYC Corporation Counsel attorneys in the State; analyzing proposed and enacted legislation and regulations at the State and Federal levels; presenting legal ideas and opinions to Federal and State legislators, representatives and officials; and working with the New York State Association of Counties to advance matters of mutual interest to counties.

Dorsey is a native and resident of the City of Saratoga Springs, and is married to Dr. Susan Dorsey. Dorsey has served as Saratoga County Attorney since late December 2010. Dorsey will serve a one year term as CAASNY President.

### ADDRESS CHANGE FOR KYRAN D. NIGRO, ESQ.

Kyran D. Nigro, Esq. is now located at
9 Maple Avenue, 2nd Floor
Saratoga Springs, New York 12866
Phone: (518) 245-9114
Fax: (518) 245-9449

### SEEKING PT LEGAL SECRETARY

Part-Time Legal Secretary needed for two solo practitioners. Work involves: reception, dictation, secretarial/clerical functions, and document preparation. The ideal candidate will be detail oriented, flexible, possess excellent organizational skills as well as good people and phone skills, and an ability to prioritize tasks and work with minimal supervision.

Candidate should have strong typing/ keyboard and computer skills and be proficient with Microsoft Office. Preferred hours are 9:00 a.m. to 2:00 p.m. Monday-Friday. Salary dependent upon experience.

Please email cover letter, resume and salary requirements to slfhlfmanagement@gmail.com

## NOTICE TO BAR AND OTHER INTERESTED PERSONS

## Implementation of Mandatory E-Filing Program (NYSCEF)

**Please visit http://files.constantcontact.com/ccc81e40301/263296be-3fcb-444a-b8d7-e1d208af3d6a.pdf for information relating to the proposed implementation of the mandatory electronic filing program in Franklin County Surrogate's Court, Montgomery County Surrogate's Court, Schenectady County Surrogate's Court; and Warren County Surrogate's Court.**