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THE COUNSELOR

ARE RESTRICTIVE COVENANTS HELPFUL OR HARMFUL TO EMPLOYERS?

— Keith J. Frank, Esq.

It has become commonplace that when an individual is offered a job, that the employer will require that the prospective employee sign a restrictive covenants agreement as a condition of employment. The employer is usually under the perception that the employee will be bound to a non-compete provision (both while employed and for a set-time post-employment), a non-solicit of customers or other employees' provision (both while employed and for a set-time post-employment) and a confidentiality provision.

Employers should be aware that restrictive covenants like the ones above have increasingly come under attack from not only the courts, but from the federal and state governments. Many states including New York are considering legislation to ban non-competes for certain professions and curtail their use in other professions or by how much money an employee makes. Several states have recently proposed legislation that either bans non-competes or restricts and narrows when they can be used, such as: a) banning for certain categories of employees (NY); b) limiting duration (NY); c) termination circumstances to be considered in enforcement; d) notice and procedural requirements have to be satisfied to be binding (NY).



Keith J. Frank, Partner

States have also proposed legislation which is directed toward restrictive covenants in general, not just non-competes, such as: a) limiting enforceability of non-solicits; b) expanding employee remedies when faced with a restrictive covenant action (NY); c) prohibiting certain choice of law and venue provisions (NY); d) no judicial blue penciling, which is when the Court modifies the agreement on its own; e) retroactively applying restrictions; f) limit enforceability of confidentiality provisions; g) require paid salary during the restricted period; and h) prohibit non-solicit of employee provisions (NY). These are just examples of what state legislatures are considering, including New York where denoted above.

Although bills regarding restrictive covenants are pending in both the U.S. Senate and House of Representatives they do not appear to be going anywhere. As a result, President Biden in July of 2021 issued an Executive Order that was meant to encourage the Chair of the Federal Trade Commission to institute rules to “curtail the unfair use of non-compete clauses or agreements that may unfairly limit worker mobility.” As of this date the FTC has not taken action on instituting a rule and what the potential scope of that rule would be, including, its interaction with any relevant state law. Section 5(g) of the Executive Order states:

[T]he Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

Our advice to our business clients is not to rely on employee restrictive covenants to protect their interests if an employee is terminated voluntarily or involuntarily, whereas what may seem a clear-cut document that protects them, may not be fool-proof.

Employers, and their counsel, must continually monitor any changes in the law to make sure that they have restrictive covenant agreements that are in compliance with the latest changes to the law. ■

EVENTS AND SPEAKING ENGAGEMENTS

Judy L. Simoncic and **Daniel S. Dornfeld** attended the Commercial Industrial Brokers Society's (CIBS) Annual Meeting.



Lisa M. Casa and **Michael A. Berger** presented, "2021 What a Year: A Look at New Laws That You May Have Missed," to the NCBA's Labor & Employment Law Committee.

Lindsay Mesh Lotito participated in Valley's Women in Business Event, "The Future of Medicine & Health Today," a conversation with Dr. Florence Comite, a clinician-scientist and innovator in the field of precision medicine.

Elbert F. Nasis, **Daniel S. Dornfeld** and **Brian W. Kennedy** attended the HIA-LI's 44th Annual Meeting and Legislative Program.

As part of Hofstra Law's virtual Student/Alumni Mentorship Program, **Lindsay Mesh Lotito** participated in a Remote Orientation/Opening Reception. Ms. Mesh Lotito will be mentoring a 1L who has been hand-selected by the Offices of Alumni Relations and Career Services because of her interest in Banking & Finance law.

John P. Gordon and **Gregory W. Carman** attended CIBS' Future Gen event – Gatsby Night.



Lisa M. Casa participated in the Melville Chamber of Commerce's NeXGen Kick Start Networking Event.

Daniel P. Deegan, **James C. Ricca**, **Gerard R. Luckman**, **David J. Borkon** and **Elbert F. Nasis** attended the Long Island Association's (LIA) "State of the Region" breakfast.

Gabriella E. Botticelli is participating

in the NCBA's Student Mentor Program. NCBA members act as role models to at-risk youths by providing adult guidance in one-on-one sessions at local middle schools across Nassau County.

Michael A. Berger was a presenter at a CLE for The Theodore Roosevelt American Inn of Court titled, "Voting Rights: Past, Present & Future."

Stephanie M. Alberts and **Peter B. Skelos** presented, "The Use of Mediation in Surrogate's Court Litigation," to the Surrogate's Court Estates & Trust and ADR Committees of the Nassau County Bar Association. Surrogate Margaret C. Reilly and Court Attorney Lesli Hiller presented with them.

Gerard R. Luckman attended the ABI's 30th Annual Duberstein Bankruptcy Moot Court Competition Gala Awards Reception. Typically, nearly 600 leading bankruptcy practitioners and bankruptcy judges from the New York metro region and around the country attend this celebration.

Daniel P. Deegan, **Kathleen Deegan Dickson**, together with their families and clients, attended The Society of the Friendly Sons of St. Patrick on Long Island's 36th Annual Emerald Ball & Banquet.

Mary E. Mongioi and **David J. Borkon** attended the Western Veterinary Conference's 94th Annual Conference in Las Vegas. This Conference touted world-class veterinary education, collaboration and innovation. Following the conference, they entertained 80+ industry professionals at the Skyfall Lounge at Mandalay Bay.



Andrea Tsoukalas Curto and **Kathleen Deegan Dickson** attended the Women Economic Developers of Long Island's (WEDLI) breakfast meeting. Kathy is a member of WEDLI's Board of Directors.

Gregory S. Lisi, **James C. Ricca**, **Joseph P. Asselta**, **Gerard R.**

Luckman, **Danielle B. Gatto**, **Stephanie M. Alberts**, **Gabriella E. Botticelli** and **Raymond A. Castronovo** attended the Columbian Lawyers' Association of Nassau County, Inc.'s St. Joseph's Day Luncheon.

Daniel S. Dornfeld attended the Real Estate Institute's Spring Luncheon.

Lindsay Mesh Lotito and **John P. Bues** attended the Community Bankers Mortgage Forum, which included a discussion and examination into the current and future state of the Manhattan office market.

Alexander Kerzhner attended a fundraising event to support and honor the children of Ukraine.



Judy L. Simoncic and **Andrea Tsoukalas Curto** attended the Long Island Real Estate Group's Spring Networking Breakfast, "Trends in Real Estate Development."

James C. Ricca attended the Mortgage Bankers Association of New York's "Welcome Back to NYC" event.

FDT sponsored America's VetDogs' two-day virtual "Walk for America's VetDogs." This organization trains, and then places, dogs with veterans, active-duty military and first responders with physical or emotional disabilities. **Kelan C. Sullivan** attended the Kickoff and Photo Opportunity, which was held at the American Legion Post in Manhasset.



Lisa M. Casa presented at the NCBA's In-House Counsel Committee meeting on, "HR and Employment Issues." She addressed potential

issues with employees returning to the office.

Kathleen Deegan Dickson attended the Nassau County Village Officials Association's member meeting.

Daniel P. Deegan attended the LIA's Young Professionals Committee meeting.



Danielle E. Tricolla was invited by Eric Alexander, Director of Vision Long Island, to participate on a LI Main Street News video episode on cannabis.

Brian W. Kennedy and **Raymond Castronovo** attended the LIBI Associate Builder Breakfast.

Judy Simoncic, Andrea Tsoukalas Curto and their guests attended The Ivy Network's Collaborate with Edge conference.



Joseph V. Cuomo helped coach the St. Mary's (Manhasset) Elementary School Junior High Mock Trial team in preparation for the team's participation on May 21, 2022, in the 2022 Catholic Middle School Mock Trial Program, hosted by St. John's University School of Law. This St. John's Program, in its 19th year now, is the leading mock trial program in the country for junior high school aged students. Mr. Cuomo has been coaching the St. Mary's team since 2015.

Andrea Tsoukalas Curto, Judy L. Simoncic and **Kathleen Deegan Dickson** attended the CIBS Ladies' Happy Hour. ■

NEWSDAY

- Published the following announcements:
 - **Danielle E. Tricolla** and **Robert L. Renda's** promotions to Firm Partner.
 - **Gregory W. Carman, Zachary J. Manasia** and **Kelan C. Sullivan's** joined the firm as Associate Attorneys.
 - **Keith J. Frank** joined the Firm as a Partner.
 - **Daniel P. Deegan** was mentioned in the article, "Denver firm buying Northrop Grumman site in Bethpage for \$51.2M."
 - **Rebecca L. Stein** was featured in the LI People on the Move column.

LONG ISLAND BUSINESS NEWS

- **Gerard R. Luckman's** TMA Long Island appointment was featured on LIBN's homepage in the Top Stories section.
- **Gregory S. Lisi** was profiled in the WHO's WHO in Intellectual Property and Labor Law Special Supplement.
- **Gregory W. Carman** and **Zachary J. Manasia** were featured in the Movers & Shakers column.

NEW YORK LAW JOURNAL PUBLISHED:

- **Danielle E. Tricolla, Robert L. Renda** and **Stephanie M. Alberts'** promotions announcements.
- **Gregory W. Carman, Zachary J. Manasia** and **Kelan C. Sullivan's** welcome announcement.

NEW YORK REAL ESTATE JOURNAL PUBLISHED:

- **Daniel S. Dornfeld** and **Gregory W. Carman's** Page 2 column, "Lease Considerations for Cannabis Dispensaries – a Brief Overview."
- **Daniel S. Dornfeld** and **Greg W. Carman's** article, "Early lease considerations for cannabis dispensaries, Part II."
- **Lisa M. Casa's** article, "General Contractors are now Liable for the Wages Paid to its Subcontractors' Employees."
- **Gregory W. Carman, Zachary J. Manasia** and **Kelan C. Sullivan's** welcome announcement.
- **Kelan C. Sullivan's** Page 2 Column, "Esports and the benefits they offer to today's CRE owners."

BEST LAWYERS®:

- **Lindsay Mesh Lotito's** article, "From

Brick to Click," was published in the inaugural The Real Estate & Infrastructure Issue.

LAW360

- **Keith J. Frank** was featured in the Law360 article, "Forchelli Deegan Rehires Partner for Employment Practice."

NASSAU LAWYER

- **Gregory S. Lisi's** monthly articles "From the President" were published.
- **Jacqueline A. Rappel & Gabriella E. Botticelli's** article, "Will Today's Millennial Trend Become Tomorrow's Partition Action?," was published in the Focus: Real Property section.
- **Gregory S. Lisi & Gerard R. Luckman** were pictured in the "Committee on Committees Networking Event at Domus" recap.

REAL ESTATE FINANCE JOURNAL

- **Aaron Gershonowitz** and **Brian W. Kennedy's** article, "Cedar Point Nursery v. Hassid: When Does Property Use Regulation Become a "Taking," for Which the Government Must Provide Compensation?," was published.

HIA-LI "THE REPORTER"

- **Stephanie M. Alberts, Danielle E. Tricolla, Robert L. Renda** and **Gerard R. Luckman's** announcements were published in the "Heard Around the Island" column.

THE LEGAL BRIEF

- **Nicole S. Forchelli** was listed in the Among Us column congratulating SCBA members who were recognized in LIBN's WHO's WHO 2021 report.

FORDHAM LAW NEWS

- **Peter B. Skelos** was mentioned in the Class Notes Column.

THE ISLAND NOW

- **Douglas W. Atkins'** article, "Long Island Property Tax - Where are we and how did we get here?," was published. ■



BANKING & FINANCE

James C. Ricca negotiated and closed a \$125,000,000 secured line of credit loan by New York Community Bank to an industrial developer.

James C. Ricca and **Lindsay Mesh Lotito** negotiated and closed a \$40,275,000.00 first mortgage acquisition loan, with subordinate Mezzanine Financing, on behalf of New York Community Bank, secured by 2 properties in Rochester and Scottsville, New York.

Lindsay Mesh Lotito negotiated and closed a \$34,330,448.35 mortgage loan secured by commercial property in Commack, New York.

James C. Ricca negotiated and closed a \$21,500,000.00 first mortgage loan and a \$30,000,000.00 first mortgage loan secured by multifamily properties in Guilford County, Georgia and Gwinnett County, North Carolina.

Lindsay Mesh Lotito negotiated and closed a \$5,800,000.00 first mortgage loan and \$500,000 unsecured revolving line of credit on behalf of Valley National Bank secured by a cooperative building in Manhattan.

On behalf of New York Community Bank, **Lindsay Mesh Lotito** and **Steven G. Gaebler** negotiated and closed a \$6,800,000 mortgage and \$2,000,000 revolving line of credit second mortgage, both receiving IDA benefits secured by property located in Bellport, New York.

Steven G. Gaebler negotiated and closed a \$19,000,000 mortgage loan receiving IDA benefits on behalf of an Institutional Lender secured by commercial property in

Hauppauge, New York.

Steven G. Gaebler and **Lindsay Mesh Lotito** negotiated and closed a \$3,300,000 mortgage loan secured by property in South Carolina and assets of a Nevada entity.

On behalf of HSBC Bank, N.A., **Steven G. Gaebler** and **Lindsay Mesh Lotito** negotiated and closed a \$15,190,000 acquisition mortgage receiving IDA benefits and with a subordinated Purchase Financing Note and leaseback agreement for commercial property in Suffolk County.



CONSTRUCTION

Raymond A. Castronovo conducted a trial in the Supreme Court, Nassau County on behalf of a masonry contractor and was awarded judgment after trial on all claims. There were no signed written contracts between the parties and there were no regularly submitted invoices. Instead, the client's claims succeeded based on oral agreements and a course of dealing between the parties. Importantly, through quick and aggressive post-judgment efforts, Mr. Castronovo was able to obtain prompt and full payment of the judgment for the client.



EMPLOYMENT & LABOR

Castaldi v. Oyster Bay East Norwich School District and Syosset Central School District.
Gregory S. Lisi, Richard A. Blumberg and **Lisa M. Casa**

represented a client in front of The Appellate Division, 2nd Department, and affirmed a trial win in Nassau Supreme Court. The determination overturned the Oyster Bay School District and declared that our client's property was partially in the Syosset School District, dramatically increasing the value of our client's property.



LAND USE & ZONING

Kathleen Deegan Dickson obtained a parking variance from the Town of North Hempstead to permit a client to convert unproductive retail space to office space for his construction company.

Brian W. Kennedy obtained variances from the Town of Babylon for the legalization of a mixed-use property with insufficient parking.

Erik W. Snipas secured:

- Site Plan Approval and a Parking Variance before the Town of Oyster Bay's Planning Advisory Board and Zoning Board of Appeals in connection with a proposed addition to a medical building.
- approval from the Nassau County Planning Commission for a Lot Line Adjustment of a cemetery.

Andrea Tsoukalas Curto obtained zoning approvals from the Town of North Hempstead for a fleet service and rental facility with outdoor parking of vehicles in the Industrial zoning district in New Hyde Park. The client rents vans to Amazon, Fresh Direct, USPS and other e-commerce businesses. The zoning board approved triple-decker parking lifts to increase the parking capacity at the site. The

Board relied on Ms. Curto’s arguments that the storage of vehicles is an integral part of the client’s business, would improve site circulation and would benefit other businesses in the area by having less vehicles on the street.



LITIGATION

Working with a team of lawyers assembled by our client, **Russell G. Tisman** and **Lisa M. Casa** recently won two motions in an action in New Jersey State Court brought by a nominee shareholder for control of a start-up company established to develop and exploit patented crypto-currency technology against the patent holder and founder of the company. Plaintiff’s motion which sought an injunction to obtain control over investor funds that had been placed in crypto-wallets for use to develop the patented technology was denied. Their cross-motion, to stay the lawsuit and compel plaintiff to pursue his claims before the Hong Kong International Arbitration Centre, which Mr. Tisman argued, was granted, the lawsuit was stayed, and plaintiff was relegated to arbitration which our client and the investors have now commenced. The ruling effective placed the nominee shareholder on the sideline. Mr. Tisman & Ms. Casa expect that the arbitration will direct the shareholder to turn over his nominee share.

In a hotly contested litigation at the New York County Supreme Court, **Elbert F. Nasis** and **Michael A. Berger** succeeded in a well-argued pre-answer motion to dismiss plaintiff’s complaint wherein the court was persuaded to dismiss all but one of the plaintiff’s several causes of action. With respect to the remaining

cause of action for breach of contract, the Court nevertheless found it “extremely problematic” for the plaintiff, but declined to dismiss this cause of action at the very early stages of this litigation. Messrs. Nasis and Berger thereafter responded to plaintiff’s complaint, asserting a counterclaim for attorneys’ fees. The plaintiff then filed a motion to dismiss the counterclaim, but Messrs. Nasis and Berger were again successful with opposition papers and oral argument, persuading the Court to properly deny plaintiff’s motion to dismiss defendant’s counterclaim.

Elbert F. Nasis and **Danielle E. Tricolla** successfully opposed an appeal of an order dismissing claims in a lawsuit brought against our clients. The lawsuit challenged the allocation of certain assets formerly owned by the parties’ deceased parents. Mr. Nasis and Ms. Tricolla successfully demonstrated to the Supreme Court, Nassau County as well as the Appellate Division, Second Department that the documentary evidence established the parties’ previous agreement and ratification to the distribution of estate assets. As a result of their written submissions and persuasive oral argument, the Appellate Division, Second Department found that the plaintiffs’ contentions were without merit and affirmed the Supreme Court’s order of dismissal.

Russell G. Tisman obtained a \$6 million settlement on behalf of a passenger on a motorcycle who was injured when a commercial van turned into the motorcycle’s traffic lane. In an appeal briefed by Mr. Tisman, and argued by Hon. **Peter Skelos**, Ret., a former Justice on the Second Department bench, the Appellate Division, reversed the lower court’s denial of summary judgment holding that the van’s driver and owner

were liable, and that the passenger was without fault, as a matter of law because the van made an illegal turn, and the passenger did nothing to cause the accident. Faced with an impending trial solely as to the amount of damages, defendants settled in mediation where our client was assisted by affiliated trial counsel.



REAL ESTATE

Brian R. Sahn represented:

- A client in the acquisition of 2 tenanted medical office buildings located in St. Louis, MO, as well as an acquisition and construction loan for planned improvements to be made to the properties.
- A client in the sale of a newly-constructed 236-unit garden apartment project located in Austin, TX. Mr. Sahn previously represented the client in the acquisition of the property and closing of a \$20,700,000 construction loan.



Austin, TX Apartment Project
Photo Credit: apartmentguide.com

- A client in the sale of the F. W. Woolworth Mansion known as Winfield Hall, located in Glen Cove, NY, that sits on more than 16 acres and contains 38,000 square feet and a 17,000 square foot carriage house. The mansion had previously been used for several entertainment productions including a music video for Taylor Swift and the HBO dramas “Boardwalk Empire”

RECENT SUCCESSES: CONTINUED

and “Mildred Pierce.”



Woolworth Mansion
Photo Credit: KJW Photography

- A client in the acquisition of an industrial building located in Farmingdale, NY which included the procurement of industrial development benefits from the Town of Babylon Industrial Development Agency.
- A client investment group in the sale of the former Cedarbrook Golf Club located in Old Brookville, NY for a sale price in excess of \$15,000,000. Mr. Sahn previously represented the Seller when it acquired the property.
- A client in the sale of 11 acres of unimproved industrial land located in Medford, NY to an entity controlled by the Rechler Organization.
- A client in the \$11,000,000 refinance of an industrial warehouse located in Amityville, NY, including a lease extension by the sole tenant of the property and securing Town of Babylon Industrial Development Agency benefits for the continuing tenancy.
- A client in the acquisition of unimproved real property in Ft. Myers, FL for construction of a 251-unit garden apartment complex, including the acquisition and procurement of a construction loan in excess of \$30,000,000.

nursing facility on the east end. The property is home to 280 senior residents receiving housing, meals and medical care. Messrs. Terrana and Renda successfully demonstrated that the Town was inappropriately taxing the property on its non-real estate elements, namely the resident medical care. After appraisals and numerous pre-trial conferences, the firm recovered approximately \$400,000 for the client.

Douglas W. Atkins prosecuted a property tax case against the Town of Brookhaven on behalf of a veterinarian clinic. Mr. Atkins argued that the town was misclassifying the use of the property by putting too much weight on supposed excess land.

Additionally, Mr. Atkins successfully argued that the assessed value was well above market. The result for the client was a refund of \$104,000.

Nicole S. Forchelli resolved a property tax matter for a Fortune-500 company related to a bundle of properties in Upstate New York. She employed methodologies from both the leased fee and fee simple schools of thought, supported by the actual financial experience of the subject property, and boosted by comparable sales of similar properties in the area. After negotiations, Ms. Forchelli obtained a real estate tax benefit of more than \$350,000 for the client. ■

PLEASE JOIN US IN CONGRATULATING

JOHN V. TERRANA

Co-Managing Partner & Chair of FDT’s Tax Certiorari Practice Group

AND

KATHLEEN DEEGAN DICKSON

Co-Chair of FDT’s Cannabis Practice Group



TAX CERTIORARI

John V. Terrana and **Robert L. Renda** represented a large senior



FDT GOES...

BACK TO NETWORKING

As part of the firm's regional sponsorship, FDT's Long Island General Counsel Network (LIGCN) was thrilled to partner with the Association of Corporate Counsel (ACC) to host a Signature Social event. This year, guests were transported "Back to Networking" for an 80's themed event which was graciously hosted by long-time client AriZona Beverages, and took place on their spectacular rooftop complete with breathtaking views of Long Island.

ACC and FDT guests alike enjoyed 80's themed games & contests, memorabilia, snacks, music and even got to snap a photo with an actual DeLorean!

NOTABLE APPOINTMENTS



Keith J. Frank re-joined the firm's Employment & Labor practice group.



Rebecca L. Stein joined the firm's Tax, Trusts & Estates practice group.



Gianni V. Sbarro joined the firm's Land Use & Zoning practice group.



Jonathan Weiss, a St. John's Law student entering his third year, joined the firm as a Summer Diveristy Fellow.