



LEGAL NOTES

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BSRB OBTAINS FAVORABLE ARBITRATION AWARD FOR CLIENT

BSRB partner Gardiner S. "Tad" Barone recently obtained a significant arbitration victory for a valued client. Our client, an excavation firm, initially engaged our firm to file a lawsuit to recover the balance due on a construction contract for site & excavation work rendered in connection with the redevelopment of a local commercial center. The site owner interposed various defenses and claims, including claims for money damages on account of construction delays, defective work and incomplete work. The site owner not only refused to pay our client for any of the work performed, but in fact sought damages in excess of \$500,000.

Upon completion of pre-trial proceedings, the parties agreed to refer the case to an engineering firm for arbitration, as the technical aspects of the case rendered it less suitable to be tried before a jury. After reviewing the submissions compiled by the BSRB litigation team, the arbitrator awarded our client the maximum amount permitted.

ARTICLE 81 GUARDIANSHIPS

By Mindy Menke, J.D.

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Whether you use a will or living trust as the "centerpiece" of your estate plan, your plan should also include a comprehensive durable power of attorney, health care proxy, and living will. A durable power of attorney gives the designated agent(s) the authority to handle the principal's financial affairs. A health care proxy provides the named agent the authority to make health care decisions for the principal if he or she no longer has requisite capacity to make them. And, a living will expresses the principal's wishes concerning life-sustaining treatment and end of life care. These documents can only be signed when the individual is competent and able to understand the decisions he or she is making.

But what happens if a person becomes incompetent or incapacitated and these documents are not in place or are insufficiently detailed? In such circumstances, the only alternative may be for a third party – be it a spouse, child, sibling or friend -- to file a petition in the Supreme or Surrogate's Court seeking appointment as the guardian for the personal needs and property management of the

alleged incapacitated person under Article 81 of the Mental Hygiene Law.

The petition must contain detailed personal information about the alleged incapacitated person (referred to as the “AIP”), including: his or her level of understanding and ability to function; allegations as to why the AIP is unable to manage his or her property; why the AIP would suffer harm without a guardian; a detailed description as to the powers sought; the value of the AIP’s assets; all of the AIP’s debts; the relationship of the proposed guardian to the AIP; and the names of all close living relatives. After the petition is filed with the court, it must be served upon the AIP, and notice must be given to the AIP’s spouse, children, adult siblings, and other persons with whom the AIP resides. Notice may also have to be given to the county Department of Social Services or the chief executive officer of any hospital, nursing home or facility where there AIP resides at the time of the petition. The notified individuals have the opportunity to appear at the guardianship hearing and support or object to the appointment of a guardian. If a notified party does not believe the proposed guardian is the best choice for guardian, they may contest the guardianship and even seek to be appointed guardian themselves, thereby creating a more litigious proceeding. Contested Guardianships typically increase the costs to all parties, and may delay the time it takes for a guardian to be appointed.

A “Court Evaluator” (an attorney or other professional with special training) will be appointed by the Court to investigate the claims

in the petition and make recommendations to the court. The AIP may also hire his or her own attorney, but even if the AIP does not retain an attorney, the court will usually appoint an attorney for the AIP. Both the Court Evaluator and the AIP’s attorney will charge an hourly fee (subject to court approval) that must be paid by the AIP or the person who filed the petition.

At the hearing, the judge will evaluate the testimony and other evidence to determine whether the petitioner has proven, based on clear and convincing evidence, (i) that the AIP is in fact incapacitated and in need of a guardian, and (ii) that the petitioner is the best choice for guardian. If the guardianship is contested, the hearing will resemble a trial where each party offering evidence as to why they should be appointed.

In the event a guardian is appointed, he or she must report to the court annually, providing detailed information about the incapacitated person’s physical and mental condition, treatment plans, and social conditions. The report must also contain an accounting that references all income received, expenses paid, and all account balances.

This article just scratches the surface of Article 81 guardianships. A guardianship can be a costly, time consuming and intrusive endeavor. The good news is that it can be easily avoided through a well-designed estate plan.

HELP FOR HOMEOWNERS IN FORECLOSURE

By Carol C. Pierce, J.D.

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According to the New York State Office of Court Administration, approximately 51% of all actions currently filed in Orange County are foreclosure actions. In New York State, perhaps only Long Island has been hit as hard as Orange County by the real estate crisis facing the nation. Unlike other areas of the country, where many foreclosures are the result of subprime loans being made to people who could not really afford them, the majority of foreclosures in our region appear to be due to a change in financial circumstances, such as loss of job(s), or the death or illness of a spouse or other family member.

In February 2009, the Obama Administration implemented a comprehensive financial stability plan to address this issue. A critical piece of this plan was the *Making Home Affordable Program*, which was designed to stabilize the housing market and help struggling homeowners get relief and avoid foreclosure.

The *Making Home Affordable Program*, governed by the U.S. Department of Treasury and U.S. Department of Housing and Urban Development (HUD), encompasses programs dealing with loan modifications, refinances, second liens, and foreclosure alternatives. The program will provide much needed help to eligible homeowners until 2012. Additionally, the programs also provide free HUD-approved housing counselors to assist homeowners not only in the application process, but also to determine what type of program(s) for which the homeowner may be eligible, and to provide overall financial counseling.

Home Affordable Modification Program

This program assists eligible homeowners struggling with monthly mortgage payments due to increasing interest rates or decreasing income with affordable mortgage payments. The program's goal is to lower the borrower's front-end debt-to-income ratio to 31%. In addition to other strict requirements, (i) the home must be owner occupied; (ii) the mortgage must have originated prior to January 3, 2009; and (iii) the lien must have an unpaid balance equal to or less than \$729,750 on a one-unit dwelling. Loans can only be modified once under this program.

If the homeowner is eligible for a loan modification under this program, a 90-day trial period will be required to make sure that the homeowner can remain current. Any default by the homeowner under this trial period will result in being considered "re-default," and the homeowner will be terminated from the program.

Home Affordable Refinance Program

The goal of this program is to provide low-cost refinancing for responsible homeowners who do not qualify for traditional refinancing as a result of falling home prices. Eligible borrowers whose loans are held by Fannie Mae or Freddie Mac will have the opportunity to refinance into a 30 or 15-year fixed rate loan.

Second Lien Modification Program

The second lien modification program assists eligible homeowners who are struggling meeting their obligations because of high second mortgage payments. Additional

incentives are provided to lenders/servicers to extinguish or reduce junior liens on homes. Under this program, the homeowner must have their first lien modified through the *Home Affordable Modification Program* before the second lien can be modified.

Home Affordable Foreclosure Alternatives

This program is available to homeowners who want to avoid the negative effects of foreclosure but (i) fail to qualify for the above programs, (ii) have defaulted during the trial period, and/or (iii) can no longer afford their home. The *Home Affordable Foreclosure Alternatives* program offers eligible homeowners up to \$3,000 to help transition into affordable housing when they complete a short sale or deed-in-lieu of foreclosure.

If it is determined that you are not eligible under the guidelines for a Home Affordable Modification, all is not lost. You may also contact your mortgage servicer to see if you are eligible for their in-house modification programs and/or forbearance agreements.

TENANT EVICTIONS: NEW YORK'S SUMMARY PROCEEDINGS

By Michael S. Blustein, J.D.

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Are you a commercial or residential property owner who leases rental property? Many of our clients acquire rental real estate properties to diversify their asset portfolio and to take advantage of tax deductions and depreciation.

That is all well and good when the tenants are paying the rent in a timely manner so that you can timely pay your mortgage and property taxes. However, in those situations where a tenant falls behind under its lease obligations, New York State law provides for a “summary proceeding” to enable the landlord to retake possession of the premises in an expedited manner.

To commence a summary proceeding, the landlord would file a Petition in the local justice court where the property is located, no matter how large or small the rental property is and regardless of how much is owed. Service of the Petition must be made on the tenant no less than five and not more than twelve days prior to the court date. Every local municipality has a justice court with varying frequency of court dates. Some towns have landlord/tenant court twice per week, and others once per month.

Blustein, Shapiro, Rich & Barone, LLP represents all types of landlords, ranging from large apartment complexes that have over 2,000 rental units; strip malls; large single tenant commercial and industrial spaces; and office buildings.

If a landlord hopes to have a defaulting tenant be made responsible for payment of the landlord’s legal fees in carrying out a summary proceeding, it is important for the lease agreement to include a specific provision imposing such liability on the tenant.

Our attorneys and staff are proficient at reviewing lease agreements and serving the correct notice to the tenant to either pay the rent owed or surrender the premises. As soon as that notice is served and the tenant’s time to respond expires, we immediately file the Notice of Petition and Petition with the Justice Court requesting an immediate hearing date. We have an in-house process server to make sure these papers are served as quickly as possible. Frequently, serving notice upon a tenant results in an immediate payment of overdue rent and it

is not necessary to pursue an actual hearing in court or evict the tenant.

Since our firm has 10 attorneys, we are able to have an attorney available to appear at the first available court date. If a court appearance is necessary and the tenant has no valid defenses, we will request that a Judgment and Warrant of Eviction be issued by the court. Most courts will request that our firm prepare the paperwork that is to be signed by the judge.

A landlord cannot use "self-help" and lockout a tenant, nor can the landlord turn off the electricity or water to force a tenant from their home. Only the Sheriff can lawfully carryout the eviction of a tenant. We will deliver the Warrant to the Sheriff, who serves a notice to

the tenant specifying that either the tenant must remove themselves by an "out" date, or the Sheriff will come and deliver possession. If a monetary judgment is issued by the judge, we will docket the judgment in the County Clerk's office. All judgments, which automatically remain of record for up to ten (10) years, permit us to perform income executions, bank restraining notices and other collection remedies to try and recover the judgment dollar amount. This authority is especially important in commercial cases where the amount owed to the landlord may be a substantial figure.

If you are looking for experienced landlord/tenant counsel, please contact me to personally discuss the matter.

EDUCATIONAL WORKSHOPS

Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:

Estate Plans That Work™

June 8, 2010 – 3:00 p.m. to 6:00 p.m.

Protecting Your Assets from Nursing Home Costs

June 17, 2010 – 10:00 a.m. to 12:00 p.m.

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.