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INSIDE

MAY 2018
FOCUS ON COMMERCIAL DIVISION UPDATE

Presiding Justice Alan D. Scheinkman Spends the Day in Suffolk County

Presiding Justice Alan D. Scheinkman toured our Suffolk County Courthouses in Riverhead and Central Islip with District Administrative Judge C. Randall Hinrichs, on April 20, visiting with the members of our Judiciary. Following a busy morning and afternoon, the SCBA's Appellate Law Committee hosted a special reception for the PJ at Bar Headquarters.

Presiding Justice Scheinkman of the Appellate Division, Second Department, was appointed by the governor on New Year's Day to one of the largest appellate departments. He replaced Randall Eng, who reached the mandatory retirement in 2017. We were honored to have Associate Justice Hector LaSalle introduce Justice Scheinkman to the assembly, saying he has played a key role in the Commercial Division's efforts to transform business litigation in New York State. His experience has been as a Supreme Court Justice and administrative judge, in addition to commercial matters.

He was so gracious chatting with all of the attendees and answering questions at the end of his address. President Patricia Meisenheimer thanked Judge Scheinkman for his wonderful collegiality and told him how much the SCBA members appreciate and value his friendship and professionalism. She presented him with a memento of the special occasion.

– LaCova

Photo by Barry Smolowitz

Suffolk County Bar Association President Patricia M. Meisenheimer, and Hon. Hector D. LaSalle, Associate Justice, NYS Supreme Court, Appellate Division, Second Judicial Dept, right, welcomed Hon. Alan D. Scheinkman, Presiding Justice, NYS Supreme Court, Appellate Division, Second Judicial Dept. For more photos, see page 19.

At Peter Sweisgood Dinner Elaine Turley Honored

Elaine Turley, described as someone dedicated to the lives of others, was the honoree at the Peter Sweisgood Dinner on May 5. She said that the Lawyers Helping Lawyers Committee is important and must be available to help the attorneys when they have a problem with addiction. See story and photos, Page 17.

Photo by Laura Lane

PRESIDENT'S MESSAGE

'Who can say where the road goes, where the day flows, only time'

By Patricia Meisenheimer

Pat Meisenheimer

This quote from Enya epitomizes the journey I have had this past year, a year that has flown by in what seemed to be a matter of moments. Time has shown that the road has been a marvelous journey. It has been my greatest professional honor to have served as the 109th president of this wonderful bar association and it is with a sense of fulfillment that the torch is passed to Justin Block, an attorney of great integrity whose wisdom I have valued.

At my installation, I spoke about the tradition of professionalism and civility handed down by our past presidents. Recognizing this heritage, it has been my vision to follow in this tradition and keep the past precedent of professionalism and civility strong and vibrant for our future generations. In embracing these elements, our incredible Executive Committee and Board of Directors have had a busy year, achieving success in several initiatives.

Together with the Nassau County Bar Association, the SCBA has formed a "Joint Task Force to Study and Promote a Fifth Appellate Division." The creation of the Joint Task Force was prompted by, among other things: (i) significant demographic changes since the establishment of the Second Department in 1894; (ii) marked increases in the overall number of appeals in the Second Department (accounting for nearly 65 percent of the state's appellate caseload), increases in filed motions and lawyer disciplinary matters; and (iii) the resulting protracted period of time from filing of the notice of appeal to decision. Co-chaired by Harvey B. Besunder of SCBA and William Savino of NCBA, with Hon. A. Gail Prudenti as chair emeritus, the Task Force will study reform measures so that the burden of our state's appellate caseload can be shared more efficiently, impacting con-

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FOCUS ON
COMMERCIAL
DIVISION UPDATE
SPECIAL EDITION

BAR EVENTS

See "A Chorus Line"
Thursday, May 17
Gateway Playhouse, Bellport

SCBA Charity Foundation fundraiser at the Gateway Playhouse presents "A Chorus Line." Tickets $100/includes dinner. For information call the bar.

Installation Dinner
Friday, June 15, at 6 p.m.

The 109th Installation Dinner Dance will be held at the East Wind, Wading River, N.Y. For information call the bar.

Access to Justice Pro Bono Project: Pathway to Citizenship Training Program
Thursday, May 17, 1:30 – 4:30 p.m.
Bar center

CLE program for attorneys who represent or want to represent non-citizens to become naturalized citizens. Learn practice tips from two very experienced immigration experts. Tuition will be waived for those attorneys who participate in this Pro Bono project by taking on one case, which will be limited to the preparation of the Form N-400 Application for Citizenship and either the Form I-912 Request for Fee Waiver or the Form I-942 Request for Reduced Fee. For more information, contact Aniella Russo – Aniella.russo@gmail.com

Standards of Proof and Statute of Limitations for Fraud/Negligent Misrepresentations Claims — Clear as Mud

By Kevin Schlosser

Claims of some form of fraud, whether alleging actual intent or negligent misrepresentation, permeate commercial litigation. But courts sometimes do not make it easy to decipher the governing standards for proving such claims or for determining the applicable statute of limitations. Since the case law affords room to argue, counsel should be aware of the differing pronouncements so as to take advantage of one side or the other when faced with these issues.

Kevin Schlosser

Standards of proof

The state and federal courts in New York have rendered conflicting decisions as to whether the clear and convincing standard of proof that applies to claims of actual fraud also applies to claims of negligent misrepresentation or constructive fraud under the Debtor Creditor Law (DCL).

As to negligent misrepresentation claims, the New York Pattern Jury Instructions take the position that the preponderance of the evidence standard applies. See NY PJI Civil 321. However, there is case law support for applying the clear and convincing standard to negligent misrepresentation claims:

> Negligent misrepresentation is a species of fraud that replaces the required showing of scienter with a showing of negligence. Like actions for fraud, negligent misrepresentation actions typically are based on inference rather than direct evidence. Thus, *New York's high standard of "clear and convincing" proof applies to actions for negligent misrepresentation as well as actions for intentional fraud.* [Citing state and federal cases.]
>
> *Allen v. Westpoint-Pepperell, Inc*., 11 F.Supp.2d 277 (S.D.N.Y.1997) (emphasis added).

Constructive fraud allegations involving fiduciaries present yet other issues on standards of proof. In those circumstances, the fiduciary who enters into a transaction with the one to whom it owes a fiduciary duty has the burden of proving by *clear and convincing evidence* that the transaction was free of improper influence, fraud or other wrongdoing. *Matter of Aoki v. Aoki*, 27 N.Y.3d 32 (2016) *See also* NY PJI Civil 320

Further confusion prevails over the standard of proof to apply to constructive fraud claims under the DCL, which do not require actual intent as an element — DCL §§ 273, 273-a, 274, 275 and 277. The conflicting case law in this regard was summarized concisely in *Piccarreto v. Mura*, 51 Misc.3d 1230(A) (NY Sup. Ct, Monroe Co. 2016), in which the court decided, "in the face of this unresolved judicial dispute, [to] apply the higher standard — clear and convincing evidence — to all of the plaintiff's claims under the Debtor/Creditor Law."

Statute of limitations

CPLR 213(8) provides that for "an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud or could with reasonable diligence have discovered it." The cases reveal that the generous statute of limitations in CPLR 213(8), allowing for an extended period of two years from the actual or with reasonable diligence discovery of the fraud, does not apply to fraud claims that do not require actual intent to defraud. See *Berman v Holland & Knight, LLP*, 156 AD3d 429 (1st Dep't 2017).

Nevertheless, courts have treated claims alleging "negligent misrepresentation" in various ways in determining what statute of limitations applies and when it accrues.

Some courts have held that a "cause of action for negligent misrepresentation has a three-year statute of limitations." *Remis v Fried*, 31 Misc 3d 1203(A) (NY Co. Sup Ct 2011); *Enzinna v. D'Youville College,* 34 Misc.3d 1223(A) (NY Co. Sup Ct 2010)("plaintiff's claim for damages for negligent misrepresentation…is governed by a three-year limitations period"); *U.S. Fire Ins. Co. v. North Shore Risk Management*, 114 A.D.3d 408 (1st Dep't 2014) ("negligent misrepresentation claims, to which a three-year statute of limitations applied").

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Takeaways from Two Commercial Jury Trials

By Bryan F. Lewis and Tara M. Darling

The relative infrequency of jury trials in commercial matters, and the fact-specific nature of the disputes, can make it difficult to draw broadly applicable conclusions for future use. However, over the past two years we have tried to verdict five similar commercial cases, two before juries and all before current or former commercial division justices. These were all contract disputes, involving "typical" commercial litigation scenarios seen by our SCBA members every day: "business divorces," claims for unpaid sales commissions, and breaches of fiduciary duty/non-competition obligations. Trying these similar cases in close proximity, before both juries and our esteemed bench, gave us a little perspective on the differences between these kinds of trials. These are our "takeaways" — take them for what they are.

Bryan F. Lewis

Tara M. Darling

There are plenty of good reasons for commercial practitioners to shy away from juries, but we think that too often emphasis is placed on the *wrong* reason — complexity. Certainly, commercial matters can be complex, as we in the commercial bar will not hesitate to tell anyone who will listen. Commercial litigation requires an attorney to consider matters from several disciplines and angles and apply a body of case law that is not always intuitive. However, this also leads too many of us to conclude that juries cannot try commercial cases because they will not understand the issues, will be "bored," or will ignore the instructions given by the court and decide the case based on their own sense of right and wrong.

In our experience, the opposite was true. *Voir dire* in our cases (one in Nassau, one in Suffolk) revealed that virtually all members of the panels either were, or knew, a business owner who had been involved in a legal dispute. Still others had been parties to non-competition agreements or policies in employee handbooks or understood that a shareholder or LLC member had fiduciary obligations to the company or their partners. During our jury trials, jurors listened intently, read along through countless exhibits and clearly took their responsibility as fact finders seriously. When polled on their verdicts after deliberations, it was not only clear that they understood the arguments of both sides, but that they also understood and worked hard to make sure they applied the instructions they were given by the court.

The takeaway: Juries are more capable of understanding the nuances of a commercial case than many of us give them credit for and practitioners should not be so quick to dismiss the idea of a jury trial because the subject matter is complex or "boring."

That said, preparing a case to present to a jury does force the attorneys to hone their presentation to the core issues in dispute, and to eliminate "side show" issues that have made their way into a bench trial or arbitration. It is also true that some of the other traditional reasons for avoiding — or choosing — juries still apply. Unpredictability is one. Practitioners are understandably more comfortable advising their clients about how a judge might assess the evidence than a jury. With a judge we share an education and professional experience; we have had countless opportunities to interact with them pre-trial (often over the course of years); we have colleagues who have tried cases before them, and can share their war stories; and we may even have a body of case law, either in our own case (decisions on motions to dismiss, injunctions, or summary judgment), or in other cases, that give a window into how disputed issues may be resolved at trial by a particular jurist. Conversely, we know very little about, and may have very little in common with, our empaneled jurors. This makes forecasting how a jury will view the facts exceedingly difficult and makes many of us pre-disposed to avoid them.

We saw this first-hand in the first of our jury cases, where we received a favorable verdict, but upon polling the jury learned it was for reasons neither we, nor our adversary, really anticipated. It was not that the jury did not understand the arguments or evidence or arrived at "incorrect" factual conclusions; it was that the jurors, after seeing the witnesses, hearing the testimony, and sharing their common experiences during deliberations, put those facts together, and came to their perfectly reasonable conclusion, in a different way than the lawyers.

"Likeability" and "credibility" may be two other reasons for avoiding — or pressing for — jury trials. In our second case, polling revealed that the jurors, to a member, decided our adversary's lead witness was "not a good guy" almost "as soon as he opened his mouth," and believed he was not being truthful. While we certainly agreed with this assessment of our adversary's witness, and tried to bring that out during cross-examination, hearing it from the jurors, years into the case, was a reminder that it is very easy

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Debtor Amends Exemptions to Protect Homestead 19 Years Later (Continued from page 21)

was that even though trustees are held to abandon assets that they do not administer, when a debtor fails to disclose the asset, there is no abandonment as a matter of law. (This concept has been discussed several times in this column especially with regard to debtors who failed to disclose personal injury suits and how such debtors sometimes lose the opportunity to proceed with the suit as they technically do not have standing).

Thus, the debtor's interest in the property remained an asset of the bankruptcy estate. To resolve the title objection and proceed to closing, the debtor and her children worked out an agreement with the title company in which they would hold the entire net proceeds in escrow until such time as they could resolve the interest of the bankruptcy estate.

Almost a year later, the debtor moved to reopen her case, which was granted. The debtor then amended her schedules to acknowledge the ownership of the life estate interest that she held at the time of filing in 1998, and to claim a homestead exemption in that interest – some 19 years later.

The Chapter 7 trustee (now a successor trustee as the original trustee had passed away) of course raised objections. First, the trustee argued that the debtor acted in bad faith as evidenced by her intentional failure to disclose a known asset. Secondly, the trustee contended that the debtor's amendment, 19 years later, should be rejected as untimely and unduly prejudicial to the bankruptcy estate.

The debtor's attorney argued that the debtor may have been unfamiliar with the concept of a life tenancy and that her initial failure to disclose the life estate was an innocent mistake that should not affect her right to an exemption.

Judge Bucki determined that the central issue involved the extent to which the court can disallow a valid but tardily claimed exemption under the standard that the Supreme Court established in *Law v. Siegel*.

The judge concluded that Siegal permitted debtors to freely amend their exemption schedules without limitation as to whether the case is open or reopened after closing. He noted that Code Section 350(b), which is that provision that provides for reopening a closed case, expressly acknowledges that a proper purpose of reopening is "to accord relief to the debtor," and that this includes the right to enjoy the benefit of all allowable exemptions. Judge Bucki also noted that the Federal Rules of Bankruptcy Procedure do not require that exemption schedules be amended within a specified period. Accordingly, the debtor was entitled to reopen her case and exempt her homestead 19 years after filing even though she did not disclose her ownership interest at the time of filing.

Practical tip: Trustees often seek to administer assets that debtors were either unaware of at the time of filing or unaware of the value, such as anticipated tax refunds. In such cases, debtor's counsel should consider whether to amend the schedule of exemptions to maximize those assets which can be protected, as *Siegel* freely permits debtors to make such amendments at any time.

Note: Craig D. Robins, a regular columnist, is a Long Island bankruptcy lawyer who has represented thousands of consumer and business clients during the past thirty-three years. He has offices in Melville, Coram, and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: www.BankruptcyCanHelp.com and his Bankruptcy Blog: www.LongIslandBankruptcyBlog.com.

The Closely Held Business and the Minority Owner (Continued from page 20)

The term "return" includes any tax or information return, any claim for refund, and any amendment or supplement thereto, including supporting schedules or attachments which are supplemental to, or part of, the return.

By contrast, "return information" may also be open to inspection by, or disclosure to, any person authorized above, *provided* the IRS determines that such disclosure would not seriously impair federal tax administration. The term "return information" includes, among other things, whether the return, was, is being, or will be examined, data prepared by or collected by the IRS with respect to the return or the determination of any liability, any closing agreement, and other items.

When it passed the Tax Reform Act of 1976, Congress clearly distinguished between "returns" and "return information," allowing greater access to tax returns than to return information:

Under the Act, disclosure can be made, upon written request, to the filing taxpayer... the partners of a partnership, the shareholders of subchapter S corporations ... [and] a one-percent shareholder... Return information (in contrast to "returns") may be disclosed to persons with a material interest only to the extent the IRS determines this would not adversely affect the administration of the tax laws.[12]

Based on the foregoing, one would reasonably conclude that the code provides a minority shareholder or partner an alternative means by which to obtain information regarding the economics of a business entity where the controlling owner may not be forthcoming in sharing it.

Or is there?

Actual experience, however, undermines that conclusion. Stay tuned for part 2.

Note: Lou Vlahos, a partner at Farrell Fritz, heads the law firm's Tax Practice Group. Lou can be reached at (516) 227-0639 or at lvlahos@farrellfritzcom.

[1] Beyond inheritance, for example. Speaking of inheritance, it probably results in the death of many a closely held business, at least where there has not been any succession planning, and where there is no well-drafted shareholders' or partnership agreement. Mom and dad know best? Not always.

[2] Minority owners should insist upon certain safeguards, including, for example: the assurance of receiving some minimum level of regular distributions from the business (at least to cover estimated or annual income taxes in the case of a pass-through entity); being able to put some or all of their equity to the business (at least upon one's demise), and having a right to vote on certain major business decisions.

[3] A bit of good luck doesn't hurt either.

[4] This is where a well-drafted shareholders' or partnership agreement may be vital. Of course, it may also be the reason, in hindsight, that such an agreement was never entered into.

[5] This is a commonly used tool of "oppression" in pass through entities. The minority owner will be subject to income tax, and perhaps employment taxes, whether or not the entity's profits are distributed to the owners. By withholding distributions from them, the minority owners (especially those that are not even employed by the business) may be forced to use other assets (which they may have to liquidate) to pay their tax liabilities.

[6] To Form 1065 or Form 1120S, as the case may be.

[7] Technically speaking, a partner cannot be an employee of their partnership, though they may be rendering services comparable to one, and for which they are compensated without reference to the profits of the partnership.

[8] Assuming the return is prepared properly and accurately. That's a whole other story.

[9] RC Sec. 6103(e)(1)(C) and (D). The return shall also be open to inspection by or disclosure to the attorney in fact authorized in writing by any of the persons described above to inspect the return or receive the information on his behalf.

[10] Including an LLC that is treated as a partnership for tax purposes. Of course, an LLC may elect to be taxed as a corporation.

[11] It should be noted that the information disclosed or inspected must not include any schedule, attachment or list that includes the TIN of a person other than the entity making the return or the person conducting the inspection or to whom the disclosure is made. Thus, for example, a requesting partner cannot receive any Form K-1 or other attachments that include identifying information of other partners.

[12] General Explanation of the Tax Reform Act of 1976, Joint Committee on Taxation, pg. 335.

Two Commercial Jury Trials (Continued from page 11)

for a practitioner, who may have had these same visceral reactions when they first deposed the witness, to get lost in the weeds of procedure and legal issues and allow that "gut feeling" to fade over time. Consequently, we can underestimate the impact of a witness' demeanor or presentation on a jury who hearing from that witness for the first time.

Our experience has made us far more inclined to utilize a jury in a commercial case. A jury naturally forces the attorneys to hone their jury presentation to the core issues, and to abandon some of the more convoluted arguments — threading the legal needle — that may have snuck into a bench trial or arbitration but may not go over well with jurors. Doing so can also be a pre-trial wake-up call for the lawyers and their clients. In our experience, Long Island jurors were not only adept at evaluating a witness' demeanor and credibility, but equally adept at understanding business issues and applying the law provided to them.

Note: Bryan Lewis' practice focuses on representation of commercial clients in all manner of civil litigation and business disputes. Representative matters range from complex contractual disputes between businesses, internal management disputes between business owners, and high-stakes construction litigation for builders and property owners. Bryan received his Juris Doctor degree from Brooklyn Law School, and is a proud alum of Washington & Lee University in Lexington, Virginia. Bryan volunteers as a youth baseball and soccer coach in Sayville, and is a member of the Commercial Division Committee of the Suffolk County Bar Association.

Note: Tara Darling concentrates her practice in the areas of real estate, banking law and commercial litigation. Tara received her Juris Doctorate, magna cum laude, from Touro College, Jacob D. Fuchsberg Law Center, where she also served as a senior staff member of the Touro Law Review. Tara graduated magna cum laude from Manhattan College with a Bachelor's of Science in Business Administration and a minor in Sociology. Tara volunteers her time as a session member of the First Presbyterian Church of Port Jefferson, and is a member of the Commercial Division Committee of the Suffolk County Bar Association.