THE SUFFOLK LAWYER
THE OFFICIAL PUBLICATION OF THE SUFFOLK COUNTY BAR ASSOCIATION
DEDICATED TO LEGAL EXCELLENCE SINCE 1908 www.scba.org Vol. 33, No. 2 – October 2017

INSIDE
OCTOBER 2017

ABA Holds 2017 Annual Meeting in New York City

By Scott M. Karson

As the Suffolk County Bar Association's delegate to the American Bar Association, I was privileged to attend the 2017 ABA annual meeting, which was held in New York City from August 10 – 15, 2017.

The highlight of the annual meeting was the two-day meeting of the ABA House of Delegates, the governing and policy-making body of the ABA comprised of 601 delegates from state, local and other specialty bar associations and legal entities.

Among the resolutions approved by the House was Resolution 10C, which urges Congress to amend Section 287 of the Immigration and Nationality Act to expand and codify Department of Homeland Security guidelines regarding immigration enforcement. It would specifically add courthouses to the government's list of "sensitive locations."

Scott Karson

Under current U.S. Immigration and Customs Enforcement ("ICE") policy, a handful of locations, such as schools, healthcare facilities, places of worship and religious ceremonies, and public demonstrations, are off-limits to ICE agents. Proponents of the resolution cited examples across the country where individuals avoided courthouses because of fears that ICE had been notified of their pending presence and their undocumented status. They argued that without designating courthouses as "sensitive locations," the effect would be to chill participation of undocumented victims, witnesses and defendants in the justice process.

The House also approved Resolution 108, proposed by the ABA Law Student Division and embraced by the ABA Young Lawyers Division, calling for state courts with authority to regulate admission to the bar to admit undocumented law school graduates if they are

(Continued on page 23)

Suffolk judges travel to Sagamore Hill to preside over Naturalization Ceremony

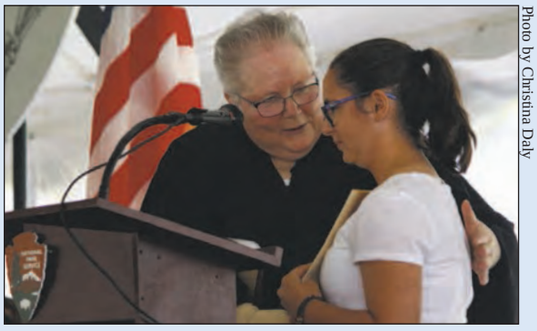


Photo by Christina Daly

U.S. District Judge A. Kathleen Tomlinson, who presided over the Naturalization Ceremony at Sagamore Hill, congratulated eighth grader Meghan Cox, who read her winning essay that welcomed the new citizens. See story page 5, more photos page 15.

PRESIDENT'S MESSAGE

By Patricia Meisenheimer

Pat Meisenheimer

On October 18, 2017, we will welcome our esteemed Federal and State Judiciary to the Suffolk County Bar Association. The evening is a celebration of the dedicated work performed by our judges in upholding our constitution and preserving the rule of law. It is without any doubt that our esteemed judiciary sustains the core values of protecting the rule of law by the delivery of equal justice, by treating all who come before them with fairness and impartiality and by showing dignity and respect to both litigants and members of the bar.

The bedrock of our democracy is the rule of law in that we have an independent judiciary who make decisions without regard to political pressures. Providing equal justice for all, while safeguarding judicial independence is a hallmark of our constitution and system of justice. Our judiciary is committed to fair, neutral and impartial nonpartisan decision making, treating all who come before them with fairness and impartiality in the administration of justice.

The rule of law is a principal under which all persons and institutions are accountable to the laws that are publicly promulgated, equally enforced and independently adjudicated. Our courts play an integral role in maintaining the rule of law. Our courts in Suffolk County clearly strive each day to reach the goal of excellence in the core values of equal justice, independence and preserving the public trust in our system of justice.

(Continued on page 22)

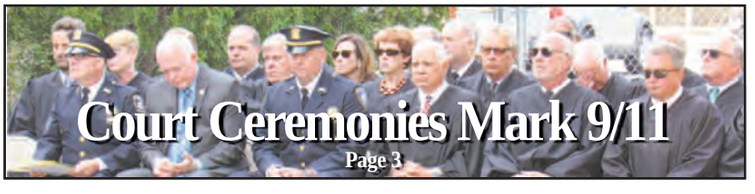
BAR EVENTS

Annual Halloween Party
Friday, Oct. 27 at 6 p.m.
Great Hall, Bar Center

The Charity Foundation will host this popular event for the second time. Come in costume and get a raffle ticket., 6 p.m. Meet Freddie the Dragon, and Edith, who reads Tarot Cards, and Witchy Poo. There will be skeletons and jack-o-lanterns and lots of fun. Look for the flyer on our website.

SCBA Holiday Party
Friday, Dec. 8, from 4 to 7 p.m.
Great Hall, Bar Center

Join your colleagues in ringing in the holidays at this festive party which includes refreshments and live entertainment. For further information call the bar.



LABOR AND EMPLOYMENT

The WARN Act — What Attorneys Advising Business Owners Need to Know

By Vincent J. Costa

The Worker Adjustment and Retraining Notification Act (WARN) is administered by the U.S. Department of Labor Employment and Training Administration on the federal level and by the New York State Department of Labor on the state level. Whether you are advising a longtime business owner or an entrepreneur purchasing a new business, you must familiarize yourself with the complex requirements of the WARN Act.

On the federal level, a WARN notice is required when a business with more than 100 full-time workers is laying off at least 50 people at a "single site of employment." New York is one of a handful of states (New Jersey, California, Illinois, Wisconsin, and Tennessee) to establish more stringent WARN laws at the state level.

The New York WARN Act applies to private businesses (for-profit or not-for-profit) with 50 or more full-time employees within New York State. WARN requires businesses to give advance written notice to *all* employees as well as certain government agencies prior to particular layoffs, downsizing, or reductions in force. It covers:

Vincent J. Costa

• A "mass layoff" occurs when, over a 30-day period, a reduction-in-force results in an "employment loss" of more than six months for: (a) at least 25 full-time employees who represent at least 33 percent of all of employees at the work site; or (b) at least 250 full-time employees.

• A "plant closing" is defined as an "employment loss" of 25 or more full-time employees during a 30-day period due to a permanent or temporary shutdown of the worksite.

• Under WARN, a "relocation" occurs when "all or substantially all" operations are relocated to a location at least 50 miles from the current location and where 25 or more full-time employees suffer an "employment loss."

The New York WARN requirements are complex. To complicate matters further, employment losses are aggregated over a rolling 90-day period. So, employers not only have to look at whether employment losses taking place at a particular point in time meet the thresholds above, but they must also be mindful of employment losses in the recent past and anticipated employment losses in the near future when determining whether notice is required. Also, certain workers, such as part-time employees working fewer than 20 hours per week or employees that have worked less than six months in the past year, are not counted when calculating the number of employees for WARN.

Attorneys advising clients in M&A transactions must be mindful of WARN throughout the process. In M&A transactions, the seller is responsible for providing WARN notice for employment losses up to and including the effective date of the sale. The buyer is responsible for providing WARN notice for employment losses post-closing. On the closing date, employees of the seller automatically become employees of the buyer for purposes of the WARN notice requirement. Because of this, post-closing WARN liability is commonly negotiated between buyers and sellers. The parties are best served to work together when it comes to transitioning employees or letting them go.

Businesses that do not comply with WARN's requirements may be required to pay back wages and benefits to workers as well as a civil penalty to the Department of Labor. Each scenario is different, and attorneys advising business owners must understand these issues when making recommendations to their clients regarding employment decisions.

Note: Vincent Costa is an attorney at Campolo, Middleton & McCormick, LLP, a premier law firm with offices in Ronkonkoma and Bridgehampton. His practice includes corporate transactions, M&A, and labor and employment matters. Contact Vincent at

CYBER

Are Private Clouds the Answer?

By Victor Yannacone, Jr.

While the Cloud can help you as a practicing attorney, it also means you have less control over sensitive data and less protection against advanced malware. The Cloud creates a changing threat landscape that takes advantage of new gaps in protection as well as changes in how data and applications are delivered.

With a "private Cloud," lawyers and law firms can obtain the key benefits of the public Cloud while asserting greater control over security, protection and compliance.

In the public Cloud, you purchase features and functions as a service and the Cloud service provider owns and controls the infrastructure. The private Cloud enables you to build your own on-premises infrastructure and assure control over security by allowing you to define your own service-level agreements.

Your own individualized private Cloud can "float" in a software-defined data center (SDDC), where you extend virtualization to a centrally managed storage, networking and security platform.

Security Challenges

Unfortunately, the traditional point security solutions you are relying upon were not built to protect the traffic flows within a private cloud. The security risks that threaten your network today become more significant when you move to the Cloud, whether a public Cloud, a private Cloud or some hybrid Cloud.

Victor Yannacone,

Security best practices dictate that mission-critical applications and data be separated in secure segments on the network, which is accomplished using firewalls and policies based on application and user identity. In your cloud computing environment, direct communication between virtual machines within a server occurs constantly, in some cases across varied levels of trust, making segmentation a difficult task.

Security deployments are process-oriented, while cloud computing environments are dynamic. The result is a discrepancy between security policy and virtualized workload deployment and a weakened security posture. The Private Cloud is a new type of infrastructure — highly virtualized and software-defined.

In a highly virtualized or software-defined private Cloud, network traffic flows primarily between virtual machines and internal threats can propagate laterally. One compromised server can attack another. With always-on availability, manual processes create unnecessary risks.

Running many traditional security packages such as antivirus in a highly virtualized Cloud environment will generally result in a significant negative impact on performance and operations.

Because different jurisdictions have different and often seemingly contradictory regulatory requirements for data protection and privacy, you must comply with the laws, rules, regulations and policies wherever your practice takes you. That means everywhere data and applications flow through the Cloud — private, public or hybrid.

Securing the Private Cloud

If you take a holistic, integrated approach to private Cloud security, you can reduce complexity and close security gaps; lower costs with security as a service; and reduce risk through compliance automation.

By addressing security as a critical and integral component of the software-defined architecture, you can leverage a security-as-a-service model.

The key technology to incorporate is a virtualized network security platform for intrusion prevention and permit optimization of all appropriate security systems for virtual environments.

The critical element of security system for the Private Cloud is detection of advanced targeted attacks and converting threat information into immediate action and protection.

You should strive to unify security management across endpoints, networks, data, Clouds and compliance solutions, with the ability to quickly remediate outstanding issues.

Where do you host your private Cloud?

One of the basic considerations in determining whether to host your private Cloud in-house or with a commercial host service provider is an SAS 70 audit (Statement on Auditing Standards 70) or its successor SSAE 16 (Statement of Standards for Attestation Engagements 16) and evidence of compliance with PCI DSS, the *Payment Card Industry Data Security Standard*, which is a set of security standards designed to ensure that *all* companies that accept, process, store or transmit credit card information maintain a secure environment. Many attorneys practicing in the areas of personal injury, matrimonial and elder law must also comply with HIPAA, the *Health Insurance Portability and Accountability Act*, which es-

(Continued on page 20)

Bench Briefs (Continued from page 4)

American Home Mortgage, Index No.: 37543/2009, decided on Aug. 7, 2017, the court denied the defendant's motion to vacate pursuant to CPLR 5015(a)(3).

In support of the motion, the defendant contended that the plaintiff misrepresented the merits of the action, specifically the chain of title, which she claimed was defective and that this misrepresentation warranted vacatur under CPLR 5015(a)(3). The defendant further alleged that the note was never transferred to the plaintiff, and that the mortgage assignments contained improper notarization and were therefore invalid. The defendant additionally contended that plaintiff's representations to the court that the defendant's affirmative defenses of unclean hands and "defense founded on documentary evidence" were not valid, was another misrepresentation.

The defendant also argued that the misrepresentations amounted mail and/or wire fraud. On these grounds, plaintiff requested that summary judgment should be vacated and the complaint should be dismissed.

In denying the application, the court found that the defendant did not provide a reasonable excuse for failing to oppose the plaintiff's motion for summary judgment. The court also stated, that while defense counsel couched his argument under the banner of "misrepresentations" by plaintiff's counsel to the court, the true essence of his challenge was to the merits of the action itself. The court said that no evidence whatsoever was proffered to demonstrate that any of the alleged conduct by the plaintiff, however characterized, prevented the defendant from fully or fairly litigating the matter.

Motion to dismiss or vacate default denied; to the extent that the defendant may either seek dismissal of the complaint or vacatur on the ground that the plaintiff allegedly lacks standing to prosecute its claims for foreclosure, the defendant waived such defense by failing to timely interpose an answer or file a pre-answer motion which asserted the defense of standing; he did not provide a reasonable excuse for his failure to answer.

In *Wells Fargo Bank, N.A. v. Lee Salzmann, National City Bank, Corina Salzmann,* Index No.: 12637/2008, decided on July 21, 2017, the court denied defendant's motion to dismiss or vacate pursuant to CPLR 5015(a)(3)(006). The court noted that the instant matter was one for foreclosure, wherein defendant executed a note in the amount of $417,000.00 in favor of EverHome Mortgage Company. The defendant failed to timely appear or answer the complaint.

An order of reference on default was granted on April 14, 2010. There were further motions decided by the court and conferences held. Ultimately, the defendant made a motion to dismiss or vacate, contending that the note was fatally defective due to robo-signatures (stamps that are not signatures and not actual signatures), which make the indorseemnnts on the note void, and amount to fraud.

In opposition, plaintiff contended that the defendant's claims were really a challenge to the plaintiff's standing in disguise. and that the defense of standing had been waived. In deciding this aspect of the motion, the court stated that a party may not move for affirmative relief of a non-jurisdictional nature, such as dismissal of a complaint pursuant to CPLR 3211, without successfully moving to vacate its default. It continued, and said that while the defendant asserted that his challenges to the validity of the note, its indorsement and the plaintiff's holder status were being made pursuant to CPLR 5015(a)(3), to the extent that the defendant may either seek dismissal of the complaint or vacatur on the ground that the plaintiff allegedly lacks standing to prosecute its claims for foreclosure, the defendant had waived such defense by failing to timely interpose an answer or file a pre-answer motion which asserted the defense of standing.

The defendant's motion to vacate pursuant to CPLR 5015(a)(3) was denied on the grounds that he did not provide a reasonable excuse for his failure to answer. Moreover, the court found that the defendant failed to otherwise demonstrate that the invocation of the court's inherent power to vacate a judgment in the interest of substantial justice was warranted in this case.

Honorable Arthur G. Pitts

Motion for a preliminary injunction granted; plaintiffs met burden.

In *Susan Ferdinand and David Ferdinand, individually and as trustee of the East Coast Trust v. Gary Salino and Karen Salino,* Index No.: 612821/2016, decided on November 15, 2016, the court granted the motion for an order enjoining defendants Gary Salino and Karen Salino from placing signs on the plaintiffs' property for the purpose of deterring others from entering, harassing and intimidating the plaintiffs' invitees, blocking the driveway of the subject property, insulting the plaintiffs' invitees, videotaping or photographing the premises as well as the plaintiffs and their invitees, and any other action with the intent to chill the economic value of the property such as deterring potential workers, utility service workers or other occupants.

The plaintiffs purchased a property with two single family dwellings. Shortly after the plaintiffs started making improvements to the property, the defendants placed a sign by the entrance, which stated that the cottages could not be legally occupied. When requested to move the sign, the defendants contacted the Town of Brookhaven.

The Town of Brookhaven commenced an action to enjoin plaintiffs from performing any work on the property, however, the application was denied. The court noted that in order to prevail on a motion for a preliminary injunction, the movant must clearly demonstrate the likelihood of success on the merits; irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in his or her favor. The court concluded that plaintiffs met their burden.

Motion for summary judgment denied; general release inapplicable to defendant

In *Christine McDonald v. Pllumb Bajraktari,* Index No.: 2531/2015, decided on March 22, 2017, the court denied the defendant's motion for summary judgment dismissing plaintiff's complaint.

The case at bar was one for personal injuries sounding in negligence that arose from a motor vehicle accident. There was a prior action filed by plaintiff against Gina M. Ulrich, which arose from the same accident. In the prior action, discovery was conducted and depositions of defendant Ulrich and the defendant herein Bajraktari, as a non-party witness, were held. Both Ulrich and Bajraktari testified that Ulrich was the owner and driver of a vehicle and Bajraktari was a passenger in her vehicle at the time of the subject accident.

The prior action was settled and a general release was issued to Ulrich. The defendant now moved for summary judgment averring that plaintiff was barred from bringing this action because she issued a general release related to this accident. In denying the branch of the motion as to whether or not the general release barred the instant action against Bajraktari, the court noted that the words of a general release are operative not only as to all controversies and causes of action between the releaser and releases which had ripened into litigation, but to all such issues which might then have been adjudicated as a result of a pre-existing controversy.

Herein, the court concluded that the general release was inapplicable as to Bajraktari, who was not specifically released by the plaintiff. As such, summary judgment on such grounds was denied.

Please send future decisions to appear in "Decisions of Interest" column to Elaine M. Colavito at elaine_colavito@live.com. There is no guarantee that decisions received will be published. Submissions are limited to decisions from Suffolk County trial courts. Submissions are accepted on a continual basis.

Note: Elaine Colavito graduated from Touro Law Center in 2007 in the top 6% of her class. She is an associate at Sahn Ward Coschignano, PLLC in Uniondale. Ms. Colavito concentrates her practice in matrimonial and family law, civil litigation and immigration matters.

Are Private Clouds the Answer? (Continued from page 13)

tablishes the standard for protecting protected health information (PHI) by ensuring that all the required physical, network, and process security measures are in place and followed.

Always keep in mind that most security technologies and techniques of legacy data centers do not carry over into the Cloud. It is wise to insist upon an integrated, coordinated approach to private Cloud security from a single vendor.

Choosing among one or more public clouds, a private cloud or a hybrid cloud solution is a complex process. It requires a thorough understanding of how you and your firm access, use, and store data as well as the privacy and privilege concerns attached to that data. The choices you make and the systems you choose require a significant amount of research or force you to rely upon experts whom you may not be qualified to evaluate.

Unfortunately, however, if you intend to continue providing legal services to modern business enterprises you must make these choices sooner rather than later.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.