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FINKELSTEIN NEWMAN FERRARA LLP

## KISS THIS SANATASS!

In *Sanatass v. Consolidated Investing Co., Inc.*, Christopher Sanatass was injured while installing an air conditioning unit in a building owned by Consolidated Investing.

C2 Media (C2) -- a tenant in Consolidated's building -- agreed not to make any changes to the premises without the owner's written consent. Yet, C2 secretly hired Sanatass's employer to install an air-conditioning unit and, because of faulty lifts, Sanatass was "nearly crushed."

Sanatass sued Consolidated under a New York State law which imposes "strict liability" on building owners when laborers employed to perform services are injured. Consolidated argued that since its tenant didn't have permission to make these repairs, C2 was solely responsible for Sanatass's damages. The New York County Supreme Court agreed with that position, as did the Appellate Division, First Department.

On appeal to our state's highest court, the New York State Court of Appeals looked to the Labor Law's legislative history and found the statute clearly intended to hold building owners responsible for most on-site accidents which result in a laborer's injuries. As a result, Consolidated was unable to "escape strict liability" even though it had no "notice or control over the work ordered by its tenant."

In a dissent, Judge Smith rejected such a "literal, mechanical" application of the law and was of the opinion the majority was inappropriately treating the building owner as an "insurer" and wrongfully holding it responsible for the tenant's misconduct.

The law's "strict liability" standard is quite frigid, wouldn't you agree?

## WAS THIS PROFESSIONAL?

Rafael Villanueva was inspecting a building's roof -- which had been repaired by Professional Environmental Systems (PES) -- when a heavy wind caused a loose piece of plywood to hit him. Apparently, construction materials had been left on the property after PES' completion of its work.

When the Kings County Supreme Court denied PES' motion to dismiss the case, the company appealed to the Appellate Division, Second Department, which found there were unresolved questions as to whether PES had "adequately secured its equipment."

Will poor PES get popped for its purported unprofessionalism?

## IS A "WATER BILL" A TAX?

In *Innophos, Inc. v. Rhodia, S.A.,* Innophos contested a $130 million water-usage fee which the Government of Mexico demanded be paid after Rhodia's operations had been acquired by Innophos.

In early 2004, the Comision Nacional del Agua (CNA) informed Rhodia the latter owed money for water usage. In June 2004, Innophos purchased Rhodia's operations unaware of the past-due fees owed.

The parties' purchase and sale agreement provided Rhodia would be obligated to indemnify Innophos from "taxes of Mexican Subsidiaries," and defined "taxes" as "assessments, charges, duties, levies, of other similar charges of any nature." The agreement further provided Innophos would be indemnified for any "losses" arising from "the breach of any representation or warranty made in the agreement," subject to a cap.

After receiving notice CNA was owed $130 million for water usage by Rhodia over a five year period, Innophos filed suit in the New York County Supreme Court, seeking a declaration the CNA fees were "taxes," as defined by the parties' agreement. Rhodia refused to pay, claiming the charges were "losses," as defined by that same contract, and that it would only pay up to the capped amount.

The Supreme Court sided with Innophos and noted the agreement hadn't limited "taxes" to its traditional sense. On appeal, the Appellate Division, First Department, affirmed, noting the word should be broadly construed.

When the dispute reached our state's highest court, it also affirmed. Since the Government of Mexico was acting in its sovereign capacity when CNA assessed these fees, and because the charge was "imposed on the value of natural resources extracted from the earth," the water-usage charges were "taxes" encompassed by the parties' agreement.

Now that was taxing!

## WAS IT RIGHT UNDER THEIR NOSE(S)?

In *Eliopoulous v. Lake George Land Conservancy, Inc*., the Lake George Land Conservancy entered into an agreement with Thomas Eliopoulous to convey a piece of real property known as "Anthony's Nose." At contract, a precise metes and bounds description wasn't available, so it was agreed a survey would be conducted, a new description prepared, and a corrective deed issued after closing.

When Eliopoulous obtained a survey and filed a corrective deed using the new metes and bounds description, the Conservancy objected, claiming the deed included an extra 20 acres of property known as "Clifton Parcel" -- which had been excluded from the sale.

After Eliopoulous refused to rectify that supposed error, the Conservancy filed suit and the Washington County Supreme Court granted relief in Eliopoulous's favor. On appeal, the Appellate Division, Third Department, thought it was unclear whether the Clifton Parcel was intended to be encompassed by the conveyance.

While their exact intentions couldn't be gleaned from the description was contained in the contract of sale, the AD3 was of the opinion rescission (or cancellation) of the entire deal wasn't appropriate, since the parties had intended to convey "Anthony's Nose" -- even though they weren't aware of its "precise dimensions."

Does anyone smell anything stinky here?

## DOWNPAYMENT LOST DUE TO DEFAULT


In *Rivera v. Konkol*, Annette Rivera's downpayment was in jeopardy when she was unable to pay the balance of her new home's purchase price.

While Rivera claimed that some of those funds had been embezzled by her attorney, seller Kent Konkol still had his attorney send a letter advising Rivera that she had violated the contract of sale's "time of the essence" provision and thus forfeited her downpayment.

When Rivera filed suit, the Bronx County Supreme Court sided with her, and found the letter sent by Konkol's lawyer hadn't provided a clear and unequivocal statement her failure to close on or before October 18, 2006, would be considered a default upon which she would lose her down payment.

On appeal, the Appellate Division, First Department, reversed because any irregularity with the attorney's letter wasn't "the dispositive issue." According to the AD1, neither the alleged embezzlement nor her failure to obtain a mortgage, excused Rivera's non-performance. Thus, her downpayment could be released to the seller.

Clearly, Konkol was on solid ground. ("Konkolo" is Zulu for "concrete" or "solid foundation.")

## BROKER OUT OF COMMISSION

In *F. Richard Wolff & Son, Inc. v. Tutora*, F. Richard Wolff & Son (Wolff) sued Anthony Tutora for a commission Tutora allegedly owed to the company.

Tutora hired Wolff as a real-estate broker to sell Tutora's "adult care resident facility" business and accompanying real estate, "as a package." The terms of their contract provided that Wolff's commission would be 6.5% of the selling price.

After Wolff found a prospective buyer, Tutora agreed to a $1.3 million deal, but the sale was subject to the purchaser getting a substantial bank loan. When that fell through, the parties continued their negotiations and the purchaser bought the business and leased the real property from Tutora, months after the brokerage agreement expired.

Wolff felt that it was still owed a commission based on the $1.3 million price because the company had procured a "ready and willing" buyer. The Westchester County Supreme Court felt otherwise and dismissed the case.

On appeal, the Appellate Division, Second Department, reiterated the established rule "a real estate broker will be deemed to have earned his or her commission when he or she produces a purchaser who is not only ready and willing to purchase ... but able to do so as well." As the sale of the business and real estate was contingent upon bank financing, and the purchaser was unable to close the deal originally contemplated without those proceeds, Wolff wasn't entitled to a commission.

The AD2 wasn't afraid of no Wolff.

## HELP GETS PAID

In *Campos v. Ofman*, Mendel Ofman allegedly agreed to pay $7,000 for each apartment Martin Campos renovated. When he went unpaid after finishing nine units, Campos filed suit with the Kings County Supreme Court.

Ofman claimed that Campos had been hired as a helper to assist with the renovations, and was fully compensated for those services. After a jury found in Campos' favor, the parties stipulated to damages in the amount of $51,000.

On appeal, the Appellate Division, Second Department, determined that the jury's verdict was supported by a fair interpretation of the evidence. It further concluded Ofman wasn't entitled to challenge the amount awarded since he agreed, in writing, to that sum.

You certainly have our word on that.

## WHERE DOES A "HOMELESS" PERSON PRIMARILY RESIDE?

In *TOA Construction Co., Inc v. Tsitsires*, the Appellate Division, First Department, struggled with whether Michael Tsitsires maintained his apartment as his "primary residence," even though "mental illness" kept him from actually occupying the unit.

Tsitsires' landlord -- a "notorious slumlord" driven to "empty its building of all tenants" -- filed a case to evict Tsitsires from his "single-room occupancy" apartment since it wasn't the tenant's principal or "primary" home. The evidence established Tsitsires used this apartment as only a mail drop and storage space, he didn't keep a key, and that his long-time girlfriend -- Alberta Lang -- used the apartment for showers and storage of her own belongings.

While the unit was described as "uninhabitable," that wasn't the dispute's central focus. The New York County Civil Court was compelled to find in the landlord's favor since Tsitsires hadn't maintained the apartment as his "primary residence." (The tenant's mental illness didn't excuse his physical absence.)

On appeal, the Appellate Term, First Department, expressed discomfort condemning a man to homelessness and reversed. ("[P]ublic policy concerns do not require us to sustain the needless eviction of this seriously disturbed tenant, upon what in essence would be a judicial finding that tenant maintains his primary residence on a park bench.") When the dispute reached the Appellate Division, First Department, it sided with the Civil Court.

While Tsitsires didn't maintain another residence (as he preferred to sleep in Central Park or on local stoops), his "lifestyle choice" wasn't a dispositive consideration as a regulated tenant is required to maintain an "ongoing, substantial, physical nexus [with the regulated unit] ... for actual living purposes."

Although cases have excused "temporary" absences, a tenant must demonstrate an intention "to return to and reside in the apartment as soon as practicable." Tsitsires wasn't able to supply any evidence that he could, or would, return to the apartment particularly since he declined medical treatment for his condition.

While "sympathetic" to his "plight," the majority was steadfast in its conviction Tsitsires had "abandoned" his apartment and was properly subject to eviction.

In a heated dissent, two justices of the AD1 felt the Civil Court's analysis was "seriously flawed and riddled with significant misstatements of fact."

The dissenters were of the opinion the trial court relied a bit too heavily on the testimony of a former building manager who never saw Tsitsires enter or exit the apartment. They believed the Civil Court hadn't considered that Tsitsires and his girlfriend "kept very irregular hours," that Tsitsires often waited in the lobby before going up to his unit for fear of seeing other building occupants, and that his girlfriend (Ms. Lang) used the apartment "on a continual basis."

Relying on the manager's characterization of Tsitsires' "homeless lifestyle," the Civil Court supposedly discounted Tsitsires' testimony he spent 7-8 months a year in his apartment and that his absences were seasonally related since apartment wiring didn't support air conditioning and the heat often wasn't working.

The dissenters also questioned the majority's reliance on Tsitsires' failure to accept medical treatment as the basis for his refusal to return to the apartment when, perhaps, the reason was the unit's uninhabitable condition. (They also objected to the lack of any evidence that Tsitsires "exceeded the 183-day period of unexplained absence permitted by the applicable statute.")

Life has certainly proven to be like a box of chocolates for this particular tenant.

Will Tsitsires take his tsuris to the Court of Appeals?

## WELCOME OUR NEW PARTNER, GLENN H. SPIEGEL

For over a decade, Glenn H. Spiegel has specialized in commercial and real-estate litigation and has appeared before various administrative agencies. Formerly a named partner with Turek Roth Spiegel LLP, Glenn has successfully tried cases and argued appeals on behalf of clients in Federal, State, Supreme and Civil Courts.

Glenn represents real-estate developers, contractors, building owners, Fortune 500 corporations, nationally traded companies, condominium and cooperative boards, and tenants' associations.

His practice includes representing clients' interests in a variety of complex matters including disputes involving commercial and real-estate contracts, residential and commercial landlord/tenant issues, business and partnership disputes, mortgage foreclosure and mechanic's lien proceedings, shareholder disputes, employment contracts and brokerage commission litigation.

He is an active member of various committees of the New York State Bar Association, the Association of the Bar of the City of New York, and the New York County Lawyer's Association.

Welcome to your new home, Glenn!

## CHURCH ADVERSELY POSSESSED?

In *West Middlebury Baptist Church v. Koester*, after Kevin Koester built a fence around a parcel of land believed to be his, the West Middlebury Baptist Church filed suit to determine who was the property's true owner.

The Church and Koester owned adjacent properties in West Middlebury, linked by a 1.19 acre "pie-shaped" parcel of land which the church claimed ownership.

An 1832 deed, which conveyed the property to the Church, described the northern boundary which the Church believed included the 1.19 acres, while Koester's deed made no reference to the area. Interestingly, when both parties employed surveyors, the mutual conclusion was that the 1.19 acres belonged to Koester and in 1999 he fenced-in the parcel.

When the Wyoming County Supreme Court found Koester to be the property's rightful owner, the Church appealed to the Appellate Division, Fourth Department.

The AD4 was of the opinion that the Church had acquired title to the property by way of "adverse possession" since it had open and exclusive use of the property for parking and treated it as its lawn for a 10 year period, had maintained two horse sheds on the property for nearly a century (prior to 1995 or 1996), and cultivated the area by "mowing, raking, and clearing." (As a result of the recent amendments to the law, [see below], mere "mowing, raking, and clearing" no longer cuts it.)

Was that a miracle or what?

## CHANGES TO "ADVERSE POSSESSION" ENACTED

On July 8, 2008, Governor Patterson signed an amendment to the state's controversial law of "adverse possession" -- a legal loophole that allows a person to stake a right to real property actually owned by another.

Of course, there are a number of elements that need to be satisfied before that "taking" can occur but, in recent years, more and more owners were losing parts of their properties to neighbors who claimed to have fenced-in the disputed area, mowed the grass, or otherwise cared for the parcel for a consecutive ten-year period.

The new law has eliminated some of the absurdities that had crept into the caselaw and had supported a claim. Now, "the existence of de minimis non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse. ... [L]awn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse."

## MANAGEMENT COMPANY WASN'T LIABLE

In *Vushaj v. Insignia Residential Group, Inc.*, handyman Kanto Vushaj was injured while making electrical repairs to a fuse block in a building managed by Insignia Residential Group, Inc. (Insignia).

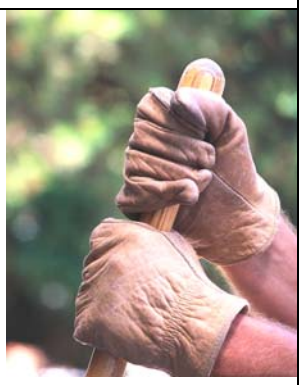
When the Bronx County Supreme Court refused to dismiss the case against Insignia, the company appealed to the Appellate Division, First Department.

The AD1 determined that under the management agreement's terms, Insignia didn't have a duty to ensure the building was in "good repair" nor was there enough evidence to establish Insignia was aware of an electrical defect.

In order to hold Insignia responsible for the accident, Vushaj needed to demonstrate it was in "complete and exclusive control of the premises." Since the company lacked such "broad authority," the building's owner was solely responsible for any failure to make repairs.

Are you shocked by that?

## UNLICENSED LANDSCAPER GETS MULCHED



In *Hakimi v. Cantwell Landscaping & Design, Inc.*, Farhad Hakimi claimed breach of contract stemming from landscaping work Cantwell performed on the homeowner's property.

Apparently, when Hakimi hired the company, Cantwell wasn't a licensed home improvement contactor as required by Suffolk County Law.

After a suit was filed, Cantwell countered with its own claim for the unpaid balance, and sought to foreclose on a mechanic's lien it filed on Hakimi's property.

Hakimi argued that Cantwell wasn't entitled to the monies since the company wasn't licensed when it performed the services. Cantwell contended the work fell within a license exemption for "new construction," and the Suffolk County Supreme Court agreed with the landscaper's position.

On appeal, the Appellate Division, Second Department, looked at the law's wording and found the loophole only applied to the actual construction of a new structure. The AD2 noted that "interpreting the phrase to include landscaping work performed at a property ... would require this Court to 'impermissibly rewrite a clearly worded statute to obtain a desired result.'" Therefore, since the work didn't fall within the governing licensing exemption, Cantwell couldn't get paid for its services and its lien was vacated.

Do you share that view of the landscape?

## OUR NEWEST ASSOCIATE, GLENN BEREZANSKIY

Glenn Berezanskiy joined Finkelstein Newman Ferrara LLP as an Associate in May of 2008. Mr. Berezanskiy was previously a commercial litigator at Cozen O'Connor P.C. where he engaged in broad-based litigation representing various entities and high-net worth individuals in state and federal courts and various arbitration panels across the country. Mr. Berezanskiy has also practiced in the intellectual property arena, representing various entertainers, musicians, and recording artists.

Mr. Berezanskiy earned his law degree, *cum laude,* from New York Law School in 2005 and his Bachelor of Arts degree, *magna cum laude,* from St. John's University in 2002. At New York Law School, Mr. Berezanskiy was an editor of the *New York Law School Law Review*. Mr. Berezanskiy was also a member of the Center of International Law, and a Justice John Marshall Harlan Scholar.

A fluent Russian speaker, Berezanskiy is admitted to practice in the State of New York, the United States District Courts for both the Southern and Eastern Districts.

## THERE'S NO RAINING ON BLOOMINGDALE'S PARADE!

In *Bloomingdales, Inc. v. New York City Transit Authority*, the New York City Transit Authority (NYCTA) had been repairing the electricity in the subway station near Bloomingdales' department store (on Third Avenue in Manhattan), when the retailer noticed its lower level flooded whenever it rained "heavily."

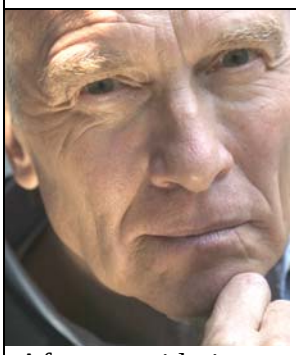
While Bloomingdales suspected there was a problem with the storm drainpipe, an inspection revealed it had been "cut and that a concrete duct was bisecting the pipe" causing water to enter the building rather than flow to the sewer.

When Bloomingdales filed suit against the NYCTA claiming negligence, trespass, and nuisance, the New York County Supreme Court found each of store's claims "time-barred" -- meaning the time within which those claims could be asserted had passed.

On appeal, the Appellate Division, First Department, noted "a claim involving an underground trespass was not barred by the three-year statute of limitations for injury to property" because the continuous obstruction to the drainpipe created "successive causes of action." Therefore, instead of treating the NYCTA's severance of the drainpipe as a "single negligent act," the AD1 saw it as a "continuous interference" and thus allowed the case to proceed.

A lone dissenter -- Justice Sweeny -- believed Bloomingdales' claims weren't timely since there wasn't an "encroachment" onto the store's property and, therefore, no lasting effects from the NYCTA's severing of the drainpipe.

If this case reaches the Court of Appeals, will NYCTA be caught in its Bloomies?



## WHAT HAPPENS WHEN LAWYER HAS ALZHEIMER'S?

In *Shapiro v. Kurtzman*, the Rockland County Supreme Court dismissed a case brought against Deborah Shapiro Kurtzman -- in July of 2004 -- after Milton B. Shapiro failed to respond to discovery.

A little over a year later, when his attorney was diagnosed with Alzheimer's, Milton reinstated his complaint against Kurtzman claiming his attorney didn't "properly represent him."

After considering an expert's affidavit which provided that in the earliest stages of Alzheimer's "there are noticeable deficits in demanding job situations," the Rockland County Supreme Court concluded counsel's "mental illness" rendered the lawsuit's dismissal inappropriate. However, it imposed a $10,000 sanction against Milton and directed he answer all "outstanding interrogatories within 60 days."

On appeal, the Appellate Division, Second Department, agreed the attorney's incapacity vitiated any deliberateness and concurred with the lawsuit's reinstatement and conditions imposed.

Sorry ... but we forgot the point of this piece.

## YOU DON'T GET IT, IF YOU CAN'T PERFORM

In *Weiss v. Feldbrand*, Solomon Weiss sought "specific performance" -- a court directive compelling Irene Feldbrand to sell him certain real property. To get that kind of relief, a buyer must demonstrate s/he is "ready, willing, and able" to perform according to the contract's terms.

When the Kings County Supreme Court denied Feldbrand's request to dismiss the case, and handed Weiss a victory, an appeal to the Appellate Division, Second Department, followed.

Since Weiss hadn't obtained a mortgage commitment and wasn't able to substantiate his claim that a relative would supply the funds needed to close, the AD2 rescinded the victory.

Unfortunately, we can't get more specific than that.

## THE AD1 DOESN'T DELIVER

In *Tower Ins. Co. of N.Y. v. Lin Hsin Long Co.*, Tower wanted a court to rule that it wasn't obligated to defend or indemnify Lin Hsin Long Co. -- known as Hunan Ritz Restaurant -- in connection with a personal injury suit filed against the establishment.

When it received notice some nine months after Charlotte Theodoratos fell in defendant's place of business, Tower filed its own case contending, since neither Lin Hsin nor Theodoratos timely notified the insurer of a possible claim, Tower wasn't responsible for the payment of any sums found due to Theodoratos.

After the New York County Supreme Court denied Tower's motion for relief in its favor, the insurer appealed to the Appellate Division, First Department, which agreed Tower hadn't been given notice of the accident within a "reasonable period of time."

While Lin Hsin argued it didn't contact Tower because it didn't believe there would be a claim, the AD1 was of the opinion the restaurant wasn't in a position to make that kind of assessment. (The AD1 also found Theodoratos' counsel failed to exercise "due diligence" when he merely urged the restaurant to notify its carrier.)

A lone dissenter -- Justice Andrias -- didn't believe Theodoratos or her attorney did anything wrong, and that the governing standard should have been be less stringently applied to an injured party (rather that the insured).

If the Court of Appeals doesn't intervene, this Tower will be insurmountable.

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