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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

By Michael J. Berey
Senior Underwriter

Adverse Possession

Adverse Possession – The owner of real property in Brooklyn commenced an action seeking damages for the claimed trespass onto its property of a 40-foot-high advertising sign encroaching up to 2 feet. The Defendants claimed that they acquired title to the property in question by adverse possession. The Appellate Division, Second Department, affirmed the Supreme Court, Kings County's grant of the Defendants' motion for summary judgment dismissing the complaint. According to the Appellate Division,

> *"[t]he respondents established, prima facie, that the defendants' possession of the disputed property was actual, open and notorious, exclusive, and continuous for the statutory period of 10 years [citation omitted]…[T]he defendants alone cared for the signpost and sign, establishing their exclusive possession of the disputed property [citations omitted]. Furthermore, the respondents established that the defendants had improved the disputed property through the erection and maintenance of the sign advertising their businesses [citations omitted]. In opposition, the plaintiff, which had the burden of producing evidence rebutting the presumption of adversity, failed to raise a triable issue of fact [citation omitted]."*

Green Hills (USA), LLC v. Marjam of Rewe Street, Inc., 2022 NY Slip Op 05152, decided September 14, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05152.htm.

In Isnady v. Walden Preservation, L.P., 2022 NY Slip Op 04904, decided August 10, 2022, the Supreme Court, Orange County, dismissed part of an amended complaint insofar as it sought a judgment that the Plaintiff had an easement of ingress and egress or a prescriptive easement over part of the Defendant's property. The Appellate Division, Second Department, modified the lower court's Order to declare that there was not an easement. According to the Appellate Division,

> *"[w]hile there was evidence that the plaintiff's use of the Cliff Street fire lane for ingress an egress was open, notorious, continuous and undisputed, Walden Preservation made a prima facie showing negating the element of hostility by demonstrating that the use was permissive [citations omitted]. Therefore, the burden shifted to the plaintiff to come forward with evidence of hostile use sufficient to raise a triable issue of fact [citation omitted]…[T]he plaintiff failed to do so…"*

This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04904.htm.

Contracts of Sale/Cooperative Unit/UCC

Under a contract for the sale of a cooperative unit, the unit was to be transferred at closing free and clear of any liens, encumbrances and adverse interests. A rider to the contract required removal by closing of any UCC-1 relating to the unit. A financing statement filed by Emigrant Mortgage Company, Inc., which had foreclosed on the unit, had been removed. A financing statement filed by an Ethan Klauser in 2011 against the purchaser of the unit from Emigrant, which re-sold the unit to the sellers, was unable to be discharged, but it had not been extended. A UCC-3 not having been filed for the Klausner UCC, the buyers terminated the contract and demanded return of their contract deposit held in escrow.

The Sellers commenced an action alleging that the buyers breached the contract, sought to recover the contract expenses and reasonable attorneys' fees they had incurred, and to be awarded the contract deposit. The Supreme Court, New York County, granted the sellers' motion for summary judgment, ruling that the Sellers were entitled to recover the contract deposit and reasonable costs and attorneys' fees, in an amount to be reported to the Court by a Special Referee. The Court found that because the contract did not set a time of the essence closing date, the sellers, who had attempted to have the Klausner UCC terminated of record, had not breached the contract, Further,

> *"…Buyers breached [the contract] by failing to proceed with closing based on the mistaken belief that Mr. Klausner's UCC-1 may be valid and enforceable. Sellers have also shown they were damaged by the transaction falling through as they had to sell their apartment for $50,000 less, accrued carrying costs for the property, and accrued costs of defending themselves in this litigation. Given that Mr. Klausner's UCC-1 was expired and void…and this was the sole basis by which Buyers refused to go through with the Contract, the Court finds that there is no excuse or triable issue of fact related to Buyers' breach.*

Ciechorksa v. Todd, 2022 NY Slip Op 33235, decided September 26, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_33235.pdf.

Cooperatives

Plaintiffs, the owners of a cooperative unit which had been damaged by water leaks, withheld their maintenance payments and sued the cooperative corporation for breach of the warranty of habitability. The Appellate Division, First Department, affirming the ruling of the Supreme Court, New York County, dismissed the cause of action for breach of the warranty of habitability and ordered the unpaid maintenance released to the cooperative corporation from escrow. Although the Plaintiffs' proprietary lease allows for rent offsets in the case of "damages by fire or otherwise", that provision, according to the Appellate Division, "refers to sudden and singular incidents, like fire, which has the immediate impact of rendering an apartment untenantable…[A] recurring water intrusion is not the type of sudden event contemplated by the proprietary lease as excusing maintenance payments." Andreas v. 186 Tenants Corp., 2022 NY Slip Op 04883, decided August 9, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_04883.htm.

Deeds/Acknowledgments

The Plaintiff brought an action under Real Property Actions and Proceedings Law ("RPAPL") Article 15 ("Action to compel a determination of a claim to real property"), seeking a ruling that she was the sole owner of a property in Queens County from 1990 until she sold the property in 2016. The Defendants disputed her claim, arguing that signatures on acknowledged documents in a 1950 probate proceeding and on a 1952 deed in the Plaintiff's chain of tile were forged.

The Supreme Court, Queens County's denial of the Plaintiff's motion for summary judgment was reversed by the Appellate Division, Second Department; the Appellate Division remitted the case for entry of a judgment declaring that the Plaintiff solely owned the property from 1990 until she sold it in 2016. "The affidavits… submitted by the defendants were insufficient to rebut the presumption of due execution arising from the notarized certificates of acknowledgement accompanying the 1950 documents and the 1952 deed [citations omitted]." Oro v. Figeroa, 2022 NY Slip Op 05327, decided September 28, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05327.htm.

Fraud/Default Judgments

Henry and Rosalina Fagan (the "Fagans"), the owners of a building in Manhattan, died intestate in 1966 and 1975, leaving their son as their sole heir. The son and his wife died and their sole heirs (the "Heirs") commenced an action in 2017 to void a no consideration deed executed in 2012 by a tenant at the property to Defendant One 56 Street Corporation Inc. ("One 56"). The tenant had claimed that he was the sole heir of the Fagans.

In an action brought by One 56 in 2014, the Supreme Court, New York County, entered a default judgment which held that One 56 was the property's sole owner. In 2017, the Heirs, claiming fraud, commenced an action to void both the transfer of title to One 56 and mortgages on the property. The Supreme Court, New York County, holding that the Plaintiffs lacked standing, dismissed the case with prejudice. According to the Court,

> *"[t]he default judgment entered in 2014 is presumed valid and unless reversed or annulled in a proper proceeding is not open to attack…in any collateral action or proceeding [citations omitted]. The remedy for fraud allegedly committed during a legal proceeding must be exercised in that lawsuit by moving to vacate the civil judgment, and not by another action collaterally attacking that judgment [citations omitted]."*

Fagan v. One 56 Street Corporation Inc., 2022 NY Slip Op 32692, decided August 10, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_32692.pdf.

Joint Tenants

The Plaintiff and the Defendant purchased property as joint tenants in 2001. On or about December 14, 2010, they entered into an agreement giving the Defendant until April 1, 2011 to refinance the property's mortgage to make available funds to enable the Defendant to buy out the Plaintiff's interest. If the mortgage was not refinanced by that date, the property was to be sold and the sales proceeds divided. The agreement also required the Defendant, prior to a refinance or a sale, to make all mortgage payments, applying to those payments the property's rental income. The cost of reasonable extraordinary repairs was to be shared if consented to in writing.

The Supreme Court, Richmond County, ruled that the Defendant had breached the agreement by not refinancing the mortgage or listing the property for sale and held that the property should be sold. The Court also held that the Plaintiff was responsible for one-half of the mortgage payments and one-half of the amount expended by the Defendant for repairs and maintenance over a period of ninety-six months, and that the Plaintiff be awarded one-half of the rental income collected by the Defendant during that period.

The Appellate Division, Second Department, modified the lower court's Order, deleting the award to the Defendant of one-half of the mortgage payments and one-half of the amount the Defendant expended for repairs and maintenance over 96 months, and deleting the credit to the Plaintiff of one-half of the rental income received for 96 months. The Appellate Division directed that the Plaintiff be credited the total amount the Defendant received in rental income over that period. According to the Appellate Division,

> *"…the Supreme Court erred in determining that the plaintiff was responsible for one-half of the mortgage payments that the defendant made during the period of 96 months. The language [in the agreement] that the defendant was to 'assume full responsibility' for the mortgage payments as of the date of the agreement was unambiguous, and there was no reasonable basis for a difference in opinion that the defendant was to pay the mortgage without contribution from the plaintiff going forward…Likewise, the defendant is not entitled to a credit for one-half of the amount he expended toward repairs and maintenance…as the agreement was unambiguous that the parties would share responsibility for reasonable extraordinary repairs…[Further, the agreement] provided that the plaintiff would retain the rental income…if, and only if, the defendant was unable to refinance the mortgage by April 1, 2011. As the defendant was unable to refinance by April 1, 2011, the plaintiff was entitled to 'all income realized from the rental' of the subject property after that date."*

Falanga v. Hillabrant, 2022 NY Slip Op 05312, decided September 28, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_05312.htm.

Limited Partnerships/Dissolution

The Defendants in an action to foreclose a mortgage contended that the Plaintiff, a New York limited partnership dissolved in 2017, lacked the capacity to bring the action. The Supreme Court, Kings County, held that this argument was "without merit", noting that under Partnership Law Section 121-803 ("Winding up") "[u]pon dissolution of a limited partnership, the persons winding up the limited partnership's affairs may, in the name of and for and on behalf of the limited partnership…prosecute and defend suits…settle and close the limited partnership's business…" Shaw Funding, LP v. Cleveland Street LLC, 2022 NY Slip Op 32684, decided August 5, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_32684.pdf.

Mortgage Foreclosures/Notes

The Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Suffolk County, finding that the Plaintiff had not established that it had standing. Although standing may be established when a duly endorsed consolidated note is produced with a consolidation agreement, here there was not a formally executed consolidated note; the agreement consolidating the two mortgages into a single lien defined the two notes secured as a consolidated note. Therefore, each note had to be duly endorsed.

> *"Here, the plaintiff attached to the complaint copies of the 2003 note and 2004 note, which together constituted the consolidated note, and each note was accompanied by an undated purported allonge endorsed to the plaintiff. However, the plaintiff failed to demonstrate that the purported allonges, each of which was on a paper completely separate from the corresponding note, was 'so firmly affixed' to the corresponding note 'as to become a part thereof', as required by UCC 3-202(2) [citation omitted]."*

Wells Fargo Bank, N.A. v. Murray, 2022 NY Slip Op 05110, decided August 31, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05110.htm.

The Appellate Division, Second Department, in U.S. Bank NA v. Warshaw, 2022 NY Slip Op 05108, decided August 31, 2022, held that "the plaintiff [had] established, prima facie, that it had standing to commence the [foreclosure] action by attaching to the summons and complaint copies of the consolidated note…, endorsed in blank, along with a copy of the CEMA [citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05108.htm.

Mortgage Foreclosures/Notices - RPAPL Section 1303

In the foreclosure of a mortgage on an owner-occupied one-to-four family dwelling, RPAPL Section 1303 ("Foreclosures; required notices") requires the foreclosing party to deliver to the mortgagor and to tenants of each dwelling unit, with the summons and complaint, a notice captioned "Help for Homeowners in Foreclosure." In Investors Bank v. Rodney Realty, LLC, 2022 NY Slip Op 32631, decided July 29, 2022, the Supreme Court, Kings County, granted a cross-motion to dismiss the complaint because the foreclosing plaintiff had not complied with Section 1303. The notices were not mailed to the tenants at the property until two years after service of process on many of the Defendants. This decision is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_32631.pdf.

Mortgage Foreclosures/Notices - RPAPL Section 1304

Cases previously reported in Current Developments have held that for a RPAPL Section 1304 notice to be effective, no other material can be included in the mailing of the notice, what has been referred to as the "separate envelope requirement." The Defendants in BCMB1 Trust v. Rubio, 2022 NY Slip Op 50760, decided August 17, 2022, asserted that including the Hardship Declaration, required to be provided by a foreclosing lender by Chapter 381 of the Laws of 2020 (the "Emergency Eviction and Foreclosure Act of 2020" (the "ACT") which amended Section 1304) with the Section 1304 notice violated the separate envelope requirement. A Hardship Declaration was a form required to be provided by the foreclosing mortgagee to enable a natural person owning a one-to-four family residence occupied by the borrower as his or her principal residence to claim the inability to pay the mortgage debt due to the Pandemic, such as by reason of the borrower's "significant loss of household income during the COVID-19 pandemic." The Act sunset on May 1, 2021.

The Supreme Court, Suffolk County, noting that the Section 1304 notice and the Hardship Declaration were mailed in separate envelopes, pointed out that the Act requires the Hardship Declaration to be included "with every notice provided to a mortgagor" pursuant to RPAPL Sections 1303 and 1304. Therefore, including the Hardship Declaration with the Section 1304 notice would not violate the separate envelope requirement. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_50760.htm.

In Ditech Financial, LLC v. Cummings, 2022 NY Slip Op 04949, decided August 17, 2022, the Appellate Division, Second Department, reversed the grant of the foreclosing Plaintiff's motion for summary judgment by the Supreme Court, Queens County, because the Plaintiff had not established that it had complied with the requirements of Section 1304. An affidavit submitted by an officer to the loan servicer did not attest to the Plaintiff's mailing practices and, although a second affidavit submitted with reply papers included a log establishing the mailing of Section 1304 notices, "the plaintiff could not, under the circumstances, rely on the second affidavit to correct deficiencies inherent in the original one [citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_04949.htm.

In Emigrant Bank v. Carrera, 2022 NY Slip Op 04950, decided August 17, 2022, the Appellate Division Second Department, affirming the grant of the foreclosing Plaintiff's motion for summary judgment by the Supreme Court Kings County, held that the Plaintiff had complied with the requirements of RPAPL Section 1304. According to the Appellate Division,

> *"[s]ervice of notice pursuant to RPAPL 1304 may be established 'through either an affidavit of service other proof of mailing…,or evidence of a standard office mailing procedure' [citation omitted]. Since the plaintiff submitted affidavits of service from a person who attested that on May 16, 2013, he mailed, by both first-class and certified mail, and in separate envelopes, the requisite notices to the borrowers, proof of a mailing procedure was not necessary [citations omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_04950.htm.

Mortgage Foreclosures/Statute of Limitations

In Freedom Mortgage Corp. v Engel, New York State's Court of Appeals held that a lender's voluntary withdrawal of a mortgage foreclosure revokes its election to accelerate the mortgage debt absent a statement to the contrary. That decision, issued on February 18, 2021, is reported at 37 N.Y.3d 1. In U.S Bank, National Association v. Marcia, 2022 NY Slip Op 32573, decided August 17, 2022, the Defendant asserted that the foreclosure of a mortgage should be dismissed as time-barred because a prior foreclosure, commenced in 2010 by a predecessor holder of the mortgage, was dismissed as abandoned. The Plaintiff in the current action argued that the prior holder "'voluntarily de facto discontinued the 2010 Action, and therefore, the Plaintiff voluntarily revoked the acceleration of the mortgage loan.'" The Supreme Court, Nassau County, granted the Defendant's motion to dismiss. According to the Court,

> *"…it cannot be stated that a de facto discontinuance is akin to a voluntary discontinuance for the purposes of deceleration of a debt as contemplated in Engel…Abandonment of an action does not constitute an affirmative act of any sort. It must also be noted that, inasmuch as same was filed long after the expiration of the statute of limitations, the May 7, 2021 Notice of Discontinuance does not serve to decelerate the debt in any event. Therefore, the mortgage debt is unenforceable…"*

This decision, dated August 17, 2022, is posted at
https://www.nycourts.gov/reporter/pdfs/2022/2022_32753.pdf.

Mortgages/Collateral Assignments

The assignee of a mortgage, after collaterally assigning the mortgage, commenced an action to foreclose the lien. The Defendants asserted that the collateral assignor, having collaterally assigned the mortgage, lacked standing. The Supreme Court, New York County, held that the foreclosing Plaintiff had standing and granted the Plaintiff's motion for the appointment of a Receiver, as provided for in the mortgage. According to the Court, "[t]he Lender did not deliver the Note to [the collateral assignee] and the express terms of the Collateral Assignment indicate that it is the Lender and not [the collateral assignee] that has the right to enforce the obligations under the Note." SKW 6 East 74th Street Lender LLC v. Adina 74 Realty Corporation, 2022 NY Slip Op 32821, decided August 17, 2022, is posted at
https://www.nycourts.gov/reporter/pdfs/2022/2022_32821.pdf.

Mortgages/Satisfactions

A mortgage securing a HELOC was recorded in 2004. A second mortgage to a different lender was recorded in 2007. In February 2018 the holder of the HELOC recorded a satisfaction of its mortgage and, a month later, commenced an action in the United States District Court for the Eastern District of New York to foreclose the mortgage. The Plaintiff also brough an action pursuant to RPAPL Article 15 ("Action to compel the determination of a claim to real property") in the Supreme Court, Richmond County, to have the satisfaction of its mortgage vacated. The holder of the second mortgage was granted leave to intervene in the Article 15 action by the Supreme Court; the Appellate Division, Second Department, reversed the lower court's Order. According to the Appellate Division, the intervenor did not have "a real and substantial interest in the outcome of this action."

> *"Here, the intervenor's predecessor in interest [the original second mortgagee] could not reasonably have relied on a purportedly erroneous satisfaction of mortgage that did not exist at the time the second mortgage was executed, and it executed the second mortgage with notice that the HELOC mortgage had first priority. [citations omitted]."*

Windward Bora, LLC v. PNC Bank, National Association, 2022 NY Slip Op 04930, decided August 10, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_04930.htm

Pandemic/Lease Guarantees

Section 22-1005, ("Personal liability provisions in commercial leases"), also known as the "Guaranty Law", was added to New York City's Administrative Code by Local Law No. 55-2020. 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 paragraphs 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."*

In 18 East 41st Street Partners, LLC v. Gamlieli, 2022 NY Slip Op 32471, decided July 15, 2022, the Supreme Court, New York County, held that the Guarantee Law did not apply because the tenant was a real estate brokerage and not a non-essential retail establishment. Further, the lease provided that the premises could not be used for retail and the certificate of occupancy allowed the unit to be used only as office space.

As to the Defendant's claim of impossibility of performance, according to the Court, "it has been established that a party will not quality under the doctrine of impossibility due to a loss of profits [citation omitted]. Tenant has still been able to conduct business and use the leased unit albeit on a limited basis." This decision is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_32471.pdf.

Partition

The Plaintiffs, claiming that they held a one-third interest in a property, sought an Order for the property to be sold and for them to receive one-third of the sale proceeds. The Supreme Court, Kings County, denied the Plaintiff's motion for summary judgment, noting that "'[t]he right to partition is not absolute… [and] is always subject to the equities between the parties' [citation omitted"]. According to the Court, the respective ownership interests of the parties are disputed and "…there are issues of fact relating to an accounting. An interlocutory judgment for sale of the Premises is…inappropriate before an accounting is performed [citation omitted]." Chung v. Braithwaite, 2022 NY Slip Op 33240, decided September 2, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_33240.pdf.

Recording Act

At issue in the strict foreclosure of a mortgage was the relative priority of two recorded mortgages, the first executed in 2000 to Lincoln Equities Credit Corp (the "Lincoln mortgage") and the other, a reverse mortgage executed in 2009 to Bank of America, N.A. ("BANA"). At the closing of its mortgage BANA obtained from Lincoln, by facsimile, a copy of a "Release of Mortgaged Premises [and] Satisfaction of Lien", which indicated that the Lincoln mortgage had been paid in full. However, as stated in this decision, "the signature on the faxed satisfaction was illegible, the signer's position was not indicated, and the signer's name was not written in either the space provided underneath the signature or in the notary's stamp."

BANA closed the reverse mortgage; no satisfaction of the Lincoln mortgage was ever recorded. BANA asserted that its mortgage had priority over the Lincoln mortgage because it was a good faith purchaser for value. Affirming the Order and Judgment of the Supreme Court, Queens County, which, among other things, denied BANA's motion for summary judgment on its counterclaim, the Appellate Division, Second Department, held that BANA was not a good faith purchaser for value. According to the Appellate Division,

> *"[h]ere, BANA had notice and knowledge of the Lincoln mortgage [which was first recorded]. Moreover, contrary to BANA's contention, a reasonably prudent lender would not have relied upon the faxed, unrecorded, and incomplete satisfaction of lien to conclude that its mortgage would be first in priority [citations omitted]."*

71-21 Loubet, LLC v. Bank of America, N.A., 2022 NY Slip Op 05012, decided August 24, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05012.htm.

Unlimited Assets, Inc. v. PennyMac Corp., 2022 NY Slip Op 50763, decided August 8, 2022, concerns an action to quiet title brought by the grantee of a deed executed in 2014, after the lis pendens had expired in 2011 in an action to foreclose a mortgage, which deed remained unrecorded as of May 2022. The Plaintiff sought a ruling that the expired notice of pendency and the related judgment of foreclosure did not apply to it since it was a bona fide purchaser. The Plaintiff asserted that the deed was mailed to the recording office in 2014. The Supreme Court, Bronx County, dismissed the complaint.

What the Court found controlling was that the mortgage was on record and the notice of pendency, which "simply preserved an existing property right", was refiled in 2016, before the deed was recorded. Further, according to the Court, "[b]oth mailing and hand-delivery [of an instrument] are not deemed received until delivered and entered, and even an electronically filed document is deemed recorded upon issuance of a receipt…Here…there was no such proof of the finalization of the recordation as required."

The Court found that the affidavit supporting the Plaintiff's argument that the deed was submitted for recording was "conclusory and lacking in probative value." Among the affidavit's deficiencies was its failure to include a recording receipt and the failure to address why the recording of the deed, if it was submitted for recording in 2014, was not verified by the recording office. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_50763.htm.

Zoning

The Supreme Court, New York County, denied a petition to annul the approval of a rezoning application filed by the New York City Blood Center, Inc. ("NYBC") and the issuance of a special permit issued by New York City's Department of City Planning, both of which were approved by the New York City Council, with modifications, to allow for a building to be constructed for scientific research and development in a C2-7 Zoning District to house a biological safety laboratory, a blood donation center and office space...A C2-7 Zoning District allows for primarily residential use and commercial use at street level typical for residential areas. The petitioners asserted that the special permit issue was unlawful "spot zoning." According to the Court,

> *"'Spot zoning is the singling out of a small parcel of land for a use classification totally different from the surrounding area…to the detriment of other owners. In evaluating a claim of spot zoning, the inquiry focuses on whether the rezoning is part of a well-considered and comprehensive plan calculated to serve the general welfare of the community' [citations omitted].*
>
> *"The Court finds that the approvals…were not illegal spot zoning. The record here shows that the instant rezoning is part of the City's effort to support the growth of the life sciences industry…Obviously, allowing NYBC to replace its dated three-story building with a 16-story structure to serve as a life sciences hub will benefit the community…NYBC is located…right near many medical facilities and hospitals and it fits within the City's stated goal to support this industry."*

301 East 66th Street Condominium Corp. v. The City of New York, 2022 NY Slip Op 32829, decided August 22, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_32829.pdf.

Zoning/Equitable Estoppel

The Village of Sands Point's Zoning Code prohibits the use of accessory structures for "habitable purposes" in a residential district. Not aware that the property in question was used for residential purposes, the Village issued a building permit to allow for the enlargement and renovation of an accessory structure. After the improvements were completed, the Petitioner's application for a certificate of completion and a use variance was denied by the Village, which asserted that the building permit was issued in error and multiple variances were required. A Civil Practice Law and Rules Article 78 ("Proceeding against body or officer") proceeding was commenced to review the determination of the Village's Board of Appeals. The Supreme Court, Nassau County, denied the petition and dismissed the proceeding.

Noting that "'[t]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances' [citation omitted]", the Court held that "prior issuance of a building permit does not estop a municipality from enforcing its zoning laws [citation omitted]...The building permit was mistakenly issued… [and] the petitioner failed to show any fraud, deception, or other malfeasance by the Village."

Matter of E&S Realty, LLC v. Board of Appeals of Village of Sands Point, 2022 NY Slip Op 05209, decided September 21, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05209.htm.

Zoning/South Street Seaport

Petitioners, property owners and residents in the South Street Historic District, and four community groups, sought to invalidate the approval by New York City's Planning Commission and the New York City Council of the transfer of development rights from within the Historic District to land in the tax block at 250 Water Street, which is also within the Historic District. As approved, the site's developer can construct a 324-foot-tall, 547,000 square-foot building on land otherwise zoned with a 120-foot height limit and an allowable floor area of 312,000 square feet. As part of the City's approvals, a Large-Scale General Development ["LSGD"), consisting of the land at 250 Water Street and the Tin Building and the de-mapped streets, was approved. The Supreme Court, New York County, dismissed the petition.

A majority of the development rights being transferred will be derived from those portions of Fulton, Water, Front and South Streets which were de-mapped between 1970-1983 and from the Tin Building on Pier 17, all of which are located within the Historic District. The development rights from those "de-mapped" streets are held by the Seaport Development Rights Bank and the "de-mapped" streets continue as "streets" under the City's Zoning Resolution to allow for the continuation of pedestrian access and to prevent the development of the streets.

Among issues raised by the Petitioners were that part of the de-mapped streets constituted only a portion of a tax lot, that the de-mapped streets remained streets under the Zoning Resolution and were therefore not a zoning lot, and that the Tin Building site and the development site are not contiguous, As to those issues, the Court stated the following:

"The City Council's intent in amending ZR Section 91-68 could not be clearer: the identified South Street Seaport Streets (including Front, Fulton, and Water)…' may be considered a single zoning lot for purposes of the definition of large-scale general development in [ZR] Section 12-10…{T]he City Council had an unfettered right to do this…The Court sees no reason why demapped streets cannot be both 'streets'…and, at the same time, a 'zoning lot,' to allow the transfer of development rights within a LSGD, especially if the City Council says so, which it did."

……

"Petitioners' most salient argument is that development rights cannot be transferred from [the Tin Building site] to [the development site] because they are not 'contiguous'. However, an LSGD may contain "two or more zoning lots that are contiguous or would be contiguous but for their separation by a street or a street intersection." ZR Section 12-10 (emphasis added). [The Tin Building site] and [the de-mapped streets] are contiguous because they are separated only by South Street (with, it might be noted, the FDR Drive running over it) and [the development site] and [the de-mapped streets] are contiguous because they are separated only by the intersection of Beekman and Water Streets."

South Street Seaport Coalition, Inc. v. City of New York, 2022 NY Slip Op 32645, decided August 5, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_32645.pdf.

Wishing everyone a healthy and joyous holiday season!

Michael J. Berey
Current Developments since 1997
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