

## Weidenbaum & Harari, LLP

### Welcome to our First Edition!

This is the first of many quarterly publications to be presented by W&H.

On the first page you will find some of the recent accomplishments of W&H.

We hope all our clients and colleagues find this publication informative and entertaining.

Weidenbaum & Harari has made tremendous strides over the past year in a number of different areas. Our Commercial Collections Division has successfully recovered hundreds of thousands of dollars on behalf of our clients in the Construction Industry. Our Transactions Division has served as counsel to numerous high-tech companies from small internet start-ups to large multi-national corporations in various corporate and telecommunications matters. Our Corporate Division recently represented a client relating to musical production work in an upcoming major Hollywood film.

We are pleased with the quality of our professional staff. Congratulations to Janice Christensen, a Weidenbaum & Harari Summer Associate, for being selected to the Fordham International Law Journal. Janice graduated magna cum laude from St. John's University. She was also the Valedictorian of her high school graduating class in 1995.

We are also pleased to continue our work with Gerald Collyer, Esq., former president of the Sub-contractor's Association of America, and Jeffrey Levine, Esq., who serve as special advisors to the

firm. Mr. Collyer has over thirty years of experience in the Construction Industry. Mr. Levine has extensive experience in the areas of complex trusts and estates, matrimonial law, and civil litigation.

Maria Kariotis, one of our legal assistants, is currently on a six week sabbatical in Greece and will return to the firm in August. We would like to welcome Mary Vinokur to the secretarial staff of the firm.

Weidenbaum & Harari looks forward to further growth and expansion over the next year. Let us know how we can help you!

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## Attorney-Client Privilege Does Not Protect Debtor in Post Judgment Collection Proceedings

New York CPLR § 5223 generally permits extensive discovery, allowing a judgment creditor to trace or locate the assets of the judgment debtor in order to satisfy a judgment.

In *American Greetings Corp. v. Hubkra Card & Gift Shop, Inc.*, where plaintiff had obtained a judgment against defendant in a commercial landlord-tenant proceeding, the New York Civil Court ruled that a judgment creditor is entitled to broad latitude to seek information such as retainer agreements, fee arrangements, and payments for legal bills or reimbursements made on behalf of a debtor by any third party. The attor-

ney-client privilege would not attach to the information sought under such circumstances. The period during which such information may be requested by the judgment creditor is, however, limited to two years.

## Special Issues Involving Public Improvement Liens



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According to a recent opinion of the New York Civil Court, once an action has been filed on a mechanics lien for a public improvement project along with a Notice of Pendency, there is no requirement that the Notice of Pendency be extended at the expiration of three years as is required with a Notice of Pendency on private property.

In *Maverick Construction Corp. v. SRM Construction Corp.*, the court stated that a lien filed on a public improvement does not attach to any realty, but only attaches to the money that the public agency has set aside for the improvement.

The defendant in *Maverick* entered into a contract with the New York City Housing Authority for

improvements to a Manhattan Housing Project. The surety and the contractor sought to dismiss the case on the grounds that the plaintiff had no privity of contract, that the lien expired three years after the filing of the Notice of Pendency for failure to renew the Notice of Pendency, and that the lien expired 30 days after filing the Notice of Pendency for failure to serve in that time.

The Court denied the motion on the grounds that public improvement liens are not governed by the same requirements set forth in the CPLR for Private Liens.

## Accord and Satisfaction in the Construction Industry

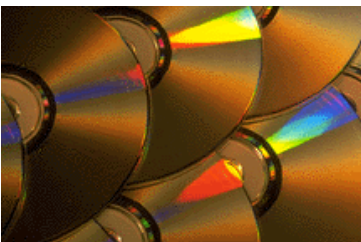
*Hematian v. E&M Hardwood Flooring*, N.Y.L.J., June 29, 2000 (N.Y. Sup.Ct.).

Where there is a dispute between parties regarding a claim, either party may assert the defense of accord and satisfaction. The party asserting this defense must establish that the amount due on the claim was in dispute and that the parties mutually resolved the dispute through a new contract. The acceptance of a check in full satisfaction of a disputed claim also operates as an accord and satisfaction discharging the entire claim.

In *Hematian v. E & M Hardwood Flooring Corp.*, plaintiffs alleged that defendant, a hardwood flooring company, improperly installed defective

maple flooring in plaintiff's home. The court granted defendant's motion to dismiss the complaint on the ground that there had been an accord and satisfaction. Defendants presented an invoice showing a price reduction due to defective materials. As plaintiffs had paid the reduced balance in satisfaction of their claims against the flooring company, the court concluded that plaintiff's claim had been discharged through accord and satisfaction.

## Piercing the Corporate Veil



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Although corporate defendants are generally shielded from personal liability for claims established against the company, they may lose this protection under a theory commonly referred to as "piercing the corporate veil," which imposes liability on certain individuals. In order to pierce the corporate veil, a plaintiff must show that the individual defendant (1) exercised complete control over a certain portion of the corporation and used this control to commit a fraud or wrong which injured the plaintiff.

In *Goldstein v. The Health and Injury Center*, plaintiffs adequately set forth the necessary elements to pierce the corporate veil by showing that defendants had used their control over the company to decide unilaterally to sell its assets, had personally benefited from the sale, and had intentionally and wrongfully denied plaintiffs their share of the sale proceeds.

## Diversion of Trust Funds

Pursuant to Article 3-A of the New York Lien Law, contractors are required to hold certain assets in trust funds to assure the payment of subcontractors, suppliers, architects, engineers, and other expenses of construction. A contractor who fails to keep a proper record of the funds receivable, payable, transferred, or assigned as detailed in the Lien Law may be presumed to have diverted the funds for nontrust purposes.

In *Alpha Mechanical Corp. v. Schwartz*, defendant subcontractors failed to pay the plaintiff for heating and air conditioning work which the plaintiff had performed under a sub-

contract with defendants. Plaintiffs brought suit under Lien Law Article 3-A. The court held that, in order to prevail under Article 3-A, plaintiff must show that the corporate principals knowingly caused or participated in the diversion of the funds.



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## Meeting the "Serious Injury" Threshold in "No Fault" Personal Injury Cases

Generally speaking, a plaintiff in an auto accident must sustain a "serious injury" as defined by New York Insurance Law § \_\_\_\_\_, commonly referred to as the "No Fault" Statute.

In *Elewa v. Enterprise Rent-A-Car Co.*, defendants moved for summary judgment dismissing the complaint on the grounds that it failed to allege a "serious injury."

In a ruling by New York Civil Court Judge Rothenberg, the Court held that an emotional or psychological injury can be a basis for a finding of "serious injury" under the No-Fault Statute. At a minimum, the plaintiff must show psychological impairment which prevented him or her from performing substantially all of the material acts which constituted his or her usual and custom-

ary daily activities for at least 90 of the first 180 days immediately following the accident.

In another case involving an auto accident, *Horgan v. Tiegan*, the Court held that proof of plaintiff's small disc herniation on its own was insufficient to meet the "serious injury" threshold under the insurance law. By contrast, a disc herniation coupled with evidence of a significant limitation of use of a body function or system or a permanent consequential physical limitation would be sufficient to establish the existence of a serious injury under the statute.

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*Elewa v. Enterprise Rent-A-Car Co.*, N.Y.L.J. April 27, 2000 (N.Y. Civ. Ct.).



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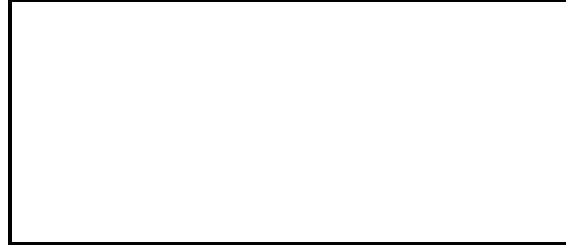
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## Tools of the Trade

### **Leases**

Careful drafting of leases can save a Landlord both time and money. One common problem Landlords encounter is that Tenants often commit the same lease violation repeatedly but then cure the violation before it becomes "an event of default" under the lease. To stop Tenants from chronically committing lease violations, the lease should allow the Landlord to treat more than two (or three) lease violations in any 12-month period (or shorter period) as an automatic noncurable "Event of Default." Advice for Tenants would be to try to negotiate that the automatic default would apply only to certain types of lease violations such as nonpayment or late payment of rent.

**We welcome all comments, questions, and suggestions for  
our next edition of the WH Legal Bulletin.**

**Call us at (212) 832-7400.**

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