THE FPT NEWS

". . . useful information for clients and prospective clients."

© 2015 Fischer Porter &Thomas, P.C.
Attorneys at Law

Fall 2015
Vol. XI, No. 1

MEDIATION
Perfect for Commercial Disputes

Recognizing that a negotiated settlement is often more satisfying to all parties than a decision imposed by a judge, the New Jersey court system encourages parties to a lawsuit to try to settle their dispute through mediation. Most commercial litigants are ordered by the judge to mediate for at least two hours. If the parties find the mediation promising, they can agree to continue; if not, any party can stop mediating after the mandatory two hours. Litigants can also ask the court for an order referring them to mediation at any time. Indeed, mediation is often useful before a lawsuit begins when the parties are willing to work out their differences but have trouble negotiating directly with each other.

Mediation is essentially negotiation assisted by a neutral facilitator who tries to help the parties resolve their dispute to their mutual satisfaction. Unlike a judge or an arbitrator, the mediator does not decide anything, or even push for a particular solution. Rather, the mediator gives all parties a chance to be heard, helps the parties understand the strengths and weaknesses of their own positions and those of the other parties, and facilitates discussions once the parties are ready to think seriously about what it would take to settle their case.

Continued on page 2

INSIDE THIS ISSUE

LOCAL REDEVELOPMENT
You Are Not Powerless

The New Jersey Local Redevelopment and Housing Law, N.J.S.A. 40A: 12A-1 *et seq.* ("LRHL") addresses the issue of "deterioration in housing, commercial and industrial installations, public services and facilities, and other [aspects] of community life" and seeks to improve the efficiency of local redevelopment intended to combat that problem. The LHRL allows for any area to be deemed in need of rehabilitation by a municipal resolution after a preliminary investigation by the local planning board and a public comment period. Together with the State's Eminent Domain Act of 1971 (N.J.S.A. 20: 3-1 *et seq.*), the State has granted great powers to municipalities to invigorate a community by taking private property and turning it over to a developer, and it is all permitted by the U.S. and New Jersey Constitutions. However, the laws provide numerous opportunities to challenge a municipality's actions to insure the actions are not arbitrary, supported by competent evidence and subject to public scrutiny as well as to insure property owners receive "just compensation" for their property. It is a multi-year process and property owners must be vigilant at each step along the way.

The first step is the municipality's adoption of a resolution directing its Planning Board to investigate and report on an area believed to be in need of redevelopment. The Planning Board follows its usual procedures including a public hearing and notice to the public and to property owners in the proposed area. A report is made the municipality which then must adopt a binding resolution designating all or part of the area

Continued on page 2

MEDIATION (continued from page 1)

One advantage of mediation is that the parties are free to think "outside the box" and come up with creative solutions that a judge or an arbitrator would never suggest, let alone impose. In a commercial setting, the parties can often design solutions that satisfy at least some business interests of all parties. This can be much more desirable than litigating a case through trial, which will take a year or more to complete and involve substantial legal fees and expenses. Even a "win" after a long expensive litigation may not be as economically sensible as a negotiated settlement reached earlier in the process.

Another advantage of mediation is that a mediator can inject some "reality" into the process and help litigants understand that they may not get everything in a lawsuit, and that even if they do, it will take a lot of time and money to get there. Hearing an independent assessment of their case from a neutral third party often makes that assessment easier for a litigant to accept.

Finally, everything that happens in mediation is confidential and cannot be used in court. This helps the parties negotiate without fear of giving away leverage to the other parties that could be used against them later.

Fischer Porter & Thomas has represented many commercial clients in mediation and assisted them in achieving negotiated settlements. Indeed, Mr. Albert is a trained mediator. Ask us whether mediation can help you resolve your business disputes. - *AEA*

For more information or to learn about Fischer Porter & Thomas, P.C., and our firm's services and experience, see our website at www.fpt-law.com or call telephone number (201) 569-5959 and ask to speak with one of our attorneys:

Arthur "Scott" L. Porter, Jr.
aporter@fpt-law.com

Alan C. Thomas
athomas@fpt-law.com

Aaron E. Albert
aalbert@fpt-law.com

Reena Forst
rforst@fpt-law.com

James N. Faller
jfaller@fpt-law.com

Our address in New Jersey is 560 Sylvan Avenue (Route 9W), Suite 3061, Englewood Cliffs, NJ 07632.

A Correspondent Law Firm to LawExchange International
www.lawexchangeinternational.com

REDEVELOPM'T (continued from page 1)

as a "Redevelopment Area." Again, the municipality must follow the law on public notice and a hearing before the resolution is adopted.

Once adopted, the LRHL requires that you be notified within 10 days of a determination that your property is located in a Redevelopment Area. The notice must "adequate," which means it must alert you that: (1) your property has been designated to be in need of redevelopment, (2) the designation operates as a finding of public purpose and authorizes the municipality to take your property against your will, and (3) you have 45 days to challenge the determination or be barred from doing so in the future.

After legal challenges have been completed, the LHRL allows the municipality to "proceed with the clearance, replanning, development, and redevelopment of" the designated area. This typically involves a return to the Planning Board to insure compliance with the municipal Master Plan and preparation of the actual "Redevelopment Plan." Again, the Planning Board must follow the law on public notice, notice to property owners in the Redevelopment Area, and a public hearing. Once the Planning Board adopts a Redevelopment Plan, the municipality must adopt the Plan by ordinance, with notice and a public hearing.

This is when the eminent domain process typically begins. The town must first attempt to acquire your property through bona fide negotiations, including a written offer and a description of how the offer was calculated. The town must appraise your property, and its offer cannot be lower than the appraised value. If no agreement is reached, the town will file a condemnation action in court. You can try to prove, as a defense, that the town does not have the power to condemn the property, but that is a difficult burden to bear. After the court has determined that the town does have such power, it will appoint a board of commissioners to determine what just compensation would be. You can only appeal the compensation determined by the commissioners, not the condemnation or taking.

Clearly, your town has broad powers to take your property for a public purpose. It is important to be aware of the redevelopment talk and plans in your town and especially of the public notices issued by your town government and local planning board. If you think that your property might be designated an area in need of redevelopment, you can fight back at each stage of the process, the sooner the better. Contact a lawyer immediately to get the advice you'll need to save your home or business. - *THF &ACT*

A NEW ALIMONY LAW FOR NEW JERSEY
Most Changes Benefit the Payor

In response to activism from groups comprised of alimony payors and their supporters, New Jersey has made significant changes to its alimony statute (N.J. Stat. § 2A:34-23). These changes affect the courts' considerations when assessing alimony claims, both at the time a divorce is finalized and in the event the alimony payor seeks to terminate or modify alimony obligations at a later date.

The new statute enumerates fourteen factors to be considered when courts are determining the amount of alimony, which is just one more than the old statute. The more significant change is a statutory directive that "the court shall consider and assess evidence with respect to all relevant statutory factors" (emphasis added). This change responds to the criticism that courts, under the old statute, focused on one single factor – the standard of living established during the marriage and the likelihood that each party can maintain a reasonably comparable standard of living – to the detriment of the payor. Now, if the court decides to elevate any factor above the others, the court must state as much and issue specific written findings of fact and conclusions of law to support its decision. Emphasizing the point, the new statute directs that neither party shall have "a greater entitlement to that standard of living than the other."

There are also changes to the courts' considerations of the duration of alimony. The new law replaces "permanent alimony" with "open durational alimony." Moreover, the law now directs that where a marriage dissolves after less than twenty years, short of exceptional circumstances, the total duration of alimony shall not exceed the length of the marriage. Eight potential factors that might constitute exceptional circumstances are set forth in the new law, including a catchall that empowers the court with the discretion to find exceptional circumstances under a set of facts the court deems "equitable, relevant and material." Thus, in practice, the ultimate decision between open durational and limited duration alimony lies within the discretion of the courts.

The most lengthy, most publicly reported, and, likely, most significant changes to the new alimony law pertain to the termination of alimony obligations. First, there is now a powerful rebuttable presumption that alimony terminates upon the payor attaining full retirement age. In other words, unless exceptional circumstances exist, upon the payor's application to the court, alimony will likely terminate when the payor is about to or does retire. As for the exceptional circumstances, the new law lists eight factors. The Court must consider all eight and make specific written findings of fact and conclusions of law. The eight factors considered for rebutting the presumption that retirement ends the payor's alimony obligation includes a catchall factor that allows the court to consider "[a]ny other relevant factors affecting the parties' respective financial positions." Thus, once again, the Court retains a great deal of discretion.

Continued next column

Consistent with the discretion afforded the courts mentioned above, the new law includes new guidelines for alimony termination when the alimony recipient takes up cohabitation with a new person. The new law now broadly defines cohabitation as a relationship involving "a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not maintain a single common household." Thus, cohabitation no longer means cohabitation in a strict, factual sense – a reality driven home by the new law's admonishment that a court "may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis." Indeed, the new law gives seven factors for the courts to consider where cohabitation is alleged, including, again, a catchall factor permitting consideration of "[a]ll other relevant evidence" in addition to the other six enumerated factors.

There are many other changes to alimony in the new law, in particular as to how alimony obligations can be reduced before the payor reaches retirement age. The old "change of circumstances" standard is still viable, but the law now sets up specific criteria for specific circumstances, such as retirement before full retirement age, unemployment, decreased income, major financial blows, and changes in health.

The new law took effect immediately. However, negotiated settlements that pre-date the new law and that contain provisions contradictory to the new law may not be impacted. The agreement will first have to be reviewed before any opinion can be offered.

If your personal situation requires discussion of these issues or of the changes detailed above, you should contact a licensed attorney, who can help you weigh your options and take action on your behalf, if the situation calls for it. Now, more than ever, a proper factual foundation must be compiled for presentment to the Court to achieve your goals. - *JNF*

In CASE you were wondering . . . . Interesting or Quirky Court Decisions

Where There's Smoke . . . Even though marijuana may be legal for medical purposes, the smell of marijuana smoke in your car still provides probable cause for the police to arrest you for a marijuana offense. State v. Myers (App. Div. 2015).

An Arbitration Clause Never Dies. Plaintiff was fired in a reduction in force, a RIF, as part of his company's sale to another company. His subsequent applications for jobs with the successor company were rejected and he sued on the basis of age discrimination. Arbitration was compelled as per Plaintiff's employment agreement with his old company. The Court reasoned: (1) the new company was a successor to Plaintiff's old employer and the employment contract expressly benefited the company's successors; and (2) his agreement to arbitrate employment-related disputes did not end with Plaintiff's termination. Filippis v. Ericsson Inc., (App. Div. 2015).

It's Fun to Play at the YMCA. An Essex County trial judge ruled that the YMCA's dominant purpose is no longer charity; it is now promoting fitness and healthy living. Therefore, plaintiff's personal injury law suit may proceed because the YMCA is not entitled to the benefits of New Jersey's Charitable Immunity law. Walter v. YMCA (Law Div. 2015).

No Do Over. The Petitioners, a landowner and developer, were served with an Administrative Order and Penalty Assessment by NJDEP and was advised of the 35-day time limit in which to request a hearing. Assuming that a copy was also sent to the lawyer who had been representing them throughout NJDEP's investigation, Petitioners did nothing and waited to hear from their lawyer. The lawyer was not served and had no idea the DEP had acted until the time limit had expired. Ruling the requests were untimely, the Court rejected all of Petitioners' attempts to gain a hearing The Court reasoned that, unlike the Court Rules, the statutes governing an agency's administrative actions require service on the parties and the time deadlines were jurisdictional, not discretionary. I/M/O Rodriguez (App. Div. 2015).

Are You Who You Say You Are? Dismissal of medical malpractice reversed because the evidence presented to the trial court on the motion to dismiss was incompetent and wrong. Affidavits and certifications must be made on first-hand knowledge and thus an attorney's submissions stating that his client was Board certified is not evidence at all. Moreover, in this case, the doctor was not certified at the time of the alleged negligent treatment. Mazur v. Crane's Hill Nursing Home (App Div. 2015).

What Did the Man Say? The Court dismissed claims for breach of the non-disparagement provisions of a separation agreement and for defamation filed by a former investigator against his former employer, the County Prosecutor. Complaints of this sort must specifically set forth the statements allegedly made that were disparaging and/or defamatory. Without such "particularity," the Complaint cannot withstand a Rule 12(b)(6) motion. Suarez v. Molinelli (U.S.D.C. 2015).

No Warrant, Consent, or Emergency = No Search. For a week, Police suspected Plaintiff had stolen property in her home but did not think they had enough evidence for a search warrant. So they approached Plaintiff and told her precisely what they were looking for. When she refused consent for a search, plaintiff was kept confined to her kitchen chair while police sought a search warrant on an emergency basis. Angrily, the Court ruled police cannot create an emergency justifying a search. Brown v. State (App. Div. 2015). - *ACT*

Continued next column