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THE FPT NEWS

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WELCOME, JAMES!

New Blood Joins the Firm

The firm is pleased to announce the addition of James Faller to its attorney staff. James received a merit scholarship and graduated with a Juris Doctor degree from Rutgers School of Law-Newark in May of 2013. While at Rutgers, James was an active member of the Public Interest Law Foundation. In addition to working as a law clerk at the firm during his third year of law school, James gained valuable experience with internships in the Newark Municipal Prosecutor's Office and the Newark office of the Equal Employment Opportunity Commission.

James received his Bachelor of Arts from New York University, *cum laude*, with a double major in History and Politics in 2006. He is also a 2002 graduate of St. Peter's Prep High School in Jersey City. He currently resides in Verona. Prior to entering the field of law, James spent many years as a golf caddy in Northern New Jersey, where he learned the value of an open ear for his clients' wants and anticipation of their needs. He also took time in his work to hone his even demeanor and quick wit, as well as to cultivate an undying love for a good, long walk, which he exercises when time allows on the ridges and peaks of the Catskills, Adirondacks, and White Mountains, to name a few. James looks forward to working hard with the firm's staff to accomplish the goals of our clients.

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LESSONS OF REDEMPTION

A Most Favored Sacred Cow

Fortunately, the severe economic downturn is over, although it will take another year or two to get back to a productive real estate market. In these troubling times, we have on numerous occasions been engaged to defend and prosecute commercial and residential foreclosure matters. In some of these cases, the owner's right to equitably redeem the mortgage has come into play. We have been compelled to use the right of equitable redemption as a "sword" and "shield", to achieve positive results for our clients. You ask, what is the equitable right of redemption and what role does it play in foreclosure? The purpose of this article is to provide insight into the foreclosure process if you are an owner of commercial property, a lender or borrower of commercial property, or if you are the traditional homeowner/mortgagor.

In New Jersey, the owner of a property is fiercely protected by common and statutory laws to assure that he/she has every chance to stop a bank/lender from seizing the property after default. "The right to redeem was devised by equity to protect [the owner] from forfeiture of his title. It is a favored right, so much so that it may not be released in the mortgage itself or in a contemporaneous agreement." *Hardyston Nat'l Bank v. Tartamella*, 56 N.J. 508, 513 (1970). In other words, you cannot waive the right to redeem and you cannot be forced to waive your right to redeem to delay foreclosure. The owner-mortgagor's right to redemption is absolute and it is understood to constitute an equitable estate on land that is alienable, divisible and descendible. *Lobsenz v. Micucci Holdings, Inc.*,

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LESSONS OF REDUMPTION: A Most Favored Sacred Cow *(continued from page 1)*

127 N.J. Super, 50 (App. Div. 1974); *Carteret Savings and Loan Ass'n, F.A. v. Davis*, 105 N.J. 344, 347 (1987). Accordingly, no matter what your circumstances are, unless you obtained your mortgage through fraud, at any time you can stop foreclosure by paying the full amount due, which will generally include interest, costs and fees. By statutory law, this right is enforceable even ten (10) days after a foreclosure sale by Sheriff.

Disputes arise between the owner-mortgagor and lender-mortgagee over the monetary amount required to be paid to satisfy the redemption price. Most mortgage documents permit the lender to include in the redemption amount costs to preserve the property, such as the cost of property or casualty insurance, payment of real estate taxes or water/sewer assessments, and the cost to make reasonable repairs and provide security. Moreover, it is very common for the mortgage documents to permit the lender to charge a penalty interest rate, which is typically five to ten points higher than the interest rate at the time of the default.

In general, the procedure for redemption during the pendency of a foreclosure proceeding is to be settled on an application to the Court. *Eichler v. Rubin*, 140 N.J. Eq. 5 (Ch. 1947). However, some lenders try to delay or prevent the owner-mortgagor from redeeming by trying to increase the redemption prices by wrongly

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including costs of improvements, excessive and/or unreasonable repair costs, or unrelated costs. Such conduct can be struck down by courts and the mortgagor-owner will likely be permitted to redeem upon equitable terms. *See Humble Oil & Refining Co. v. Doerr*, 123 N.J. Super 530, 546-47 (Ch. Div. 1973). This could mean that not only would the alleged cost of improvement be deducted by the court from the lenders–mortgagee's demand of redemption (the "redemption price"), but the court can deduct interest and/or the penalty interest to insure a fair redemption price.

In our experience, since the right to redeem creates an "equitable estate" on the land, courts are guided by principals of equity to determine the correct redemption price. However, bear in mind that equity will not knowingly become an instrument of injustice and that generally one who seeks equity must do equity. *Associated East Mortgage Co. v. Young*, 163 N.J. Super. 315, 330 (Ch. Div. 1978) and *Barry, Inc. v. Baf, Ltd.*, 3 N.J. Super. 355, 360-61 (Ch. Div. 1949). In the case of *Leisure Technology – Northeast v. Klingbeil Holding, Co.*, 137 N.J. Super. 353 (App. Div. 1975), the Court found that a party that resorts to equity to foreclose a mortgagor exposes himself to the operation of equitable principals and must submit to an equitable resolution of the issues raised, such that the doctrine of "unclean hands" will be a court's guide posts to determine the amount of a contested redemption price. This means that a plethora of defenses may be available to delay the foreclosure and give the owner-mortgager time to find the financing necessary to meet the redemption price.

Property ownership is a "sacred cow". Our courts of equity have circumscribed the mortgage process with procedures and equity considerations to reduce the possibility that property is lost through foreclosure and to assure that the process is fair and equitable. Most important, whether you are a borrower or lender, your conduct - whether it was the borrower presenting false information to a lender at the mortgage application stage and during any work-out negotiations or it was the lender ignoring its own risk assessment in granting the loan or inflating the cost of redemption - will dictate how "fairly" you are treated by the Court. - *ALP*

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:

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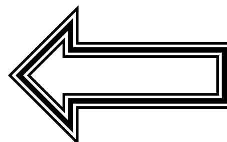

Please Note Our New Address in New Jersey

PATENT TROLLS
IT COULD HAPPEN TO YOU!

Patent Trolls have gotten a lot of bad press lately, and a client of FPT was recently "bitten" by one. What are Patent Trolls?

Most patents are obtained by inventors, and are used to protect the inventor's right to the exclusive use of the invention for enough time to reap the rewards (usually about twenty years). In some cases, patents end up in the hands of companies who don't make or sell anything, but simply license the patents to those who want to use the invention. These licensing companies are called "Non-Practicing Entities," "Patent Assertion Entities," or, by those who disapprove, "Patent Trolls." Many NPEs are what most of us would consider legitimate. For example, research universities license the patents obtained by their scientists. Individual inventors also may not have the resources to develop, manufacture or distribute what they've invented, and so they turn to licensing companies to commercialize their inventions. One thing that makes an NPE a Patent Troll, however, is the aggressiveness of its tactics.

Patent Trolls often "troll the web" looking for people or companies who might be using inventions to which the Patent Troll holds a patent. Patent Trolls use keyword searches to find words or phrases in websites that resemble key phrases in the description of the patented invention. When the Patent Troll finds a candidate, it sends a demand letter informing the supposed user of the patent that the user may be infringing, and inviting the user to buy a license. The demand letter often includes a statement to the effect that the Patent Troll vigorously enforces its patent rights, and those who use the patented invention without permission will be sued for infringing the patent. Because patent infringement lawsuits can take years and cost millions to defend, the threat is a serious one. It often turns out that the license can be had for much less than the initial asking price. Many Patent Trolls never actually try a case. They simply make the best deal they can with each supposed infringer and move on to the next one.

Our client, a software developer in the logistics space, received a demand letter from a Patent Troll claiming infringement of a number of patents relating to tracking of deliveries. The demand letter cited as evidence of the supposed infringement phrases from our client's website that resembled language from the

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patents in question. Even though our client was firmly convinced there was no infringement, the Patent Troll refused to take "no" for an answer. Interestingly, the initial approach was from a law firm, and after a little back-and-forth, the conversation died, but almost two years later, another law firm picked up the thread. Ultimately, our client decided it was more cost effective to buy a license (at less than 10% of the original demand) than to defend an infringement lawsuit even though we were convinced there was no merit to the infringement claims. In order to successfully defend the lawsuit, we would have had to retain experts to render opinions regarding the validity of the claimed infringement, in addition to the legal fees and other costs and the time and energy our client would have had to divert from running the business.

One of the most famous patent assertion operations in history reaped $1.5 billion in licensing fees before an industry group banded together to mount a defense. The inventor, Jerome Lemelson, obtained patents in the 1950s on the use of optical and radio frequency technologies to track items in factories and warehouses. More than thirty years later, through the exploitation of loopholes in the patent law that have since been closed, Lemelson and his foundation claimed that his patents covered bar codes and RF ID tags, technologies that had not yet been developed when his original patents were issued. Lemelson's agents convinced numerous large companies, including auto makers and large retailers, to buy licenses. Ultimately, the National Retail Foundation funded a joint defense that essentially stopped Lemelson's efforts.

To defend a patent infringement lawsuit, the defendant must show that the alleged uses don't fall within the scope of the patents' protected claims. Although this sounds simple, if the patents are complex or technical, the defense will require expert opinions on the scope of the patent claims and whether the defendant's product or activities fall within the claims or not. A defense of a plausible sounding claim of infringement might cost $1 million or more. This is what Patent Trolls depend on to sell licenses.

If you are accused of infringing a patent, we can help you respond with an explanation of why you aren't infringing while avoiding giving the accuser any ammunition for further claims. Sometimes, unfortunately, the most cost effective solution is to buy a license at the lowest cost we can negotiate. - *AEA*

CASE REPORT: *Kubert v. Best* -- Texting While Driving

Since the development and wide use of cell phones, Courts and Legislatures have grappled with the distraction to drivers caused by the use of cell phones. While initially slow to react, things on the legal front speeded up when texting became available and even prevalent among younger drivers.

Today, most States prohibit use of handheld cell phones, including texting, while driving. In New Jersey, an offender is subjected to a $100 fine under N.J.S.A. 39:4-97.3(d). Moreover, as of July 18, 2012, New Jersey added the potential of criminal charges with a possible jail sentence when someone is injured in an accident. *See* N.J.S.A. 2C:12-1(c)(1) (assault by auto via reckless driving in which recklessness is inferred by hand held cell phone use). Needless to say, cell phone records make it relatively simple for law enforcement and prosecutors to establish cell phone use so long as the time of the accident is sufficiently established. Moreover, violation of either of these statutes raises the inference of the driver's civil liability in a personal injury law suit arising from an accident.

Until recently, neither courts nor Legislatures have addressed the potential liability of the person on the "other end" of the cell phone, e.g., the caller or the other texter. What spawned the conversation in legal and legislative circles on this topic is the August 27, 2013 decision of the New Jersey Appellate Division in *Kubert v. Best*, Docket A-1128-12T4. In this case, the Court ruled that the non-driving texter could be liable under the common law if the injured party can demonstrate the texter knew or had special reason to know that the intended text recipient (a) was driving; and (b) was likely to read the text message while driving at that time.

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While the decision caused a sensation in the press and blogosphere, a closer examination reveals that the decision is not earth-shattering. First of all, the Court made clear that the driver is still primarily liable. Second, it is not at all clear how one proves the non-driving texter knew the recipient was driving and was likely to read the text message while driving. Indeed, the Court ruled the injured parties in Kubert did not meet this evidentiary standard because the text messages were not available, the non-driver only sent one text to the driver, and evidence of previous multiple texting conduct was inadequate to show such conduct at the time in question. Moreover, so far the decision is "unpublished" in the official law books of the court; this means the decision has no precedential value, i.e., trial courts are not obligated to follow the appellate court's decision.

Finally, the Court's decision included a dissenting opinion that rejects the need for new law on the non-driver texter's liability. This opinion suggested that the "aiding and abetting" cause of action was sufficient deterrent to would be non-driver texters, even though the full court ruled that the plaintiff did not meet the evidentiary burden of establishing "aiding and abetting."

As of this date, we are told by the plaintiff's attorney that the decision is being appealed to the New Jersey Supreme Court. Now, it is up the Supreme Court to decide whether to accept the case - acceptance being discretionary. One may note that a split Appellate Division decision is typically one the Supreme Court does accept. - *ACT*

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