First American Title™
NATIONAL COMMERCIAL SERVICES

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# Current Developments

## First American Title National Commercial Services

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## Contracts of Sale/Down Payments

A contract to sell real property stated that the purchaser "shall accept such title as any reputable title insurance or abstract company licensed to do business in the state of New York to be selected by Purchaser shall be willing to approve and insure…" Two title companies declined to insure title due to litigation related to the property. The buyer brought an action claiming breach of contract, seeking return of his down payment and attorney's fee. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment and directed the return of the down payment. Attorneys' fees were not awarded.

> *"In order to defeat the motion, the defendant had the burden to demonstrate by admissible proof that a title insurance company of the class mentioned in the contract would insure title [citations omitted]... The conclusory allegations of defendant's counsel that the title was marketable notwithstanding the title defects referred to in the…title report failed to raise an issue of fact precluding summary judgment. Since the proof sufficiently demonstrated that the seller could not have cured the title defects within the time provided by the contract, even if the defendant [seller] elected to do so, the buyer's failure to tender performance on the time is of the essence closing date was immaterial on the issue of whether it was entitled to a return of the down payment [citations omitted]."*

Schweid v. Bainbridge St Realty II Inc., 2021 NY Slip Op 30387, decided February 8, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30387.pdf.

In Prosperous View LLC v. 170 Mercer LLC, 2021 NY Slip Op 30729, decided March 9, 2021, the contract of sale required, as a condition precedent to close, that the existing mortgage be assigned to the new lender and assumed by the purchaser. The contract also provided that the Defendant-seller would pay costs and expenses incurred in excess of $11,162.50 to obtain the existing mortgagee's consent. The lender conditioned its consent on, among other requirements, the deposit with it of an additional payment of $1,000,000, which it would retain for the life of the loan. The purchaser canceled the contract; the seller, claiming that the purchaser unjustifiably repudiated the contract, sued for the return of its contract deposit, compensatory damages and attorneys' fees. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment on liability, ordering the down payment to be returned to the Plaintiff. The amount of compensatory damages and reasonable attorneys' fees were left to be determined at trial.

According to the Court, the Plaintiff made good faith efforts to obtain the mortgage assignment, When the lender imposed "arduous conditions", the Plaintiff had the right to cancel the contract. There was no date set forth in the contract limiting the period in which the Plaintiff could cancel. This case is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30729.pdf.

In Freeman On LLC v. KAE investments, LLC, 2021 NY Slip Op 30278, decided January 15, 2021, the Supreme Court, Kings County, granted the Defendant-seller's motion for summary judgment allowing it to retain the down payment under the liquidated damages clause in the contract of sale. The Plaintiff-purchaser, seeking a judgment holding that the seller had breached the contract, rescinding the contract, and ordering the return of the down payment, claimed that the property was not marketable because it did not have a certificate of occupancy. The Court found that the building was constructed in 1930, which was prior to the date on which a certificate of occupancy was required. The property not requiring a certificate of occupancy, "the plaintiff had no basis upon which to terminate the contract..." This decision is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30278.pdf.

## Constructive Trusts

The Plaintiff claimed that the Defendant and she agreed that the Defendant would take title to property, and the Plaintiff would pay the down payment for the purchase, occupy the property and pay all carrying costs. The Plaintiff further alleged that it was agreed that the Defendant would convey the property to the Plaintiff on her demand. The Plaintiff sought the imposition of a constructive trust.

The Appellate Division, Second Department, affirmed the Supreme Court, Queens County's, grant of the Defendant's motion for summary judgment dismissing the complaint. There must be a fiduciary or confidential relationship to establish a constructive trust. According to the Appellate Division, "the plaintiff adduced evidence demonstrating that her relationship with the defendant was merely a friendship." Further, "[t]he plaintiff's evidence concerning the superior experience and skill of the defendant's husband in real estate and financial matters was insufficient to raise a triable issue of fact as to whether the plaintiff relied on that expertise with respect to the acquisition of the subject property." Bekas v. Valiotis, 2021 NY Slip Op 08161, decided February 24, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_08161.htm.

## Easements/By Necessity

The Plaintiff, who acquired landlocked property at a tax sale, brought an action seeking a judgment declaring that his property had the benefit of an easement by necessity over a private road within the Defendant's adjoining land, which road leads to a public street. The Appellate Division, Second Department, remitted the case to the Supreme Court, Orange County, for entry of a judgment declaring that the Plaintiff did not have an easement by necessity over the Defendant's property. According to the Appellate Division,

> *"'[t[he party asserting that it has an easement by necessity bears the burden of establishing by clear and convincing evidence that there was a unity and subsequent separation of title, and that at the time of severance, an easement over the servient estate was absolutely necessary to obtain access to the party's land…Here, [the Defendant] demonstrated her entitlement to judgment as a matter of law by demonstrating, prima facie, that the [Plaintiff's] Property did not have unity of title with the [Defendant's] Property."*

Creagan v. Stein, 2021 NY Slip Op 08164, decided February 24, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_08164.htm.

## Easements/Descriptions

The Supreme Court, Richmond County, held that a perpetual easement granted over part of the Defendant's property was invalid because it was not plottable. The Appellate Division, Second Department, modified the lower court's order, remitting the matter to the Supreme Court for entry of a judgment declaring that the easement was valid. According to the Appellate Division,

> *"[t]he fact that easement grant does not give the precise location of the easement is not fatal to a finding that the an easement was intended [citation omitted]…The evidence presented at the hearing … demonstrated that the grantor intended to grant a perpetual easement…containing improvements of a stucco wall and a covered wooden deck. The easement was specifically referenced on a survey dated July 2, 2002 [before the easement was granted in 2003]. Accordingly, the court should have determined that the subject easement was valid."*

Marino v. Mazzuoccola, 2021 NY Slip Op 08176, decided February 24, 2001, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_08176.htm.

## Equitable Mortgages/Tenants by the Entirety

Notwithstanding that the property in question was owned by a husband and his wife as tenants by the entirety, the mortgage being foreclosed and the note it secured were executed only by the husband. The Supreme Court, Kings County, held that the Plaintiff held an equitable mortgage on the wife's interest in the property and granted judgment of foreclosure and sale. The Appellate Division, Second Department, reversed the lower court's ruling. According to the Appellate Division,

> *"[T]he plaintiff failed to demonstrate that Wells Fargo intended to obtain a mortgage on [the wife's] interest in the property. The mortgage loan application submitted by the plaintiff was for [the husband] only, and [his wife] is not mentioned therein. The note and mortgage, similarly, were executed by [the husband] alone, and [his wife] is not mentioned therein. Under the circumstances, the plaintiff failed to demonstrate, prima facie, that the parties unequivocally intended to create a mortgage on [the wife's] interest in the subject property [citations omitted]."*

U.S. Bank N.A. v. Saff, 2021 NY Slip Op 00590, decided February 3, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_00590.htm.

## Fraud/Statute of Limitations

Two properties in Brooklyn were transferred in 1997 by the mother of the Plaintiff and the Defendant to the Defendant. The mother died in 2003 and, in 2010, the Defendant reconveyed the property to herself and another. The Plaintiff, claiming that their mother suffered from dementia when she executed the deeds in 1997, sought to have the 1997 and 2010 deeds rescinded, claiming fraudulent inducement and undue influence. The Plaintiff asserted that she first became aware of these deeds in 2019. The Supreme Court, Kings County, dismissed the complaint as being time-barred.

Under subparagraph "8" of Civil Practice Law and Rules ("CPLR") Section 213 ("Actions to be commenced within six years…"), for an action based upon fraud, "…the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff… discovered the fraud, or could with reasonable diligence have discovered it."

The Court, noting that the Plaintiff signed a waiver of the Petition for Letters of Administration of her mother's estate in 2008 and the recording of the deeds from her mother in 1997, held that she had "failed to establish that she could not have discovered the alleged fraud by 'reasonable diligence and [therefore] the causes of action are time-barred by the Statute of Limitations…" Ashley v. Manley, 2021 NY Slip Op 30554, decided February 19, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30554.pdf.

## Lien Law/Building Loans

A note, secured by a mortgage on the borrower's property in Oswego County, provided for a line of credit to be used, in part, to fund the completion of a residential housing development being constructed in a different county. No building loan agreement was filed. In an action to foreclose the mortgage, the holder of a mechanic's lien filed after the mortgage was recorded asserted, in a third-party action, that the lender was liable for the diversion of trust funds. The Supreme Court, Oswego County, granted the mortgagee's motion for an Order of reference and for summary judgment. The Court also denied the mechanic lienor's cross-motion seeking a finding that its lien had priority over the mortgage and dismissed the cause of action alleging the diversion of trust assets. The Appellate Division, Third Department, affirmed the lower court's rulings. According to the Appellate Division, the foreclosing mortgagee

> *"established that the mortgage did not constitute a building loan mortgage because it was not 'made pursuant to a building loan contract' ([Lien Law} Section 2 [14]).The note provided that the line of credit would be used to fund the completion of construction work on a residential housing development on real property in a different county, to pay [the borrower's] preexisting debt with the Bank, and for other purposes that [the borrower] deemed appropriate, but there was no 'express promise' by [the borrower] to make an improvement on the Oswego County property [citations omitted]."*

Generations Bank v. Donnelly, 2021 NY Slip Op 00719, decided February 5, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_00719.htm.

## Lien Law/Itemized Statements

Under Lien Law Section 38 ("Itemized statement may be required of lienor"), "[a] lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished..."

In a Lien Law special proceeding, the Supreme Court, Kings County, ordered the Respondent, who had filed a mechanic's lien, to serve a revised itemized statement identifying the terms of the contract under which each item of materials and labor was furnished. Although there would be discovery in the plenary action commenced in Suffolk County to foreclose on the lien, "Petitioner was within its rights to commence a separate proceeding in support of its demand for a complete Verified Statement to which it is entitled under the Lien Law." Level 5 Carpentry Corp. v. 535 Construction LLC, 2021 NY Slip Op 30732, decided March 9, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30732.pdf.

In Danya Cebus Construction, LLC v. Bella Management Group, Inc., 2020 NY Slip Op 34098, the Supreme Court, Kings County, ordered the County Clerk to vacate and cancel of record a mechanic's lien due to the failure of the lienor to provide an itemized verified statement as required by Section 38, as had been ordered by the Court. The case, decided December 8, 2020, is posted at https://www.nycourts.gov/reporter/pdfs/2020/2020_34098.pdf.

## Lien Law/Trust Funds

The Plaintiff was engaged by the ground lessee ("Developer") of the Port Authority Bus Terminal in Manhattan to renovate and construct improvements at the Terminal. The Bus Terminal is owned by the Port Authority of New York and New Jersey and the project undertaken by the Plaintiff is, therefore, considered a "public improvement" under the Lien Law.

In a case brought in the United States District Court for the Southern District of New York, the Plaintiff, alleging that it was not paid amounts owed for work done, sued the owners of the Developer and its related entities (collectively, the "Developer Affiliates") and four Defendants who had each lent money to the ground lessee (collectively, the "Lenders"). The Developer is in Bankruptcy. The Plaintiff pled causes of action against the Developer Affiliates of common law conversion and constructive fraud. The constructive fraud claim was dismissed with prejudice because the complaint did not "…identify the speaker of any alleged misrepresentation."

As to the Lenders, the Plaintiff sought a declaratory judgment that the Plaintiff's interests in the project are superior to those of the Lenders. The Plaintiff asserted that the Lenders' loans and the financial contribution made by the Port Authority for the project constituted a trust fund from which there was the improper diversion of funds by the repayment of loan principal. Under Lien Law Section 70 ("Definition of trusts"),

> *"1. The funds described in this section for or in connection with an improvement of property in this state…received by a contractor under or in connection with…a contract for a public improvement…shall constitute assets of a trust…"*

The District Court found that the Developer was, in effect, a contractor and, therefore, the trustee of a Lien Law contractor trust. The Lien Law allows the recovery of trust assets from the recipient of funds diverted from a Lien Law Trust. Under Lien Law Section 77 ("Action to enforce trust"),

> *"[w]here the holder of any trust assets is a trustee or a transferee who received the assets with the knowledge that they were trust funds, an order for distribution and retention for future distribution of any trust assets shall include the amount of diverted funds plus interest from the time of the diversion to the date of such order."*

However, under Lien Law Section 72 ("Diversion of trust funds"), "[n]othing in this article [3-A] affects the rights of…a purchaser in good faith and without notice that a transfer to him is a diversion of trust assets." The Court, in dismissing with prejudice the cause of action against the Lenders alleging the diversion of trust funds, found that the Plaintiff "has not plausibly alleged that the lenders received unlawfully diverted trust funds with knowledge that the funds were trust funds." The Second Amended Complaint ("SAC")

> *"…nowhere alleges that [the Lenders] had any knowledge – actual, constructive, objective, or subjective – that the funds they allegedly received from the Developer were assets of an Article 3-A trust…Article 3-A requires that [the Plaintiff] plead the lender transferees' knowledge that the funds they received were part of a trust. The SAC fails to do so…The SAC…specifically identifies another source of revenue that just as likely could have funded the Developer's transfers to the Lenders, without dipping into the Article 3-A trust."*

The request for declaratory relief was dismissed, without prejudice to pursuing that claim anew depending on the outcome of proceedings in the Bankruptcy Court. Tutor Perini Building Corp. v. New York City Regional Center, LLC, 20 Civ. 731, decided March 15, 2021, can be found at 2021 U.S. Dist. LEXIS 47964 and 2021 WL 965909.

## Limited Liability Companies/Apparent Authority

An LLC's operating agreement requires the "unanimous vote or consent of the [m]embers" in order for any member to transfer "all or any part of his interest" in the LLC. One of the members, Samuel Fleischman, without the consent of the other members, executed a contract for the LLC to sell its real property; the contract required the written consent of the members "to the extent required by the…operating agreement." Plaintiff, the contract vendee's assignee, sought to enforce the contract. The Appellate Division, Second Department, affirmed the dismissal of the complaint by the Supreme Court, Kings County. The execution of the contract without the consent of the other members violated the operating agreement and Fleischman lacked apparent authority. "Here, the evidence demonstrated, at best, that the plaintiff relied upon conversations with Fleischman and the defendant's attorney never communicated with the defendant's other members and failed to make reasonable inquiry into Fleischman's actual authority [citations omitted]." Shefa Trading III, LLC v. E.N.Y. Plaza, LLC, 2021 NY Slip Op 08273, decided March 17, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_08273.htm.

## Limited Liability Companies/"De Facto Corporation" Doctrine

In an action to recover on a promissory note, the Defendant questioned whether the assignment of the note to the Plaintiff was a nullity because the Plaintiff, a limited liability company, was not formed on the date of the assignment. The Appellate Division, Second Department, affirming entry of a judgment in favor of the Plaintiff by the Supreme Court, Kings County, applying the de facto corporation doctrine, upheld the validity of the assignment. According to the Appellate Division,

> *"New York has recognized that an unincorporated entity can take title or acquire rights by contract if it is a de facto corporation [citation omitted]…Here, the plaintiff submitted affidavits that demonstrated the applicability of the de facto corporation doctrine [citations omitted]. Specifically, the plaintiff demonstrated that there was a law under which the LLC might be organized (see Limited Liability Company Law §§ 203, 209), that the plaintiff made a 'colorable attempt' to comply with the statutes governing the formation of an LLC, including the filing requirement, and that the plaintiff exercised its powers as an LLC thereafter (citations omitted)."*

Torto Note Member, LLC v. Babad, 2021 NY Slip Op 01438, decided March 10, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_01438.htm.

## London Interbank Offered Rate ("LIBOR")

Chapter 94 of the Laws of 2021, enacted April 6, 2021and effective immediately, adds Article 18-C ("LIBOR Discontinuance") to the General Obligations Law authorizing the use of a "Benchmark replacement" for LIBOR on a "LIBOR replacement date". Senate Bill 002978B/Assembly Bill 00164B can be found at Bill Search and Legislative Information | New York State Assembly (nyassembly.gov).

## Mortgage Foreclosures/Abandonment

The Appellate Division, First Department, affirmed the ruling of the Supreme Court, New York County, denying the Defendant's motion to dismiss the complaint as abandoned under subsection (c) of CPLR Section 3215 ("Default judgment"), which states the following:

> *"(c) Default not entered within one year. If the plaintiff fails to take proceedings for entry of judgment within one year after the default, the court shall…dismiss the complaint as abandoned…unless sufficient cause is shown why the complaint should not be dismissed…"*

According to the Appellate Division, "[a]lthough plaintiff failed to timely seek an order of reference, its participation in the residential mortgage settlement conference before the time to seek an order of reference expired and defendant's multiple repeated bankruptcies constituted a reasonable excuse for the delay [citations omitted]." U.S. Bank N.A. v. Nunez, 2021 NY Slip Op 00515, decided January 28, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_00515.htm.

## Mortgage Foreclosures/Defendant's Standing

The Supreme Court, Queens County, granted the Plaintiff's motion for a judgment of foreclosure and sale and an order of reference. The Court also held that the Defendant, a co-mortgagor with his wife, lacked standing to oppose the Plaintiff's motion because he had conveyed his interest in the property before the foreclosure was commenced. The Appellate Division, Second Department, affirmed the lower court's Order. "[A]t the time of the plaintiff's motion…the defendant 'possessed no rights' in the subject property 'which could have been adversely affected thereby' [citation omitted]." Valiotis v. Bekas, 2021 NY Slip Op 08213, decided February 24, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_08213.htm.

## Mortgage Foreclosures/Notices - RPAPL Section 1304

In connection with a mortgage foreclosure filed in federal district court, two questions were certified to New York's Court of Appeals by the United States Court of Appeals for the Second Circuit concerning RPAPL Sections 1304 ("Required prior notices") and 1306 ("Filing with superintendent").

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. Under Section 1306, "[e]ach lender, assignee or mortgage loan servicer shall [electronically] file with the superintendent [of the Department of Financial Services]…within three business days of the mailing of the notice required by subdivision one of Section 1304…or subsection (f) ["Additional pre-disposition notice for cooperative interests"] of section 9-611 ["Notification before disposition of collateral"] of the uniform commercial code the information required by subdivision two of this section." Subdivision two requires the reporting of the name, address and the last known telephone number of the borrower and the amount claimed as due and owing on the mortgage. The complaint "shall contain…an affirmative allegation that at the time the proceeding is commenced, the plaintiff has complied with the provisions of" Section 9-611.

The first question certified was "'[w]here the foreclosure plaintiff seeks to establish compliance with RPAPL Section 1304 through proof of a standard office mailing procedure, and the defendant denies receipt and seeks to rebut the presumption of receipt by showing that the mailing procedure was not followed, what showing must the defendant make to render inadequate the plaintiff's proof of compliance with Section 1304' [citation omitted]."

The Court of Appeals ruled "that to rebut the presumption [established by evidence of "'an established and regularly followed office procedure'" that a notice was mailed and received], there must be proof of a material deviation from an aspect of the office procedure that would call into doubt whether the notice was properly mailed, impacting the likelihood of delivery to the intended recipient." The Court did not address how the standard should be applied in this case.

The second question certified was "…whether RPAPL Section 1306 requires that a lender's filing include information about all borrowers on a multi-borrower loan." The Court of Appeals concluded that "a plain reading indicates that RPAPL 1306 is satisfied as long as one borrower is listed." CIT Bank, N.A. v. Schiffman, 2021 NY Slip Op 01933, decided March 30, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_01933.htm.

Two Appellate Division cases also dealt with RPAPL Section 1304. In U.S. Bank N.A. v. Moran, 2021 NY Slip Op 00645, decided February 4, 2021, the Appellate Division, First Department, reversed the Supreme Court, New York County's grant of a judgment of foreclosure and sale, holding that the foreclosing Plaintiff had not demonstrated its strict compliance with Section 1304.

> *"Although the statute requires that the notice be sent to 'the property address and any other address of record', the affidavits submitted by plaintiff show that the notices were mailed neither to the mortgaged premises nor to defendant's residence. One of the addresses to which the notices were sent not only was never occupied by defendant but also specified a unit that did not exist at that street address. The other was sent to the correct high-rise apartment building of more than 400 units but was missing the unit number."*

In Nationstar Mortgage, LLC v. Paganini, 2021 NY Slip Op 00852, decided February 10, 2021, the Appellate Division, Second Department, held that the foreclosing Plaintiff had complied with the notice requirements of Section 1304.

> *"…Nationstar submitted evidence that a third-party vendor mailed the 90-day preforeclosure notice through the testimony of a witness who had personal knowledge of the vendor's standard business practice with regard to sending the 90-day preforeclosure notice to borrowers, and who affirmed, based on the business records she reviewed regarding the subject loans, that the notices had been sent to the defendant in compliance with the requirements of RPAPL Section 1304 [citations omitted]."*

These cases are posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_00645.htm and https://www.nycourts.gov/reporter/3dseries/2021/2021_00852.htm.

## Mortgage Foreclosures/Standing

The Supreme Court, Kings County, denied the foreclosing Plaintiff's motion for summary on the grounds that the Plaintiff had failed to establish, prima facie, its standing. The Appellate Division, Second Department, reversed and granted the Plaintiff's motion for summary judgment and for an Order of Reference. According to the Appellate Division,

> *"[h]ere, HSBC established its standing to commence the action by demonstrating that it had physical possession of the consolidated note prior to the commencement of the action, as evidenced by its attachment of the consolidated note, endorsed in blank by Wells Fargo, to the summons and complaint filed in the action [citation omitted]. Where, as here, an entity is in possession of a negotiable instrument that has been endorsed in blank, it need not establish how it came into possession of the instrument in order to enforce it [citations omitted]. Contrary to the Supreme Court's determination, the presence of a second, unendorsed copy of the consolidated note attached as an exhibit to the February 2007 CEMA, seven years prior to the commencement of this action, did not create a triable issue of fact warranting the denial of the subject branches of HSBC's motion [citation omitted]."*

HSBC Bank USA, N.A. v. Chabot, 2021 NY Slip Op 00548, decided February 3, 2021, is posted at https://www.nycourts.gov/Reporter/3dseries/2021/2021_00548.htm.

## Mortgage Foreclosures/Standing/Settlement Conferences

The Supreme Court, Suffolk County, granted the foreclosing Plaintiff's motion for summary judgment and dismissed the Defendant's cross-motion to dismiss the complaint as to the mortgagor for lack of standing or, alternatively, to impose sanctions against the Plaintiff for its failure to negotiate in good faith. Civil Practice Law and Rules ("CPLR") Section 3408 ("Mandatory settlement conference in residential foreclosure actions") requires that in settlement discussions to determine if "the parties can reach a mutually agreeable resolution to held the defendant avoid losing his or her home…(f)[b]oth the plaintiff and defendant shall negotiate in good faith…" The Appellate Division, Second Department reversed the lower court's Orders and remitted the case for further proceedings.

The Appellate Division found that the Plaintiff, which had stated in its motion, that it serviced the loan for the Federal Home Loan Bank of Chicago ("FHLBC"), had not established prima facie standing.

> *"The plaintiff was not in possession of the note at the time of commencement of the action. Further, the plaintiff failed to submit evidence establishing, prima facie, that it was authorized to act on behalf of FHLBC to commence the foreclosure action, since the plaintiff did not submit any power of attorney, servicing agreement or other agreement authorizing the plaintiff to commence this action [citation omitted]. Moreover, the affidavits relied on by the plaintiff contained only conclusory assertions that the plaintiff was the loan servicer…"*

As to whether the Plaintiff acted in good faith, "…the plaintiff failed to demonstrate that it followed HAMP [the federal Home Affordable Modification Program] regulations and guidelines, i.e., that it made any effort at all to seek a waiver from the investor as to the restriction [not permitting consideration of self-employment income received for less than two years] which made it unfeasible to complete the modification waterfall steps, it failed to establish that it negotiated in good faith pursuant to CPLR 3408(f) [citations omitted]." Citimortgage, Inc. v. Lofria, 2021 NY Slip Op 01026, decided February 17, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_01026.htm.

## Mortgage Foreclosures/Statute of Limitations

The Appellate Division, Second Department, affirmed the Supreme Court, Kings County's denial of the Defendant's motion to dismiss the complaint as being time barred. Although the filing of the second foreclosure action re-accelerated the mortgage, the statute of limitations was tolled during the period between the Defendant's commencement of a bankruptcy proceeding and his discharge. Bank of New York Mellon v. Sakkal, 2021 NY Slip Op 01021, was decided February 17, 2021. The Appellate Division, Second Department, similarly ruled, in Nationstar Mortgage, LLC v. Jackson, 2021 NY Slip Op 01420, decided March 10, 2021, that the statute of limitations was tolled during a bankruptcy stay. These cases are posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_01021.htm and http://www.nycourts.gov/reporter/3dseries/2021/2021_01420.htm.

In Wilmington Trust National Association v. Mausler, 2021 NY Slip Op 01296, the Appellate Division, Third Department, held that a default letter, stating that "'[i]f you do not cure this default within [thirty days from the date of this letter], your obligation for payment of the entire unpaid balance of the loan will be accelerated and become due and payable immediately' (emphasis added)" and, if the default was not cured, "'foreclosure proceedings may commence to acquire the [p]roperty by foreclosure and sale' (emphasis added)", "did not constitute a valid acceleration of the debt so as to trigger the applicable statute of limitations." Decided on March 4, 2021, this case is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_01296.htm.

In Carter v. U.S. Bank Trust, N.A., 2021 NY Slip Op 30258, the Supreme Court, Kings County, held that the following notice (in all capital letters) sent to the borrower effectively de-accelerated the mortgage: "Please be advised that to the extent any previous acceleration may be applicable, we hereby revoke any prior and currently applicable acceleration of the loan, withdrawing any prior demand for immediate payment of all sums secured by the security instrument and re-institute the loan as an installment loan." Decided on January 27, 2021, this case is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30258.pdf.

## Pandemic/Leaseholds

The Plaintiff, the owner of a building in Manhattan, sued the guarantor of a tenant's obligations for unpaid rent. The tenant's business is the licensing of office space. The Defendant claimed as defenses frustration of purpose and the protection of New York City Administrative Code Section 22-1005 ("Personal liability provisions in commercial leases"), also known as the "Guaranty Law." The Guaranty Law provides, in part, the following:

> *"A provision in a commercial lease…that provides for one or more natural persons…to become, upon the occurrence of a default or other event, wholly or partially personally liable for [amounts] owed by the tenant under such agreement…shall not be enforceable against such natural persons if the conditions of paragraph 1 and 2 are satisfied:*
>
> *1. The tenant satisfies the conditions of subparagraphs (a), (b) or (c):*
>
> *(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;*
>
> *(b) the tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or*
>
> *(c) the tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.*
>
> *2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and March 31, 2021, inclusive."*

Judge Arlene Bluth held that the Guarantee Law did not apply because "the premises did not close pursuant to [the] various executive orders" issued by the Governor and "there is a demonstrated history of the Tenant not paying the rent prior to the pandemic." As to the defense of the frustration of purpose, the Defendant claimed that limits on the occupancy of office space reduced the Tenant's ability to meet its rental obligations. However, according to the Court, "a reduction in potential revenue is not the same as completely frustrating the purpose of the contract." The Court awarded the Plaintiff $500,000, the maximum amount payable under the guaranty, plus interest from the date of the decision with costs and disbursements. MEPT 757 Third Avenue LLC v. Grant, 2021 NY Slip Op 30592, decided March 1, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30592.pdf.

Judge Bluth also issued two decisions dealing with the impact of the pandemic on parking garage leases in Manhattan.

In RHP Hotels 51st Street Owner, LLC v. HJ Parking LLC, 2021 NY Slip Op 30286, decided January 28, 2021, the Defendant, the operator of a parking garage, sought to have vacated a default judgment entered in an action seeking to recover unpaid rent. The Defendant raised defenses of the doctrines of impossibility and frustration of purpose, as well as a defense based on the Governor's Executive Orders barring commercial evictions due to the pandemic. The Court denied the motion to vacate. The Executive Orders did not bar the recovery of rent that was owed and, as to the equitable defenses,

> *"…a less profitable business is not a basis to find that these equitable doctrines could absolve defendant of its obligation to pay rent [citation omitted]…Quite simply, here, where there is a downturn in a tenant's business–with or without Covid–it does not invoke the doctrine of impossibility of performance, especially when the business is operating. Nor does it invoke frustration of purpose – defendant's purpose was to operate a garage, and it certainly is doing just that."*

In 1515 Broadway Owner LLC v. Astor Parking LLC, 2021 NY Slip Op 30661, decided February 25, 2021, the Plaintiff-landlord sought to recover unpaid rent on a garage lease in Times Square. The Court ordered the Defendant to pay the Plaintiff rent pendente lite "going forward". The Court stated that "[t]he Tenant agreed to pay a certain amount each month; that their business is less successful [due to the pandemic] does not mean that the Court should reduce the amount that the Tenant should pay pendente lite."

These cases are posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30286.pdf and https://www.nycourts.gov/reporter/pdfs/2021/2021_30661.pdf.

In another case, decided by the Supreme Court, Queens County, the Plaintiff commenced an action against a corporate lessee of premises being used as a restaurant and its guarantor to recover damages for breach of the obligation to pay rent. The Court held that New York City's Guaranty Law barred the action as against the guarantor, but that neither Local Law 55 (Adm. Code Section 22-1005; "Personal liability provisions in commercial leases") nor New York State's Executive Order 202.28 barred the action against the tenant. Local Law 55 protects a "natural person" from liability; here, the tenant is a corporation. EO 202.28, providing that "[t]here shall be no initiation of a proceeding or enforcement of… an eviction of any…commercial tenant, for nonpayment of rent…", does not apply to an "action for a non-possessory money judgment based on breach of contract..." Able Motor Cars Corp. v. Three Brothers Chinese Cuisine Inc., 2021 NY Slip Op 30716, decided January 13, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_30716.pdf.

## Pandemic/Mortgage Foreclosures

Chapter 126 of the Laws of 2020 added Section 9-x ("Mortgage forbearance") to New York's Banking Law effective March 7, 2020. Under Section 9-x, state regulated banking organizations and mortgage servicers are required to forbear monthly payments by a "qualified mortgagor" (an individual whose primary residence is encumbered by a "home loan") when the mortgagor is in arrears , is on a "trial period plan", or has applied for loss mitigation. A mortgagor with a financial hardship has the option to extend the loan term, accumulate arrears without penalty or late fees accruing, or "negotiate a loan modification or any other option that meets the ["qualified mortgagor's] changed circumstances…"

Wells Fargo Bank, N.A. v. Kelsey, 2021 NY Slip Op 30806, involved a mortgage foreclosure brought in 2018. The Supreme Court, Dutchess County, denied the Defendant's motion for a declaratory judgment determining his "eligibility for forbearance, waiver of late fees and interest." The Court held that Banking Law Section 9-x did not apply; the mortgage was in default, the action was commenced before the pandemic and the action was brought before the law was enacted. The law was intended to address mortgages affected by the pandemic, not mortgages in default before March 7, 2020. This case, decided March 16, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_30806.pdf.

In the foreclosure of a mortgage on commercial property commenced in Kings County in October 2020, the Defendant sought dismissal of the action and cancellation of the notice of pendency under authority of the Governor's Executive Orders ("EO") 202.28 and EO 202.70 which, as extended, the Defendant claimed, prohibited the foreclosure of commercial property through January 1, 2021. Under EO 202.2, issued March 20, 2020, "[t]here shall be no…foreclosure of any residential or commercial property for a period of 90 days." Under EO 202.28, issued May 7, 2020, "[t]here shall be no initiation of a proceeding or enforcement of…a foreclosure…of a…mortgage for nonpayment of such mortgage, owned or rented by someone…facing financial hardship due to COVID-19 pandemic for a period of sixty days…" The Supreme Court, Kings County, denied the Defendant's motion, holding that EO 202.2 "merely provided a stay" and that the EOs "do not authorize the dismissal of commercial foreclosure actions commenced during the COVID-19 pause period…" U.S. Bank N.A. v. Middle Dam Street Inc., 2021 NY Slip Op 30686, decided March 4, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_30686.pdf.

## Powers of Attorney/Fraudulent Conveyance

In April 2010, the Plaintiff's half-brother executed a power of attorney naming the Defendant as his agent. In May 2010, the Defendant, as attorney-in-fact for his half-brother, transferred real property to himself. In August 2010, the half-brother died intestate. The Plaintiff commenced an action seeking to set aside that conveyance as a fraudulent transfer. The Supreme Court, Kings County, dismissed, with prejudice, the cause of action seeking to set aside the deed. The Appellate Division, Second Department, reversed, holding that the Supreme Court should have set aside the transfer as a fraudulent conveyance, remitting the case for entry of an amended judgment in favor of the Plaintiff. According to the Appellate Division,

> *"'[a]bsent a specific provision in the power of attorney document authorizing gifts, an attorney-in-fact,…may not make a gift to himself [or herself] or a third party of the money or property which is the subject of the agency relationship [citations omitted].' Here, the plaintiff submitted evidence that the power of attorney did not grant the defendant gift-making authority, and that the defendant improperly used the power of attorney to gift the subject property to himself."*

McGregor v. McGregor, 2021 NY Slip Op 08179, decided February 24, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_08179.htm.

## Recording Act/Judgments

The Plaintiff purchased property from a Joseph Paul. A month before the conveyance, the Defendant's judgment for $173,587.50 was docketed against a Dr. Joseph Paul. The judgment was not reported in the title search. The Plaintiff, having become aware that the Defendant was seeking to enforce the judgment against the property, commenced an action to quiet title. The Appellate Division, Second Department, affirmed the ruling of the Supreme Court, Kings County, which held that the judgment was not a valid lien against the real property. According to the Appellate Division,

> *"the judgment at issue was not docketed under 'Paul" – the surname of the title owner of the property. Thus, no valid lien was created. [citations omitted]. Moreover, there is no dispute that the plaintiff had no actual or constructive notice of a judgment lien on his property [citation omitted]."*

> *"The judgment creditor is obligated to ensure that the judgment lien is properly recorded [citations omitted]."*

Charles v. Berman, 2021 NY Slip Op 00542, decided February 3, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_00542.htm.

## Receivers

The Supreme Court, Kings County, in an action for partition, granted the Plaintiff's motion for the appointment of a temporary receiver. The Appellate Division, Second Department, reversed and denied the motion. Under CPLR Section 6401 ("Appointment and powers of temporary receiver"), a temporary receiver "may be appointed…where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." According to the Appellate Division,

> *"the plaintiff's speculative and conclusory allegations that the defendants [the other tenants in common] failed to repair and maintain the subject properties and comingled income derived from the [two] subject properties with their personal income were insufficient to demonstrate that there was a danger of irreparable loss or material injury to the subject properties warranting the appointment of a temporary receiver [citation omitted]. Similarly, without more, the defendants' failure to maintain adequate records does not demonstrate that the plaintiff's interest in the subject properties is in imminent danger of irreparable loss or waste [citation omitted]."*

Cyngiel v. Krigsman, 2021 NY Slip Op 01390, decided March 10, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_01390.htm.

## Rule Against Perpetuities/Right of First Refusal ("ROFR")

Plaintiffs sought an adjudication of their rights under a ROFR granted in a 2009 deed which conveyed other, adjacent, property to the Plaintiffs. The Defendants, who conveyed the adjacent land to another person in 2017, contended that the ROFR violated the rule against perpetuities (Estates, Powers and Trusts Law, Section 9-1.1(b); "Rule against perpetuities") because the ROFR was exercisable by the Plaintiffs' heirs and distributees more than twenty-one years after the Plaintiffs' deaths. The Supreme Court, Chautauqua County, denied the Defendants' motion for summary judgment dismissing the complaint and for a ruling that the RORF was null and void.

Stating also that there were questions of fact as to whether the Defendants complied with the ROFR's notice requirements, the Appellate Division, Fourth Department, affirmed the lower court's ruling. The ROFR provided that "'[t]his [r]ight of [f]irst [r]efusal shall run with the land and inure to and be for the benefit of the [plaintiffs] but not their successor and assigns…'". According to the Appellate Division, "[w]e reject defendants' contention that plaintiffs' interest could vests in heirs and distributees more than 21 years after plaintiffs' deaths inasmuch as it would not be possible for the right to vest in plaintiffs' heirs and distributees without also necessarily vesting in their successors and assigns." Martin v. Seeley, 2021 NY Slip Op 00727, decided February 5, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_00727.htm.

## Tax Lien Sales/Nassau County

The holder of a tax lien obtained an Order from the Supreme Court, Nassau County, granting a judgment of foreclosure and sale and denying the Plaintiff's motion insofar as it sought an award of attorney's fees from Defendant Kathleen Kirk, one of the-owners of the property. The Appellate Division, Second Department, affirmed the lower court's ruling.

Under Nassau County Administrative Code Section 5-51.0 ("Notice to owner by holder"), "(c) [a] holder of a tax lien shall serve notice on the owner in fee as appearing of record for said premises as class one or of a residential condominium classified as class two by personal service…when said owner is a resident of Nassau County…" Further, under subsection (f) of Section 5-51.0, "[i]f such notice is not served by the holder of the certificate of sale before commencing an action to foreclose, he shall be entitled to disbursements only as provided by the civil practice act, and not to costs, provided the defendant offers to pay the penalties allowed by law at any time before final judgment is entered."

Kirk was served the notice to redeem from the foreclosure by "nail and mail" service instead of by personal service, but before entry of the final judgment she offered to pay the penalties. Therefore, "…the plaintiff was precluded from recovering attorney's fees from the defendant [citation omitted]." DBW TL Holdco 2014, LLC v. Kirk, 2021 NY Slip Op 00543, decided February 3, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_00543.htm.

## Zoning/Deferential Zoning

Petitioner, a Jewish Community Center, sought to obtain a permit for a conditional use to enable it to expand its facilities to operate a Day School and a camp. The applicable zoning district permits the construction of detached single-family dwellings and "nonresidential uses which may not be excluded pursuant to the state and federal laws." Brookville Village's Zoning Board of Appeals ("ZBA") denied the application; the Supreme Court, Nassau County, dismissed the proceeding. The Appellate Division, Second Department, in an Article 78 proceeding, affirmed the lower court's ruling. According to the Appellate Division,

> *"…the ZBA's determination that the Day School and Camp operated by the JCC does not qualify as either a religious or educational use entitled to deferential zoning treatment has a rational basis in the record. Although the JCC is a religious organization…the activities and programs offered at the Day School and Camp are standard recreational activities that are offered at any summer camp…Finally, the ZBA's determination that the JCC's proposed use would be detrimental to the neighborhood, and the residents thereof, is not arbitrary or capricious."*

Matter of Sid Jacobson Jewish Community Center, Inc. v. Zoning Board of Appeals of the Incorporated Village of Brookville, 2021 NY Slip Op 01264, decided March 3, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_01264.htm.

## Zoning Lots/New York City

A "zoning lot" is defined in Section 12-10(d) of the Zoning Resolution ("ZR") of the City of New York, in relevant part, as "a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which…is declared to be a tract of land to be treated as one zoning lot for purposes of this Resolution". (emphasis added) On formation of an expanded zoning lot, combining what had been separate zoning lots, development rights can be transferred within the new zoning lot for development. The definition in ZR Section 12-10 also states that "[a] zoning lot…may or may not coincide with a lot as shown on the official tax map of the City of New York…".

In May 1978, Irving E. Minkin, the then Acting Commissioner of the Department of Buildings ("DOB"), issued a Departmental Memorandum (the "Minkin Memo") with the subject line "Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution". The Minkin Memo stated the following:

> *"Under this [1977] amendment [to the zoning resolution, which amended the definition of a zoning lot] an applicant for new development or enlargement who desires to permit the use of a tract of land within a single zoning lot, which may consist of one or more tax lots or parts of tax lots, as shown on the official tax maps whether in common ownership or not…is required to furnish certain information which is to be certified by a title company…before he can obtain a building permit or certificate of occupancy". (emphasis added)*

On March 2, 2020, the Buildings Department issued Bulletin 2020-003 superseding the Minkin Memo in part "to the extent that a zoning lot may not consist of parts of tax lots unless a permit has been issued in reliance on such zoning lot prior to the date of issuance of this bulletin."

As reported in Current Developments dated May 28, 2019 and March 4, 2020, relying on the Minkin Memo, and on generally accepted practice, the DOB issued a building permit for the construction of a 55-story tower at 200 Amsterdam Avenue. Development rights for the project were acquired though the creation of a combined zoning lot which included several partial tax lots. New York City's Board of Standards and Appeals ("BSA") issued a Resolution affirming the issuance of the permit.

Petitioners challenged the issuance of the building permit and commenced an Article 78 proceeding seeking a judgment vacating the BSA Resolution. They claimed that the building permit was invalid because the zoning lot assembled by the developer was not a proper zoning lot; by including several partial tax lots the zoning lot was not, as required by the ZR, either "unsubdivided" or "consisting of two or more lots of record".

The Supreme Court, New York County, annulled the BSA Resolution because it was "unreasonable and inconsistent with the plain language of the governing statute" which requires a zoning lot to be "a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block…" The Court remanded the matter to the BSA, which was directed to review DOB's approval of the building permit application "in accordance with the plain language of the [zoning resolution] and in accordance with this decision and order". The Committee for Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates LLC, 2019 NY Slip Op 30621, decided March 14, 2019, can also be found at 2019 N.Y. Misc. LEXIS 1047.

On June 25, 2019, the BSA issued a Revised Resolution affirming the issuance of the building permit because of the "uncertainty" regarding DOB's interpretation of "zoning lot" under Zoning Resolution Section 12-10(d). However, the Supreme Court, in a decision dated February 13, 2020, 2021 NY Slip Op 34453, nullified and vacated the BSA's Revised Resolution, and ordered the DOB to "revoke the Permit and compel [the] Owner to remove all floors that exceed bulk permitted under the Zoning Resolution." Notwithstanding, construction on the building continued and the building was "substantially completed." The Supreme Court's ruling, 2020 NY Slip Op 34453, was posted on March 16, 2021 at https://www.nycourts.gov/reporter/pdfs/2020/2020_34453.pdf.

The Appellate Division, First Department, reversed the ruling of the Supreme Court and dismissed the petition. According to the Appellate Division,

> *"{w}e find that the relevant zoning provision, Zoning Resolution (ZR) 12-10(d), is ambiguous. The BSA rationally interpreted the resolution to allow respondent…to include partial tax lots in its declared zoning lot based on respondent New York City Department of Buildings' (DOB) longstanding interpretation of the zoning resolution. [The] Supreme Court should have deferred to the BSA's rational interpretation…[T]he statute does not expressly prohibit the use of partial tax lots and does not provide explicit guidance about whether partial tax lots may be included in a zoning lot. Nor does it refer to 'complete', 'whole' or 'entire' tax lots. The statute states that zoning lots 'may or may not coincide' with tax lot lines and it can reasonably be interpreted to mean that zoning lots need not adhere to tax-lot boundaries at all."*

The Appellate Division also held that the proceeding was "moot as the building is substantially complete and petitioners failed to seek injunctive relief at every step." The Court noted that the Petitioners had abandoned their appeal of the lower court's Order denying their motion for injunctive relief. Matter of Committee for Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates LLC, 2021 NY Slip Op 01228, decided March 2, 2021, can also be found at 2021 NY. App. Div. LEXIS 1294, 2021 WL 786423. It is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_01228.htm.

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