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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Adjoining Owners/Condominium Units

Under Real Property Actions and Proceedings Law ("RPAPL") Section 881 ("Access to adjoining property to make improvements or repairs"), "[w]hen an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make improvements or repairs may commence a special proceedings for a license to so enter…"

The Supreme Court, Kings County, granted Petitioners a temporary license to enter the condominium unit below their unit to enable the making of improvements in the subfloor of their bathroom. On appeal by the adjoining owners, who had refused access, the Appellate Division, Second Department, affirmed the lower court's ruling, holding that Section 881 applied; under Real Property Law Section ("RPL") 339-g ("Status of units"), a condominium unit, "together with its common interest, shall for all purposes constitute real property."

The Supreme Court limited the license to ten days, and required that the Appellants' unit be returned to its original condition, that the Appellants be added as additional insureds to the Petitioners' construction insurance policy, that the Petitioners pay the Appellants a license fee of $100 a day, and that, as required by Section 881, the Petitioners indemnity the Appellants for any loss incurred. Matter of Voron v. Board of Managers of the Newswalk Condominium, 2020 NY Slip Op 04747, decided August 26, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04747.htm.

Adverse Possession

Under RPAPL Section 501 ("Adverse possession defined"), a successful claim of adverse possession requires that the person or entity making the claim have occupied the real property for no less than ten years under Civil Practice Law and Rules Section 212 ("Actions to be commenced within ten years") in a manner "adverse, under claim of right, open and notorious, continuous, exclusive, and actual."

In an action to quiet title, the Defendant counterclaimed that she had title by adverse possession; her counterclaim was dismissed by the Supreme Court, Kings County. The Plaintiff, who had inherited the property in question, asserted that he had lived in the house on the property with the Defendant for several years and when he moved out due to marital discord he had permitted the Defendant to reside in the home. The Defendant forged the Plaintiff's signature on a deed which purported to convey the property to herself, and she later transferred the property to her son. The Appellate Division, Second Department, agreed with the lower court's "determination that the defendant met his prima facie burden of establishing his entitlement to judgment as a matter of law dismissing the defendant's counterclaim alleging adverse possession."

> *"The plaintiff's evidence is sufficient, prima facie, to support the conclusion that the [Defendant's] possession of the subject property was permissive at the outset and at no point hostile under claim of right. We agree with the Supreme Court's determination that the plaintiff's showing of permissive use at the outset negated the presumption of hostility that normally accompanies actual, open and notorious, exclusive, and continuous use of real property [citation omitted]."*

Notwithstanding, the Appellate Division found that there was a triable issue of fact as to whether the decedent had a claim of right to the property stemming from a divorce in 1999 and, therefore, the lower court's Order dismissing the Defendant's counterclaim alleging adverse possession was reversed.

Lewis v. Holliman, 2020 NY Slip Op 04546, decided August 19, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04546.htm.

Architects/Statute of Limitations

Damage to a building constructed in 2002.Damage to the building was discovered in 2017. An action for malpractice against an architectural firm was commenced in 2018.The Defendant architectural firm had contracted to provide architectural services for the project with an engineering firm which had been engaged by the Plaintiff. The Plaintiff asserted that the cause of action accrued on discovery of the damage in 2017 because it was not a party to the contract with the Defendant. The Appellate Division, Fourth Department, affirmed the ruling of the Supreme Court, Erie County, which granted the Defendant's motion to dismiss the complaint, holding that the three-year statute of limitations for professional malpractice had expired.

According to the Appellate Division, the Plaintiff was an intended third-party beneficiary of the contract between the engineering firm and the Defendant and, therefore, the Plaintiff was not a "stranger to the contract'. As such, the cause of action accrued upon completion of the Defendant's performance. Town of West Seneca v. Kideney Architects, P.C., 2020 NY Slip Op 05323, decided October 2, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05323.htm.

Condominiums/Common Charges

The owner of a parking garage condominium unit commenced an action against the Board of Managers and another Defendant challenging the Boards' allocation of common expenses in the condominium's second year of operations in accordance with the first year's budget. The Plaintiff asserted that this resulted an overassessment of the common charges it should be paying. The Supreme Court, Kings County, denied the Board's motion to dismiss the complaint. The Appellate Division, Second Department, reversed and granted the motion to dismiss as to the Board. The Condominium's offering plan, declaration and by-laws specify that the Board "will allocate and assess [the] Common Charges amongst the Unit Owners in accordance with allocations set forth in the First Year's Budget". Contrary to the Plaintiff's contention, the Board was not obligated to allocate common expenses based on the commercial unit's "actual use of and benefit from the services and other items covered by the common expenses." 189 Schermerhorn Owners Company, LLC v. Board of Managers of the Be@Schermerhorn Condominium, 2020 NY Slip Op 05021, decided September 23, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05021.htm.

Cooperative Units/Legal Fees

Under the proprietary lease for the Plaintiff's unit, if a lessee defaults under the lease, attorney fees incurred by the cooperative corporation "in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the lessee" shall be paid by the lessee on demand. Under RPL Section 234 ("Tenants' right to recover attorneys' fees in actions or summary proceedings arising out of leases of residential property"), when a residential lease includes such a provision, the lessor can be required to pay the lessee's attorneys' fees and/or expenses incurred "as the result of the failure of the landlord to perform any covenant or agreement…under the lease or in the successful defense of any action or summary proceeding" by the landlord against the tenant.

The Plaintiff, who successfully brought an action for a declaratory judgment that the shares of stock appurtenant to its unit retained their status as "unsold shares", relying on the above provision of the lease and Section of the RPL, claimed that the Defendant cooperative corporation should pay its attorney fees. The Supreme Court, New York County, denied the Plaintiff's motion for an Order awarding it attorney's fees. According to the Court,

> *"…plaintiff brought this declaratory-judgment action precisely to resolve the parties' dispute before defendant could take any action that might abridge plaintiff's rights in breach of the lease. [citation omitted] Absent an alleged default by defendant under the lease, plaintiff may not obtain fees pursuant to Section 28 of the lease and RPL Section 234 [citation omitted]."*

Bellstell 7 Park Avenue LLC v. The Seven Park Avenue Corp, 2020 NY Slip Op51043, decided September 11, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_51043.htm.

Guarantees/Leaseholds

A lease executed in 2002, amended by a First Amendment to Lease entered into in 2011, was assigned in 2016 to Mason Restaurant Corp. and guaranteed by Nicholas Kaloudis. The lease, absent the First Amendment, would have expired in 2012. In an action to recover damages from the corporation, incurred due to its default and from Kaloudis, the guarantor asserted that the guaranty covered the lessee's obligations under the original lease because it did not mention the lease amendment. The Supreme Court, New York County, granted the Plaintiff's motion for a default judgment against the corporation and for the entry of summary judgment on the causes of action against Kaloudis. According to the Court,

> *"…it is clear that the parties intended that the guaranty cover the obligations under the amended lease as the original lease had expired at the time the guaranty was made…'[A] contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties' [citation omitted]. Here, without question, the guaranty at issue was only executed in connection with the assignment of the extant lease, which was the amended lease and therefore…the guaranty is enforceable."*

MF 385 First Avenue LLC v. Mason Restaurant Corp., 2020 Ny Slip 32974, decided September 9, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32974.pdf.

Leases/"Yellowstone" Injunction

The Plaintiff leased a parking garage to the Defendant. The lease provided that the tenant would not "sublet the Demised Premises or any part thereof…" The lease further provided that the garage could be used "for the parking of passenger motor vehicles (including vehicles owned and rented by a third party, such as Zipcar…" The Plaintiff licensed spaces in the garage to Avis Budget Rental Car LLC.; the Defendant claimed that in doing so the Plaintiff had defaulted under the lease. The denial of the Plaintiff's motion for a Yellowstone injunction by the Supreme Court, New York County, was reversed by the Appellate Division, First Department. According to the Appellate Division, "…we have never held that a tenant must take steps to cure an alleged default before there has been a determination that the lease was violated [citation omitted]." Quik Park 808 Garage, LLC v. 808 Columbus Commercial Owner LLC, 2020 NY Slip Op 05605, decided October 8, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05605.htm.

Lien Law/Bonded Mechanic's Lien

A bond was posted for a filed mechanic's lien and then an action was commenced to foreclose the lien. Applying Lien Law Section 37 ("Bond to discharge all liens"), The Supreme Court, New York County, dismissed the action as against the fee owner. Under paragraph 7 of Section 37, where a bond is filed, parties defendant are "the principal and surety on the bond, the contractor, and all claimants who have filed notices of claim prior to the date of the filing of [the] summons and complaint." Dired Embed Coating Systems, Inc. v. Kubik Maltbie, Inc., 2020 NY Slip Op 33086, decided September 17, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33086.pdf.

Lien Law/Mechanic's Lien

On April 4, 2018, the Plaintiff, a subcontractor, filed a mechanic's lien for work done for the New York City School Construction Authority. On June 28, 2018, an action was commenced to foreclose the lien, which was a public improvement lien, and for other relief. The Supreme Court, New York County, granted the general contractor's motion to discharge this lien. The filing lapsed because the lien had not been extended as required by Lien Law Section 17 ("Duration of lien") and a notice of pendency was not filed within one year after the date on which the lien was filed. A second mechanic's lien filed by the Plaintiff on April 3, 2020, added to the action in an amended complaint, was not discharged by the Court. Even absent the filing of a notice of pendency, under Section 17 the lien remained effective until April 3, 2021. Trugreen Contracting Corp. v. Biltmore General Contractors, Inc. 2020 NY Slip Op 33122, decided September 23, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33122.pdf.

Mortgage Description/Reformation

The Supreme Court, Nassau County, granted the foreclosing Plaintiff's motion for summary judgment on its cause of action to reform the mortgage to correct an alleged error in the legal description of the mortgaged property. The Appellate Division, Second Department, modified the lower court's Order and dismissed that cause of action for being time barred under Civil Practice Law and Rules Section 213 ("Actions to be commenced within six years: Where not otherwise provided for…") which provides a six-year statute of limitations for "an action based upon a mistake". According to the Appellate Division,

> *"[a] cause of action seeking reformation of an instrument on the ground of mistake is governed by the six-year statute of limitations pursuant to CPLR 213(6), which begins to run on the date the mistake was made [citations omitted]. Here, the mortgage…was executed…more that six years prior to commencement of the action [citation omitted]. Further, the plaintiff, which has been the assignee of the mortgage since the date of its execution, does not claim that [this] cause of action was commenced within two years of discovery of the alleged error and therefore was timely under CPLR 203(g)(1) ["Methods of computing periods of limitations generally… (g) Time computed from actual or imputed discovery of facts"] [citations omitted]."*

Investors Savings Bank v. Cover, 2020 NY Slip Op 05729, decided October 14, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05729.htm.

Mortgage Foreclosures/Bidder Default

The Supreme Court, New York County, directed that the successful bidder's deposit be released to the foreclosing Plaintiff after the bidder, having discovered a restrictive covenant affecting the property, failed to tender the full deposit required under the terms of sale. The Appellate Division, First Department, affirmed the lower court's ruling. The terms of sale provided that a defaulting purchaser "shall not be entitled to a refund of any amount deposited with the referee…" Further, the property was being sold subject to "covenants, restrictions, easements, and…agreements of record, if any." According to the Appellate Division, the "failure to perform the due diligence necessary to discover the [recorded] restrictive covenant on the property [which was also part of the documents filed electronically in the foreclosure action] likewise provides no basis for disturbing the motion court's order." NYCTL 1998-2 Trust and Bank of New York, as Collateral Agent v. Revered C.T. Walker Housing Development Fund Corporation, 2020 NY Slip Op 05289, decided October 1, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05289.htm.

Mortgage Foreclosures/Interest

The Supreme Court, Kings County, entered an Order confirming the report of the Referee awarding interest of $304,332.30 for the period May 1, 2009 through May 31, 2016 and entered a judgment of foreclosure and sale. The Defendant asserted that interest accruing on the mortgage note after May 1, 2009 should not be awarded due to the Plaintiff's predecessors in interest delay in commencing the foreclosure. The Appellate Division, Second Department, affirmed the lower court's ruling, holding that "any delay attributable the plaintiff's predecessors in interest…does not warrant the cancellation of interest that accrued on the mortgage note after May 1, 2009. Nationstar Mortgage, LLC v. Dunn, 2020 NY Slip Op 04749, decided August 26, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04749.htm.

Mortgage Foreclosures/Multiple Parcels

The Defendant-mortgagor, who had defaulted in the foreclosure of a mortgage encumbering her two properties, moved to vacate the referee's deed and deeds which were later executed for value for each property by the purchaser at the foreclosure sale. The Supreme Court, Queens County, set aside the foreclosure sale, vacating the referee's deed and the other deeds. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division, "…the Referee, in excess of his authority, altered the terms of the judgment of foreclosure and sale by selling the subject properties as one parcel [citation omitted]." Paragon Federal Credit Union v. Skarla, 2020 NY Slip Op 04751, decided August 26, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04751.htm.

Mortgage Foreclosures/Notices - RPAPL Section 1304

RPAPL Section 1304 ("Required prior notices") requires that "a lender, an assignee or a mortgage loan servicer [commencing] legal action against the borrower, including [a] mortgage foreclosure" send a notice, in the form specified in Section 1304, to the borrower at least ninety days before litigation on a "home loan" is commenced. The notice is required to be sent by registered or certified mail and by first class mail to the last known address of the borrower. The Appellate Division, Second Department, has issued the following rulings on the application of Section 1304.

In U.S. Bank, N.A. v. Villatoro, 2020 NY Slip Op 04613, decided August 19, 2020, the Appellate Division, reversing the grant of summary judgment on the complaint by the Supreme Court, Nassau County, held that the Plaintiff had not established it had complied with the requirements of Section 1304. "The Plaintiff failed to submit proof of the actual mailings of the notices by first-class mail, and the employee's affidavit that it submitted did not attest to a standard office mailing procedure designed to ensure that items are property addressed and mailed, so his statement that the 90-day pre-foreclosure notice was sent by certified and first-class mail is unsubstantiated and conclusory [citation omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04613.htm.

In HSBC Bank USA, National Association v. Bhatti, 2020 NY Slip Op 04734, decided August 26, 2020, reversing the grant of a judgment of foreclosure and sale by the Supreme Court, Queens County, held that affidavits submitted on behalf of the loan servicer "were insufficient to establish that the plaintiff mailed the 90-day pre-foreclosure notice required by RPAPL 1304, 'as the representative[s] did not provide evidence of a standard office mailing procedure and provided no independent evidence of the actual mailing [citations omitted].'" This decision is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04734.htm.

Similarly, in TD Bank, N.A. v. Roberts, 2020 NY Slip Op 05074, decided September 23, 2020, the Appellate Division, reversing the grant of a judgment of foreclosure and sale by the Supreme Court, Richmond County, held that the Plaintiff did not establish it had strictly complied with Section 1304. "[T]he Plaintiff failed to provide evidence of the actual mailing, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05074.htm.

Mortgage Foreclosures/Possession by Mortgagee After Default

The Supreme Court, Queens County, granted the foreclosing mortgagee's motion for an Order allowing the Plaintiff to take possession of and manage the property and directing the Defendant fee owner to turn over to it all leases, security deposits and rents. New York law "'allows a Court to grant the right of possession pending foreclosure only when the mortgage expressly grants that right or reasons extrinsic to the mortgage agreement so dictate'" [citations omitted]. The mortgage provided that in the event of a default "[t]he Mortgagee or any receiver shall be entitled to take possession of the Mortgaged Property" on a default. The mortgage also authorized the mortgagee if there was a default to "collect and receive the rents" and there was a separate assignment of the leases and rents. No evidence was submitted that the Defendant had not defaulted on the mortgage loan. The third branch of the Plaintiff's motion seeking, in the alternative, the appointment of a receiver was dismissed as moot. National Loan Investors, L.P. v. Bruno, 2020 NY Slip Op 510777, decided September 24, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_51077.htm.

Mortgage Foreclosures/Standing

The foreclosing Plaintiff attached to its complaint a copy of a mortgage note indorsed from the original lender to Countrywide Bank, N.A., which, in turn, endorsed the note to Countrywide Home Loans, Inc., which indorsed the loan in blank. The Defendants produced a different version of the mortgage note obtained from the mortgage servicer. This version of the note was only endorsed from the original lender to Countrywide Bank, N.A. The Supreme Court, Kings County, denied the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, affirmed, ruling that "the evidence in support of the plaintiff's motion, which included two different versions of the mortgage note – only one of which was indorsed in blank – was insufficient to establish, prima facie, the plaintiff's standing [citation omitted]." Bank of New York Mellon v. Itzkowitz, 2020 NY Slip Op 04909, decided September 16, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04909.htm.

Mortgage Foreclosures/Statute of Limitations

The Supreme Court, Suffolk County, granted the Defendant's motion to dismiss the complaint in the foreclosure of a mortgage as being time-barred. The Plaintiff accelerated the mortgage loan by commencing to foreclose on or about March 21, 2006, which action was discontinued; the instant action was commenced more than six-years later, in February 2013. The Appellate Division, Second Department, affirmed the lower court's Order. According to the Appellate Division, the voluntary discontinuance of the prior action was not "an affirmative act sufficient to revoke its acceleration of the mortgage debt because the order was silent on the issue of acceleration [citation omitted]." Further, even though the Defendant's stipulated to the discontinuance, the stipulation did not indicate that the loan would be reinstated or that the lender would accept payments from the Defendant. US Bank National Association v. Ahmed, 2020 NY Slip Op 04614, decided August 19, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04614.htm.

The Appellate Division, Second Department, also held that a stipulation discontinuing a prior foreclosure does not, in itself, constitute a de-acceleration of the debt when "'the stipulation was silent on the issue of the revocation of the election to accelerate, and did not otherwise indicate that the plaintiff would accept installment payments from the defendant' [citation omitted]." U.S. Bank Trust, N.A. v. Deceus, 2020 NY Slip Op 04989, decided September 16, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04989.htm.

The Defendant commenced a mortgage foreclosure in 2009 against the Plaintiff and others. In 2015, the foreclosure was discontinued without prejudice and the Defendant purportedly mailed a letter to the Plaintiff purporting to de-accelerate the debt. Later in 2015, the Plaintiff commenced an action to quiet title, asserting that any future mortgage foreclosure would be barred by the statute of limitations. The Plaintiff alleged that the Plaintiff had failed to establish when the letter was actually mailed. The Supreme Court, Kings County, granted the Defendant's cross-motion for summary judgment dismissing the complaint. The Vice-President of loan documentation for the loan servicer submitted an affidavit averring that "based on his knowledge that the loan servicer's regular business practices, the de-acceleration letter was mailed to [the Plaintiff] on June 10, 2015", and a copy of the Postal Service tracing information accompanied that affidavit. The Appellate Division, Second Department, "agreed with the Supreme Court's determination that the letter dated June 9, 2015, was sufficient to de-accelerate the debt." Soffer v. U.S. Bank, N.A., 2020 NY Slip Op 04985, decided September 16, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04985.htm.

The Appellate Division, Fourth Department, in Deutsche Bank, National Trust Company, as Trustee v. Lewis, noting that a "'de-acceleration notices must…be clear and unambiguous to be valid and unenforceable' [citation omitted]", held that the Plaintiff "failed to establish that the correspondence that it sent to [the Defendant in the mortgage foreclosure] during the six-year limitations period constituted an unambiguous affirmative act of de-acceleration [citation omitted]." This case, 2020 NY Slip Op 04686, decided August 20, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04686.htm.

The Appellate Division, Second Department, in Citimortgage, Inc. v. Ford, held that the dismissal of a prior foreclosure action for the failure to effectuate personal service did not toll the running of the statute of limitations which commenced to run on the entire indebtedness when the prior foreclosure action was commenced. This case, at 2020 NY Slip Op 05183, decided September 30, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05183.htm.

In U.S. Bank National Association v. McCaffery, 2020 NY Slip Op 04805, decided August 26, 2020, the foreclosing Plaintiff moved to discontinue the action and for a declaration, granted by the Supreme Court, Westchester County, that the acceleration of the mortgage debt was revoked and rescinded. The Appellate Division, Second Department, held that the motion seeking declaratory relief "constituted, in essence, an impermissible request for an advisory opinion…[T]here was [on discontinuance of the action] no active case in which such declaration could have an immediate effect." Accordingly, the Appellate Division vacated that part of the lower court's Order which declared that the acceleration of the mortgage debt was revoked and rescinded. This decision is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04805.htm.

Mortgage Recording Tax/Mezzanine Loans

Under consideration in Albany is legislation (Senate Bill 07231A/Assembly Bill 09041A) which would impose mortgage recording tax on "mezzanine debt" and on "preferred equity investments". The legislation can be found at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S07231&term=2019&Text=Y.

Notice of Pendency/Estates

The Defendant, as voluntary administrator of her father's estate, executed a contract to sell property which was owned by her father. She and her sister were his sole heirs. In an action for specific performance, the Defendant claimed he was under the "mistaken impression" that she had the authority to sell the property. The Supreme Court, Kings County, granted the Defendant's cross-motion to cancel the notice of pendency; the Court's Order was affirmed by the Appellate Division, Second Department. According to the Appellate Division, specific performance could only be decreed if the Defendant had the authority to convey.

> *"Here, the defendant established, prima facie, that it was not possible for her to comply with the subject contract by transferring title to the property…[citation omitted], since she did not have a 100% ownership interest in the property and did not possess the authority as a voluntary administrator to transfer the property (see SCPA 1302)."*

Raviv Group, LLC v. Scott, 2020 NY Slip Op 05246, decided September 30, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05246.htm.

Pandemic/Evictions and Mortgage Foreclosures (Commercial)

On October 20, 2020, Governor Cuomo issued Executive Order 202.70 ("Temporary Suspension and Modification of Laws Relating to the Disaster Emergency") providing, in part, that "[t]he directive contained in Executive Order in 202.28 that relates to eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment of such mortgage is continued through January 1, 2021." EO 202.70 is posted at https://www.governor.ny.gov/news/no-20270-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency.

Restrictions under New York law on evictions of tenants and of lawful occupants of residential property because of nonpayment of rent and on the foreclosure of residential mortgages, first contained in Executive Order 202.28 dated May 7, 2020, were superseded by Chapter 127 of the Laws of 2020, as to warrants of evictions and judgments of possession, and by Chapters 112 of the Laws of 2020 which, as amended by Chapter 126 of the Laws of 2020, added Banking Law Section 9-x ("Mortgage forbearance"). These Chapters were effective on June 17, 2020.

Pandemic/Executive Order/Mezzanine Loans

Current Developments dated July 20, 2020 reported on the May 18, 2020 decision of the Supreme Court, New York County, in 1248 Associates Mezz II LLC v. 12E48 Mezz II LLC (2020 N.Y. Misc. LEXIS 5099). In that case the Court held that Governor Cuomo's Executive Order No. 202.8 ("Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency") issued March 20, 2020, prohibiting the "foreclosure of any residential or commercial property for a period of ninety days…addresses enforcement of a judicially ordered foreclosure" and did not prevent the enforcement under the Uniform Commercial Code of the pledge of a mezzanine interest in an entity owning real property. A UCC sale is not a judicial proceeding.

More recently, the Supreme Court, Kings County, in a decision dated August 25, 2020, denied the Plaintiff-borrower's motion to enjoin the UCC sale of his mezzanine interest. Noting the decision above, the Court held that "there is no basis upon which to stay the UCC sales contemplated in this case." 893 4th Avenue Lofts LLC v. Nutmeg, 2020 NY Slip Op32752, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32752.pdf.

Receivers/Mortgage Foreclosures

In 381 Broadway Lender LLC v. 381 Broadway Realty Corp., 2020 NY Slip Op 51083, decided September 24, 2020, the Supreme Court, New York County, granted the foreclosing Plaintiff's motion to remove the receiver and to appoint a new receiver, but denied without prejudice to renew that part of the motion seeking to surcharge the receiver for expenses that were incurred due to the receiver's alleged neglect. The receiver failed to pay real estate taxes for two quarters in 2019, paid expenses out of the receivership's bank account without court approval in violation of the Order effecting his appointment, failed to notify the Plaintiff that most of the building's commercial tenants had failed to pay rent, and failed to provide monthly financial and receiver reports as required by the Order. This decision is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_51083.htm.

Recording Act/Bona Fide Encumbrancer

A deed recorded in 2009, conveying property from Suffolk County to Gerard A. Pallotta, included a restrictive covenant, running with the land, prohibiting the grantee from improving the property "by the erection of any structure." Notwithstanding, later in 2009, Pallotta obtained a building permit from the Town of Babylon for the construction of a dwelling on the property. Pallotta conveyed the property to Pallotta & Associates Development, Inc. ("Associates") by a deed that omitted the restrictive covenant, and, with Associates, received a building loan secured by a mortgage. In 2016, in an action commenced by the County, the Supreme Court, Suffolk County, rescinded the sale of the property, holding that the County owned the property. The Court also granted the mortgagee's motion for summary judgment dismissing causes of action seeking the cancellation and discharge of the building loan mortgage.

In 2014, the mortgagee commenced an action to foreclose the mortgage. The Supreme Court, Suffolk County, granted the County's motion to dismiss the complaint as to it. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division, in rescinding the deeds the Court had implicitly held that those deeds were void and, "as a consequence of that determination…the subject mortgage was invalid as against the County [citation omitted]." Because the deed to the building loan mortgagor was void, the Plaintiff's

> *"alleged status as a bona fide encumbrancer is irrelevant. 'A bona fide encumbrancer is only protected when the challenged conveyance is voidable, not when it is void' [citation omitted]. Where, as here, the deed is void, 'the interests of subsequent bona fide purchasers or encumbrancers for value are not protected under Real Property Law Section 266' [citation omitted]."*

Broder v. Pallotta & Associates Development, Inc., 2020 NY Slip Op 04821, decided September 2, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04821.htm.

Res Judicata/Mortgage Foreclosures

A deed was purportedly executed in 2005 by Gordon Tracey, the owner of real property in Brooklyn, to himself and Francis James. In 2005, James executed a note to Ameriquest Mortgage Company, secured by a mortgage on which both Tracey and James were listed as the borrowers. Ameriquest assigned the mortgage to Deutsche Bank National Trust Company which was then foreclosed; a judgment of foreclosure and sale was entered. Tracey failed to answer the complaint in the foreclosure.

In 2014, Tracey commenced an action alleging that his signature were forged on the deed and on the mortgage. In 2017, after Tracey conveyed the property to Lincoln Holdings, LLC., Tracey and Lincoln Holdings, LLC commenced an action seeking a judgment that the 2005 deed, being forged, was void, that the mortgage held by Ameriquest should be discharged, and that the judgment of foreclosure and sale should be set aside. The Supreme Court, New York County, denied Deutsche Bank's motion to dismiss the complaint. The Appellate Division, Second Department, reversed the lower court's ruling and granted Deutsche Bank's motion to dismiss. According to the Appellate Division,

> *"[t]he Supreme Court should have granted Deutsche Bank's motion…to dismiss the complaint based on the doctrine of res judicata…Tracy's contention that his signature on the 2005 deed and the 2005 mortgage were forged could have been litigated in the foreclosure action [citations omitted]. [T]he Court of Appeals' decision in Faison v. Lewis (25 NY3d 220) does not preclude the application of res judicata in actions where a plaintiff alleges that a deed was forged."*

Tracey v. Deutsche Bank National Trust Company, 2020 NY Slip Op 03548, decided October 7, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05548.htm.

Rights of First Refusal

A lease to a part of certain property granted the tenant an "option to buy". Notwithstanding this provision, and a "first option to buy" granted by the lease to a person not a party to this action, the fee owner - lessor's sole shareholder sold her shares to one of the Defendants. The tenant commenced an action to recover damages for breach of contract. The Supreme Court, Kings County, granted motions for summary judgment dismissing the complaint and the Appellate Division, Second Department, affirmed. According to the Appellate Division, "there is a 'fundamental distinction between the property interests of a shareholder and the property interests of the corporation' and 'ownership of capital stock is by no means identical with or equivalent to ownership of corporate property'" [citations omitted]. Therefore,

> *"the sale by [the shareholder] of the shares in Jodol Realty Corp. did not constitute a sale of the subject property so as to trigger the rights of refusal under the lease… [A]bsent a showing of bad faith on the part of the seller, the sale of corporate stock to a third party does not trigger a lessee's right of refusal under a lease [citations omitted]…[T]he Plaintiff failed to raise a triable issue of fact as to whether the defendants entered into the stock purchase agreement in bad faith to defeat the rights of refusal under the lease [citations omitted]."*

The seller of the stock demonstrated that she had offered the Plaintiff the opportunity to match the stock's purchase price and that she sold her shares, instead of selling the property, because the stock sale resulted in substantial tax savings.

Cypress Medical Surgical Services, LLC v. Jodol Realty Corp., 2020 NY Slip Op 04534, decided August 19, 2020, is reported at 186 AD3d 666 and posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04534.htm.

Wishing everyone a safe, healthy Holiday season!

Michael J. Berey
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