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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Acknowledgements

Real Property Law Section 299-a ("Acknowledgment to conform to law of New York or of place where taken; certificate of conformity") requires that an acknowledgment "if taken in the manner prescribed by a state [other than New York], District of Columbia, territory, possession, dependency, or other place must be accompanied by a certificate to the effect that it conforms to such laws", known as a Certificate of Conformity.

In Citimortgage, Inc. v. Zagoory, 2021 NY Slip Op 05541, decided October 13, 2021, the assignment of a first mortgage, part of the consolidated lien being foreclosed, was executed outside of New York without being accompanied by a Certificate of Conformity. Notwithstanding the failure to comply with Section 299-a, the Appellate Division, Second Department, affirmed the grant of the foreclosing Plaintiff's motion for summary judgment. According to the Appellate Division, the out-of-state acknowledgement "'substantially conformed with the template requirement of Real Property Law Section 309-b ["Uniform forms of certificate of acknowledgment or proof without this state"] [citation omitted] so as to, in effect, constitute a certificate of conformity [citations omitted]." Further,

> *"…even if the assignment of mortgage had not substantially conformed to the statutory template, 'the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be disregarded in the absence of a showing of actual prejudice' [citations omitted]. Moreover, a mere assignment of mortgage is irrelevant to the issue of the plaintiff's standing to foreclose, as the mortgage is not the dispositive document of title [citations omitted]."*

This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05541.htm.

Contracts of Sale

Under a contract of sale between the Plaintiffs-purchasers and the Defendant-seller, the closing was to take place within 60 days. Issues arose as to the Plaintiffs' mortgage commitment and a violation had been filed for the occupancy of the home's basement. The Defendant's offer to cancel the contract if she was able to retain part of the down payment was rejected. The Plaintiffs declared the Defendant in breach and demanded that the down payment be returned to them. A letter from the Plaintiffs' attorney stated that the Plaintiffs would not close and, again, demanded return of their down payment.

The Plaintiffs sued to recover their down payment, the cost of obtaining the title report, their loan application and appraisal fees. The Defendant counterclaimed to retain the down payment. The Supreme Court, Queens County, held for the Plaintiffs, finding that the Defendant had failed to "'close on the property free of violations.'" The Appellate Division, Second Department, reversed the lower court's ruling, finding that the Defendant had not breached the contract, The Court remitted the matter for entry of an amended judgment dismissing the complaint and declaring that the Defendant was entitled to retain the down payment. According to the Appellate Division,

> *"[t]he subject contract of sale did not set a definite closing date and the closing was effectively adjourned indefinitely when 60 days from the date of execution passed without a closing being scheduled. Yet, the purchasers never fixed a time by which the seller had to perform. Further, it was incumbent upon the purchasers to put the seller in default by tendering performance, demanding that the seller perform her obligations, and giving her a reasonable opportunity to cure the defects [citation omitted]…Additionally, as the purchasers advised by letter prior to the 'time of the essence' closing that they would not appear at the closing, they breached the contract and forfeited their down payment, without the necessity of a tender on the part of the seller [citation omitted]."*

Xelo v. Hamilton, 2021 NY Slip Op 05364, decided October 6, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05364.htm.

Deeds/Judicial Estoppel

The Defendant, who purchased property in 1976, married Doris Morin in 1977 and, in 1980, conveyed the property to himself and Doris as tenants by the entirety. In 2000, they both executed a deed transferring ownership solely to Doris, but that deed was not recorded. Doris, in various proceedings before the local zoning board, later claimed that she owned the property with the Defendant as tenants by the entirety. Doris died; her Will bequeathed her Estate to her two children. The Defendant-husband then conveyed the property to himself as Trustee of a revocable trust. One of Doris' children commenced an action to quiet title under Real Property Actions and Proceedings Law ("RPAPL") Article 15 ("Action to compel the determination of a claim to real property"). The husband counterclaimed for a judgment that the trust owned the property and for damages resulting from trespass. The Supreme Court, Westchester County, granted the husband's motion for summary judgment. The Appellate Division, Second Department, reversed the lower court's Order. There were triable issues of fact to as to whether the 2000 deed was effective and the Supreme Court "erred in determining that the plaintiff was judicially estopped from claiming that the decedent's estate owned the subject property."

According to the Appellate Division, although the decedent "…would be judicially estopped from claiming sole ownership of the subject property based on her position in the zoning board proceedings",

> *"[t]he plaintiff, while in privity with the decedent as the executor of her estate, is not in privity with the decedent in his individual capacity as a beneficiary of the decedent's will [citation omitted]. As such, the plaintiff may raise the issue of the ownership of the subject property in his individual capacity."*

Morin v. Morin, 2021 NY Slip Op 04973, decided September 15, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04973.htm.

Eminent Domain/Recording Act

Under Eminent Domain Procedure Law Section 402 ("Filing of acquisition maps; vesting"), on the filing of a certified copy of an acquisition map in the office of the County Clerk or in New York City, the City Register, for the county in which the property being condemned is located, "…the acquisition of the property by the state, described in such map shall be deemed complete and title to such property shall be vested in the state."

In 1992, a property was condemned by New York State but the acquisition map was indexed by the recording office against a different property. The Plaintiff, asserting that it had no knowledge of the prior taking when it purchased the property at a tax sale and recorded its deed in 2019, sought a ruling that it owned the property. The State contended that, notwithstanding the mis-indexing (which was corrected in 2020), title vested in 1992 and the deed to the Plaintiff should be declared void. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment. According to the Court,

> *"…more is required than merely ceding documents to the city register…[T]he clerk must process those documents and only then has the filing been completed. Therefore, where the documents are then indexed on the wrong property no filing has even taken place…A distinction between recording the documents akin to the recording statute (Real Property Law Section 291) and the filing of the acquisition map which necessarily demands more than merely depositing the documents is difficult to discern. Nevertheless, there can really be no dispute that in both scenarios the goal of the statutes is to provide notice and therefore an inadequate filing is no filing at all."*

Bikes By Olga, LLC v. The People of the State of New York, Index No. 506816/21, decided October 18, 2021 by Justice Leon Ruchelsman of the Supreme Court, New York County, can be obtained at 2021 N.Y. Misc. LEXIS 5452.

Heirship

The Appellate Division, Second Department, affirmed a ruling of the Supreme Court, Kings County, holding that the transfer by a person purporting to be the sole heir of the owner of that interest, which she was not, was void and directing the City Register to record its Order against the property. According to the Appellate Division, "[a] misrepresentation in a deed that the seller of the property is the sole heir of the holder of the title to the property renders the conveyance void ab initio [citations omitted]." 23A Vernon, LLC v. Oneal, 2021 NY Slip Op 05017, decided September 22, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_05017.htm.

Leases/Obligations on Surrender

A tenant surrendered the premises on termination of the lease; there was no rent in arrears. The Appellate Division, First Department, held that the tenant was not liable for use and occupancy even if the tenant failed to comply with its obligation under the lease to remove property. "[N]othing in the relevant lease provisions provided for additional rent beyond the term of the lease as part of the damages for restoring the premises to the agreed upon condition." 44-45 Broadway Leasing Co., LLC v. 45th St. Hospitality Partners LLC, 2021 NY Slip Op 05452, decided October 12, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021//2021_05452.htm.

Leases/Option to Purchase

After the lease of a house the Plaintiff was renting expired, the Plaintiff remained in possession month-to-month under what the lease termed a "new tenancy." The Plaintiff sought to purchase the home pursuant to the option to purchase contained in the lease, which option was exercisable "at any time prior to the end of the term of the Lease." The Appellate Division, First Department, affirmed the dismissal of the complaint by the Supreme Court, Bronx County. "Since the lease was not timely renewed pursuant to the terms of the lease, and the option to buy, by its terms, was dependent on the validity of the lease, the option to buy terminated when the lease expired." McMillan v. Marengo, NY Slip Op 05777, decided October 21, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05777.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. In Heartwood 2, LLC v. DeBrosse, 2021 NY Slip Op 04965, decided September 15, 2021, the Appellate Division, Second Department, reversing entry of the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Nassau County, held that the Plaintiff did not demonstrate, prima facie, that it strictly complied with Section 1304.

The affidavit of an officer of the Plaintiff's loan servicer "did not attest that she was familiar with the record-keeping practices and standard office mailing procedures of…the third-party vendor that apparently sent the RPAPL notices on behalf of the Plaintiff…" and did not "address the nature of the [servicer's] relationship with [the vendor] and whether [the vendor's] records were incorporated in [the servicer's] own records or routinely relied upon in its business [citation omitted]."

This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04965.htm.

The Appellate Division, Second Department, held that two letters mailed by Plaintiff's loan servicer before the statute of limitations had expired, stating that the loan servicer was "writing to advise…that as of the date of this letter, the maturity of the Loan is hereby de-accelerated…immediate payment of all sums owed is hereby withdrawn, and the Loan is re-instituted as an installment loan", was "sufficiently clear and unambiguous to be valid and enforceable [citation omitted'." However, the Court further held that the affidavit of the loan servicer's default servicing officer, submitted to establish compliance with notice requirements of Real Property Actions and Proceedings Law Section 1304 ("Required prior notices"), did not establish strict compliance with Section 1304. The affiant did not "aver that he was familiar with the loan servicer's mailing practices and procedures, nor did he describe such practices and procedures." U.S. Bank Trust, N.A. v. Mohammed, 2021 NY Slip Op 04990, decided September 15, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04990.htm.

In U.S. Bank National Association v. Shereshevsky, 2021 NY Slip Op 05885, decided October 27, 2021, the Appellate Division, Second Department, affirming entry of a judgment of foreclosure and sale by the Supreme Court, Kings County, held that the requirements of RPAPL Section 1304 did not apply because the mortgage loan was not a "home loan" as defined in Section 1304. A rider to the mortgage provided that the borrowers would only use and occupy the property as a second home. This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05885.htm.

In Nationstar Mortgage, LLC v. Sim., 2021 NY Slip Op 04979, decided September 15, 2021, the borrower, having executed a consolidated mortgage on property in Orangeburg, New York in 2009, moved to California in 2011. The foreclosure of the mortgage was commenced in 2015. Affirming the denial by the Supreme Court, Rockland County, of the Plaintiff's motion for summary judgment, the Appellate Division, Second Department, held that proof of compliance with RPAPL Section 1304 was required. Section 1304 requires notice when the loan secured by the mortgage being foreclosed is a "home loan", which is defined, in part, in Section 1304 as a loan to a natural person secured by a mortgage on a residence in New York State "used or occupied, or intended to be used and occupied, wholly or partly,… as the home or residence of one or more persons, and which is or will be occupied by the borrower as the borrower's principal dwelling." According to the Appellate Division,

> *"the fact that the borrower no longer occupies the residence as his or her principal dwelling would… only relieve the plaintiff of the 90-day requirement, and not the obligation to send the notice prior to commencing the foreclosure action…[T]he Supreme Court properly concluded that 'Defendant's loan qualified as a 'home loan' under RPAPL Section 1304(5) due to the fact that the home was Defendant's primary residence from the time of the loan until he was transferred to California in 2011' and that, '[t] herefore, Plaintiff needed to serve statutory notice pursuant to RPAPL Section 1304…"*

The statutory form of notice includes text stating that "[i]f this matter is not resolved within 90 days from the date the notice was mailed, we may commence legal action against you (or sooner if your cease to live in your dwelling as your primary residence). Subsection 3 of Section 1304 further provides that the ninety day period specified in the notice "shall not apply…if the borrower no longer occupies the residence as the borrower's principal dwelling." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04979.HTM.

In Wells Fargo Bank, N.A. v. Yapkowitz, 2021 NY Slip Op 05139, decided September 29, 2021, the foreclosing Plaintiff mailed a single RPAPL Section 1304 notice in the same envelope to both of the Defendants, a husband and wife. A certified mail receipt was purportedly signed by only the husband. The Defendants disputed whether they received the notice.The Appellate Division, Second Department, affirmed that dismissal of the action by the Supreme Court, Rockland County, which had held that Section 1304 "'requires a separate notice to each borrower in a separate envelope [citation omitted].'" According to the Appellate Division,

> *"…the obligation to send all required notices 'in a separate envelope from any other mailing or notice' cannot be satisfied by including the required notice for each borrower in the same envelope (RPAPL 1304[2]). To permit a single notice jointly addressed to two or more borrowers and mailed in a separate envelope to serve in lieu of a separately mailed notice to each borrower would transform the requisite standard of compliance from 'strict compliance' to 'substantial compliance'"*

This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05139.htm.

Mortgage Foreclosures/Referee's Report

The Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Kings County. An employee of the Plaintiff submitted an affidavit to establish the amount due and owing. However, the affiant did not produce any of the business records on which she purportedly relied and, therefore, her affidavit constituted inadmissible hearsay. "Consequently, the referee's findings with respect to the total amount due under the mortgage were not substantially supported by the record [citations omitted]." The matter was remitted to the lower court for preparation of a new Referee's Report. Wells Fargo Bank, NA v. Clerge, 2021 NY Slip Op 05038, decided September 22, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05038.htm.

Mortgage Foreclosures/Reforeclosure

RPAPL Section 1523 ("Judgment of foreclosure in certain cases") authorizes the reforeclosure of a mortgage if a defect in the foreclosure "was not occasioned by the fraud or willful neglect of the plaintiff…"

Andrea Lomuto, the co-owner of property on which a mortgage was foreclosed, was not named in the action as a defendant. Only Robert Wilson, the other owner, had executed the mortgage and the title search did not report the recording of a quitclaim deed to Lomuto. Accordingly, the Supreme Court, Rockland County, granted the Plaintiff's motion for summary judgment in the reforeclosure of the mortgage. However, as noted by the Appellate Division, Second Department, both Lomuto and Wilson had been named as defendants in a prior action to foreclose the same mortgage, which action was resolved when both owners obtained a loan modification. "[T]he evidence of the prior foreclosure action in which the defendant was named a party raised a triable issue of fact as to whether the plaintiff's failure to name her as a defendant…was the result of 'willful neglect' [citations omitted]." Therefore, the Appellate Division reversed the Order of the lower court. U.S. Bank N.A. v. Lomuto, 2021 NY Slip Op 05363, decided October 6, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05363.htm.

Mortgage Foreclosures/Standing

The Plaintiff, which could not establish that there was a written assignment to it of the note secured by the mortgage being foreclosed, provided an affidavit stating that it continuously possessed the note before the action was commenced. The Appellate Division, First Department, termed the statement in the affidavit "conclusory" and affirmed the denial of the Plaintiff's motion for summary judgment by the Supreme Court, New York County. According to the Appellate Division, "the affiant's bare claim that the plaintiff 'has been in continuous possession of the Note and Mortgage…' is not sufficient to establish plaintiff's standing." U.S. Bank Trust, N.A. v. Francis, 2021 NY Slip Op 05655, decided October 14, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021//2021_05655.htm.

In Freedom Mortgage Corp. v. Engel, 2021 NY Slip Op 05694, decided October 20, 2021, the Appellate Division, Second Department, ruled that the foreclosing Plaintiff had failed to prove that it had standing. An affidavit of an employee of its loan servicer averred, based on her review of the servicer's records, that the Plaintiff possessed the note, endorsed in blank, when the action was commenced. However, the affiant

> *"failed to identify and produce the business records that she relied on…Since [her] knowledge was derived solely from her review of unidentified and unproduced business records, her affidavit, without submission of those business records, constituted inadmissible hearsay and lacked probative value [citations omitted]."*

This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05694.htm.

A similar holding of the Appellate Division, Second Department, is Deutsche Bank Trust Company Americas v. Miller, 2021 NY Slip Op 05690, decided October 20, 2021, in which the Court reversed entry of a judgment of foreclosure and sale by the Supreme Court, Suffolk County. The affiant for the loan servicer

> *"failed to aver [his] familiarity with the record-keeping practices and procedures of the entity that generated the records or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business [citation omitted]."*

In addition, the affiant "'failed to identify the records upon which he relied in making the statements, and the plaintiff failed to submit copies of the records themselves [citation omitted].'"

This case is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05690.

MERS, as nominee for the lender, erroneously executed and recorded a satisfaction of a first mortgage which had been consolidated with a second mortgage. The Defendants raised as affirmative defenses the foreclosing mortgagee's lack of standing and the fact that the first mortgage was satisfied. The Appellate Division, Second Department, affirmed the grant of a judgment of foreclosure and sale by the Supreme Court, Nassau County. The Plaintiff had standing because it physically possessed the consolidated note and, according to the Appellate Division,

> *"[t]he plaintiff was not required to prove its standing to enforce either the first note or the second note, since, by executing the CEMA, the defendants agreed that the consolidated note 'will supersede all terms, covenants, and provisions of the [first and second] Notes' and agreed 'to be bound by the terms set forth in the Consolidated Mortgage which will supersede all terms, covenants, and provisions of the [first and second] Mortgages' [citation omitted]. For the same reason, the issue of the allegedly erroneous satisfaction of the first mortgage is academic [citation omitted]."*

Ridgewood Savings Bank v. Glickman, 2021 NY Slip Op 04985, decided September 15, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04985.htm.

Similarly, the Appellate Division, Second Department, in Deutsche Bank National Trust Company v. Goldstone, 2021 NY Slip Op 04693, decided September 15, 2021, ruled that "[w]here, as here, a borrower executes a CEMA and consolidated note providing that the prior notes underlying the mortgage have been consolidated into a new single lien, the plaintiff may establish its standing to commence a mortgage foreclosure action by producing the CEMA and consolidated note, endorsed in blank. [citations omitted]." This case is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04963.htm.

Mortgage Foreclosures/Standing/Allonge

The Appellate Division, Second Department, reversed the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Suffolk County, finding that the Plaintiff had failed to prove its standing to foreclose. According to the Appellate Division, "[t]he purported allonge contains an endorsement in blank, has no pagination, is undated, and contains no writing in any way to demonstrate its connection to the note or that it was firmly affixed thereto…[T]he plaintiff failed to establish that the purported allonge was so firmly attached to the note as to become a part thereof…" Federal National Mortgage Association v. Hollien, 2021 NY Slip Op 05321, decided October 6, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05321.htm.

Mortgage Foreclosures/Statute of Limitations

The borrower commenced an action to discharge a mortgage on his property, asserting that its enforcement should be time-barred. The Defendant mortgagee's predecessor-in-interest had commenced an action to foreclose the mortgage in 2009; that proceeding was voluntarily discontinued in 2017, more than two years after the statute of limitations had expired. The Defendant contended that the statute of limitations was renewed by the Plaintiff making payment of the debt as part of a conditional offer to modify the mortgage. The Appellate Division, Fourth Department, affirmed the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Niagara County. According to the Appellate Division,

> *"[t]he statute of limitations is renewed by partial payments made 'under circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder' [citation omitted]. Here, defendant failed to establish that the trial payments here satisfied that standard inasmuch as 'any promise to pay the remainder of the debt that could be inferred in such circumstances would merely be a promise conditioned upon the parties reaching a mutually satisfactory modification agreement' [citations omitted]."*

Bradley v. New Penn Financial, LLC, 2021 NY Slip Op 05187, decided October 1, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05187.htm.

Mortgage Foreclosures/Vacating Judgment of Foreclosure and Sale

The Appellate Division, Second Department, affirmed a ruling of the Supreme Court, Queens County, granting the motion of the successful bidder to set aside a foreclosure sale and directing the referee to return to him his down payment. Neither the complaint, the judgment of foreclosure and sale nor the terms of sale disclosed that there was an outstanding senior mortgage on the property. "The failure to disclose, in any document readily available to prospective bidders at the foreclosure sale, a known encumbrance on the property constituted a mistake or misconduct that cast 'suspicion on the fairness of the sale' [citation omitted]." Further, the movant, "as the successful bidder at the foreclosure sale....had standing, as an interested person, to move to set aside the sale on the ground that, after the purchase, he discovered that the property was encumbered by a senior mortgage..." SRP 2012-4, LLC v. Darkwah, 2021 NY Slip Op 05740, decided October 20, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_05740.htm.

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance has posted its Annual Statistical Report of New York State Tax Collections for the State's fiscal year 2020-2021 (April 1, 2020 - March 31, 2021). According to the Report, Real Estate Transfer Tax collected in the fiscal year was $948,856,243. Mortgage recording tax collected statewide in the fiscal year was $1,985,712,123; mortgage recording tax collected in New York City was $1,013,538,150. The report for Fiscal Year 2019-2020 is posted at Fiscal Year Tax Collections: 2020-2021 (ny.gov).

Notice of Pendency/Condominiums

The Appellate Division, First Department, affirmed the cancellation of a lis pendens by the Supreme Court, New York County, in an action brought by a Board of Managers against a unit owner seeking removal of finishing that was installed on the surface of a shared party wall. "As the complaint's allegations do not bear on any restriction over the defendant's property, the notice of pendency was properly cancelled [citation omitted]." Board of Managers of 334 East 54th Street Condominium v. 336 East 54th Street Associates LLC, 2021 NY Slip Op 05809, decided October 26, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_05809.htm.

Peconic Bay Region Community Housing Fund/Transfer Tax

Chapter 445 of the Laws of 2021, signed into law on October 8, 2021, adds new Section 64-k ("Peconic Bay region community housing fund") to New York State's Town Law and amends Section 1449-bb of Tax Law Article 31-D ("Tax on Real Estate Transfers in the Peconic Bay Region") to authorize each of East Hampton, Riverhead, Shelter Island, Southampton and Southold to adopt, subject to referendum, local laws imposing a supplemental real estate transfer tax of 0.5% of consideration on the conveyance of real property or an interest therein, when the consideration exceeds $500. This supplemental real estate transfer tax will be in addition to the existing 2% Peconic Bay Transfer Tax.

Chapter 445 also makes the following amendments to Tax Law Sections 1449-ee ("Exemptions"), which relates to the Peconic Bay Real Estate Transfer Tax:

1. The exemption from taxable consideration on the conveyance of improved real property or an interest therein in the towns of East Hampton, Shelter Island and Southampton is increased from $250,000 to $400,000.

2. The exemption from taxable consideration on the conveyance of improved real property or an interest therein in the towns of Riverhead and Southold has been increased from $150,000 to $200,000.

These exemptions, in subdivision 3 of Tax Law Section 1449-ee, will now apply when the consideration for a conveyance of residential real property is $2,000,000 or less.

3. Tax Law Section 1449-ee.4(a)(1) has provided that the purchase of "primary residential property" by one or more first-time homebuyers in the towns of Southampton, East Hampton, Shelter Island and Southold may be exempt from payment of the Peconic Bay Real Estate Transfer Tax depending on the amount of the purchase price and the buyer's household income.

This has been amended for the conveyance of primary residential property in the towns of Southampton, East Hampton, and Shelter Island. To be exempt, the conveyance must be "within 150% of the purchase price limits defined by the State of New York mortgage agency low interest rate mortgage program in the non-target one family categories for Suffolk County in effect on the contract date for the sale of such property." Prior to this amendment, the conveyance had to be within 120% of such purchase price limits.

Chapter 445 (Assembly Bill 02633/Senate Bill 06492), which is effective immediately, can be obtained at Bill Search and Legislative Information | New York State Assembly (nyassembly.gov).

Recording Act

A satisfaction of a mortgage being foreclosed was recorded in 2009. A mortgage held by J&J Realty Associates ("J&J") was recorded in 2015. The foreclosing Plaintiff, alleging that the satisfaction was recorded in error, sought to have the satisfaction vacated and J&J added as a party defendant. J&J answered that it relied on the recorded satisfaction of the Plaintiff's mortgage when it made its mortgage loan, that it was a good faith encumbrancer for value and, therefore, its mortgage lien had priority. The Supreme Court, Kings County, held that if the Plaintiff's mortgage was reinstated as a lien, it was subject and subordinate to the J&J mortgage. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division,

> *"…J&J demonstrated, prima facie, that its mortgage was valid and was superior in priority to the plaintiff's alleged mortgage [citation omitted]. J&J provided evidence establishing that it gave valuable consideration for its recorded mortgage, and that it did not have actual knowledge of the plaintiff's alleged mortgage or knowledge of facts that would have put it on 'inquiry notice' of that mortgage [citation omitted]."*

Deutsche Bank National Trust Company v. Rose, 2021 NY Slip Op 04907, decided September 1, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04907.htm.

Wishing everyone a healthy and joyous holiday season!

Michael J. Berey
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