First American Title™
NATIONAL COMMERCIAL SERVICES

NEWSLETTER ▸ NO. 230 | JANUARY 7, 2023

Current Developments

First American Title National Commercial Services

By Michael J. Berey
Senior Underwriter

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF

First American Title Insurance Company, and the operating divisions thereof, make no express or implied warranty respecting the information presented and assume no responsibility for errors or omissions. First American, the eagle logo, First American Title, and firstam.com are registered trademarks or trademarks of First American Financial Corporation and/or its affiliates.

Contracts of Sale/Anticipatory Breach

A contract of sale prohibited the Plaintiff-purchaser from assigning the contract to a third party without the Defendants' written consent. An addendum to the contract specified that the Defendants-sellers intended to effect a IRC Section 1031 exchange, requiring the Plaintiff to "cooperate with Defendants to complete the 1031 exchange." After the Defendants refused to consent to an assignment of the contract, the Plaintiff filed an action seeking specific performance. The Supreme Court, Kings County, granted the Defendants' motion for summary judgment, dismissed the complaint, and awarded the Defendants the down payment. According to the Court,

> *"…Plaintiff's conduct qualifies as an anticipatory breach of the Contract when it proposed to assign the Contract…and, upon Defendants' repeated refusal, threatened to not cooperate with Defendants' 1031 exchange as required by the Contract Addendum [citations omitted]."*

Hegeman Plaza LLC v. Burgan, 2019 NY Slip Op 34869, decided September 16, 2019, was posted to the New York Official Reports Slip Opinion Service on November 15, 2022 at https://www.nycourts.gov/reporter/pdfs/2019/2019_34869.pdf.

In MFP 933 Broadway LP v. 933 Broadway, LLC, 2022 NY Slip Op 06640, decided November 22, 2022, the contract of sale required the Defendant-seller to deliver tenant estoppel certificates by May 7, 2020, two days before the scheduled closing date, but the Defendant had the right to extend the closing date to obtain the estoppels. On May 7, the Plaintiff sent a letter to the Defendant terminating the contract and demanding return of its down payment because of the seller's failure to deliver the estoppels two days before closing. The Appellate Division, First Department, affirmed the Supreme Court, New York County's grant of the Defendant's motion for summary judgment dismissing the complaint in an action for the return of the Plaintiff's down payment. According to the Appellate Division,

> *"[g]iven defendant's rights…under the agreement to extend the closing date to obtain the estoppel certificates, plaintiff's letter constituted a clear and unequivocal repudiation of its obligations under the agreement before the deadline for defendant's performance had passed [citation omitted]…Contrary to plaintiff's assertion, its unilateral attempt to terminate the agreement before the deadline for defendant to deliver the tenant estoppel certificates or seek an extension of time constituted a repudiation, because '[a] party cannot prevent the fulfillment of a contractual condition and then argue failure of that condition as a defense to a claim that it breached the contract' [citation omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06640.htm.

Contracts of Sale/Certificate of Occupancy Report

Under a rider to a contract of sale, the Defendants-sellers were to provide at closing a certificate of occupancy if required by the municipality. The Defendant asserted at closing that a C of O was not required; the Plaintiff-purchaser refused to close without a C of O or a price reduction. The seller's cancellation of the contract was rejected by the purchaser.

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

In 2007, the Plaintiff commenced this action for specific performance. In 2010, the Appellate Division, Second Department affirmed the grant of specific performance by the Supreme Court, Queens County, holding that the sellers had "'breached their contractual duty to either provide a certificate of occupancy or provide proof that none was necessary.'" In 2011, the Defendants' counsel provided a certificate of occupancy report stating that New York City's Department of Buildings ("DOB") did not require a certificate of occupancy for buildings completed before 1938 and that the building on the property was completed in 1917. The Defendants' counsel then set a time of the essence closing date; the Plaintiff did not appear at the closing. The Supreme Court denied a motion by the Plaintiff for the appointment of a receiver to convey the property. In affirming the lower court's Order, the Appellate Division found

> *"…the defendants complied with the orders of the Supreme Court and this Court determining that plaintiff was entitled to specific performance by providing notice to the plaintiff that they were setting a closing date…and by providing the plaintiff with the certificate of occupancy report showing that no certificate of occupancy was required for the subject property. [Neither the contract or any other authority] supports [the Plaintiff's] position that a certificate of occupancy report is not sufficient to satisfy the defendants' contractual obligation to prove that no certificate of occupancy was necessary, and that this obligation could be satisfied only through a 'Letter of No Objection' from the DOB."*

Chao-Yu C. Huang v. Shih, 2022 NY Slip Op 06684, decided November 23, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06684.htm.

Cooperatives/Statute of Frauds

The Plaintiff claimed that his deceased brother, the proprietary lessee of a cooperative apartment, had, before his demise, made an inter vivos gift of the stock and proprietary lease to him. The Supreme Court, New York County, denied the Defendant cooperative corporation's motion for summary judgment dismissing the complaint. The Appellate Division, First Department, reversed the lower court's ruling, holding that there had not been a valid inter vivos gift due to the lack of a writing, required by New York's Statute of Frauds. In addition, the proprietary lease required a written assignment of shares and the Board of Directors' approval of the transfer during the decedent's lifetime and, "[i]n any event, with respect to symbolic delivery of a share certificate, such a delivery becomes effective only when there is a transfer of record on the stock books of the company…" Rivera v. 98-100 Avenue C Housing Development Fund Corporation, 2022 NY Slip Op 06074, decided October 27, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06074.htm.

In K&S 22W66 LLC v. Bonello, 2022 NY Slip Op 33688, decided October 20, 2022, the Supreme Court, New York County, dismissed the complaint and cancelled the filed lis pendens in an action for specific performance brought by a contract vendee. The Defendant-seller's counsel had emailed the Plaintiff's counsel that the seller "would proceed…provided that (1) the contract…is final…; and (2) deposit is funded by Friday." Notwithstanding that the down payment was wired, the Defendant did not execute the agreement and terminated the contract. The Court, noting that the contract provided it was not effective until signed by both parties and that the Seller's counsel, in an email to the Plaintiff's counsel, stated that the contract "is not binding until actually signed by [the defendant]", held that there was no enforceable agreement. Further, according to the Court, any agreement, not being in writing, was unenforceable under New York's Statute of Frauds.

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

The Court also dismissed the Plaintiff's causes of action for breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel and negligent misrepresentation. This decision is posted at https://www.nycourts.gov/reporter/ pdfs/2022/2022_33688.pdf.

Deeds/Constructive Trust

The Plaintiff sued his daughter, claiming that although he had provided the funds to enable the Defendant to purchase the property his name was omitted from the deed. He sought to quiet title in his name, to restrain the Defendant from selling the property, to create a constructive trust, and to be awarded damages and his attorney's fees. In response, the Defendant asserted that the funds provided by her father were either a gift or a loan. The Supreme Court, New York County, denied the Plaintiff's request for injunctive relief, allowed the Defendant to proceed to sell the property, and ordered that the sale proceeds be held in a constructive trust. According to the Court, which only imposed a constructive trust and did not afford injunctive relief,

> *"…a trier of the fact may find that the monies for the purchase of the property was a gift or a loan that defendant has to pay back…[However, the plaintiff has failed to demonstrate that he would suffer irreparable harm [if the property is sold], as he has the ability to recover economic damages in this action…[A] balance of the equities weighs in favor of denying injunctive relief because if injunctive relief was issued by this Court, the defendant would be restrained from selling the subject property, in which she is solely named on the deed, during the pendency of the litigation."*

Wald v. Wald, 2022 NY Slip Op 33324, decided October 2, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_33324.pdf.

Deeds/Mutual Mistake

The Plaintiff-seller of real property in Delaware County sued to rescind her deed to the Defendant, claiming that there was a mutual mistake as to the size of the parcel and that although the parties had agreed to a sale of 20 acres almost 30 acres were conveyed. The Appellate Division, Third Department, reversed the Supreme Court, Delaware County's denial of the Defendant's motion for summary judgment dismissing the complaint. According to the Appellate Division, for a conveyance to be rescinded based on mutual mistake

> *"'it must be shown that the mistake in question is mutual, substantial, material and exists at the time the contract is entered' [citations omitted].*
>
> *"[T]he statements in the minutes [of the Town Planning Board in which the Planning Board approved a subdivision with a parcel larger than 20 acres] failed to call into question…that defendant, at a minimum, was aware of that fact…Moreover, even if plaintiff misunderstood the size of the parcel she ultimately conveyed…she was bound by the contents of a deed she executed absent fraud or other wrongdoing by defendant that she does not suggest occurred, and any unilateral mistake on her part as to the acreage being conveyed by it 'resulted from [her] negligence in failing to take the means readily accessible of checking' its property description [citations omitted]."*

Williams v. Sowle, 2022 NY Slip Op 05914, decided October 20, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05914.htm.

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Default Judgment/Mortgages

A default judgment was entered in an action to expunge a mortgage as time-barred under the statute of limitations. Service was made on Anson Street LLC, the holder of the mortgage when the action was commenced, under Limited Liability Company Law Section 303 ("Service of property on limited liability companies") by delivery of a copy of the summons and complaint to New York's Secretary of State, which forwarded the same to Anson Street's registered agent. However, the Master Servicer for Anson Street, having received a copy of the summons and complaint from the registered agent, did not, purportedly due to an internal office error, forward the copy to the mortgage's sub-servicer.

The Supreme Court, New York County, denied the motion of the Wilmington Savings Fund Society, FSB, the last assignee of the mortgage, to vacate the default judgment under Civil Practice Law and Rules ("CPLR") Section 317 ("Defense by person to whom summons not personally delivered"), or under CPLR Rule 5015 ("Relief from judgment or order") based on an "excusable default". According to the Court,

> *"…plaintiff properly served [the registered agent] on July 25, 2018, via service on the Secretary of State. This notice was not only sent to Anson Street's registered agent, but the notice was then sent to Anson's master servicer, Resurgent. Under such circumstances, Anson is deemed to have received actual notice of the lawsuit [citation omitted]. The failure of Anson, and later [Wilmington Savings] to seek relief from its 2018 default in appearing until 2020 was not reasonable…Moreover, the loan was transferred to [Wilmington Savings] on July 31, 2019, and basic due diligence would have disclosed the existence of the instant litigation…Accordingly, the branch of the motion seeking to vacate the default under CPLR 317 is denied."*

The Court further held that the default was not "excusable" under CPLR Section 5015. Decatur 1147 LLC v. Anson Street LLC, 2022 NY Slip Op 33276, decided September 29, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_33276.pdf.

Financial Crimes Enforcement Network ("FinCEN"), U.S. Treasury Department

On September 30, 2022, FinCEN published a Final Rule (87 Fed. Reg. 189) amending 31 CFR Part 1010, referred to in 87 FR 59498 as "Beneficial Ownership Information Reporting Requirements." According to FinCEN's Summary at 87 FR 59498, this Final Rule requires "certain entities to file with FinCEN reports that identify…the beneficial owners of [the entity], and individuals who have filed an application with specified governmental authorities to create the entity or register it to do business…These requirements are intended to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity…"

For purposes of the Rule, "beneficial owner" is defined to include "any individual who directly or indirectly, either exercises substantial control over such reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company." "Substantial control" and "ownership interests" are defined.

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Under 31 CFR Section 1010.380 ("Reports of beneficial ownership information"), "(i) Any domestic reporting company created on or after January 1, 2024 shall file a report within 30 calendar days of the date on which it receives actual notice that its creation has become effective or the date on which a secretary of state or similar office first provides public notice…that the domestic reporting company has been created.

"(ii) Any entity that becomes a foreign reporting company on or after January 1, 2024 shall file a report within 30 calendar days of the earlier of the date on which it receives actual notice that it has registered to do business or the date on which a secretary of state or similar office first provides public notice…that the foreign reporting company has been registered to do business.

"(iii) Any domestic reporting company created before January 1, 2024 and any entity that became a foreign reporting company before January 1, 2024 shall file a report not later than January 1, 2025."

A "domestic reporting company", as defined in the Rule, "means any entity that is: (A) A corporation; (B) A limited liability company; or (C) Created by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe."

A "foreign reporting company", as defined in the Rule, "means any entity that is (A) A corporation, limited liability company, or other entity; (B) Formed under the law of a foreign country; and (C) Registered to do business in any State or tribal jurisdiction by the filing of a document with a secretary of state or any similar office under the law of a State or Indian tribe." A "reporting company" does not include certain types of entities, which entities are therefore exempt from the reporting requirements.

Among the information required to be in an "initial report" is the full legal name, date of birth, and complete current address of "every individual who is a beneficial owner of such reporting company, and every individual who is a company applicant with respect such reporting company…"

A "company applicant" is the individual filing the document creating a domestic reporting company and the individual filing the document that first registers a foreign reporting company with a secretary of state, or any similar office under the law of a state, or with an Indian tribe.

The Rule, effective January 1, 2024, can be found at 2022-21020.pdf (govinfo.gov).

Liens/Medical Bills

On November 23, 2022, Governor Hochul signed into law Senate Bill No. 6522A/Assembly Bill No. 7363A, as Chapter 648 of the Laws of 2022, amending Civil Practice Law and Rules Sections 5201 ("Debt or property subject to enforcement…") and 5231 ("Income Execution") to provide that "[n]o property lien shall be entered or enforced against a debtor's primary residence in an action under article twenty-eight ["Hospitals"] of the public health law or a health care professional authorized by title eight ["The Professions"] of the education law." Chapter 648 is effective "immediately." Chapter 648 can be found at Bill Search and Legislative Information | New York State Assembly (nyassembly.gov)

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Mortgage Foreclosures/Default

In Wells Fargo Bank, N.A. v. Pane, 2022 NY Slip Op 06516, decided November 16, 2022, the Appellate Division, Second Department, reversed the grant by the Supreme Court, Suffolk County, of the foreclosing Plaintiff's motion for summary judgment because the Plaintiff had not established, prima facie, that the Defendant had defaulted in his payments. The affidavit of the loan servicer's Default Document Manager

> *"did not demonstrate that she had personal knowledge of the alleged default. Moreover, she failed to identify the entity whose business records she reviewed and did not aver that she was familiar with that entity's record-keeping practices and procedures [citations omitted]. Further, [the affiant] did not identify the records she relied upon in order to attest to the default, and did not attach them to her affidavit [citation omitted]. Thus, [the affiant's] assertion regarding the alleged default constituted inadmissible hearsay and lacked probative value [citations omitted]…[A] party moving for summary judgment cannot meet its prima facie burden by submitting evidence [in an additional affidavit submitted] for the first time in reply [papers] [citations omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06516.htm.

Mortgage Foreclosures/Deficiency Judgment

Under Real Property Actions and Proceedings Law ("RPAPL") Section 1371 ("Deficiency judgment"), a deficiency judgment "shall be for an amount equal to the sum of the amount owing…as determined in the judgment with interest, plus the amount owed owing on all prior liens and encumbrances with interests, plus costs and disbursements of the action…less the market value determined by the court or the sale price of the property whichever shall be the higher." The market value of the property is to be "the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof…"

In Rhinebeck Bank v. WA 319 Main, LLC, 2022 NY Slip Op 06507, decided November 16, 2022, the appraisal submitted by the foreclosing Plaintiff estimated the value of the property as being between $1,060,000 and $620,000, the latter being the property's estimated "liquidation value." The Supreme Court, Dutchess County, approved a deficiency judgment which was computed based on the "liquidation value". The Appellate Division, Second Department, modified the lower court's Order and granted the Plaintiff leave to enter a deficiency judgment computed using the market value of $1,060,000. According to the Appellate Division,

> *"'Fair market value means neither panic value, auction value, speculative value, nor a value fixed by depressed or inflated prices' [citations omitted]. Here, the record does not support a finding that the estimated liquidation value of $620,000 constituted the fair and reasonable market value of the property at the time of the foreclosure sale [citation omitted]. Rather, the record supports a determination that the higher estimated value of $1,060,000…constituted the fair and reasonable market value of the property at the time of the foreclosure sale."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06507.htm.

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

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, with the summons and complaint, a notice captioned "Help for Homeowners in Foreclosure." In a building with fewer than five dwelling units, the notice is also required to be delivered to each tenant by certified mail, return receipt requested, and by first-class mail to a tenant's address at the property if the identity of the tenant is known to the Plaintiff, or to an "occupant" when a tenant's name is not known by the Plaintiff. For a building with five or more dwelling units, "a legible copy of the notice shall be posted on the outside of each entrance and exit of the building."

In Merrill Lynch Credit Corporation v. Nicholson, 2022 NY Slip Op 06239, decided November 9, 2022, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Kings County because the foreclosing Plaintiff had "failed to submit any evidence that it served any tenant of the subject property with the notices required by RPAPL 1303 by certified mail, or that it was not aware of any tenant's identity." In addition, an affidavit of the mortgagor "raised triable issues of fact as to whether Merrill Lynch was aware of the identity of a tenant at the subject property and failed to comply with RPAPL 1304(4) by sending him the required notice by certified mail." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_06239.htm.

RPAPL Section 1303 also requires that the "Help for Homeowners in Foreclosure Notice" "shall be in bold, fourteen-point type…and the title of the notice shall be in bold, twenty-point type." In MTGLQ Investors, L.P. v. Assim, 2022 NY Slip Op 06000, decided October 26, 2022, the Appellate Division, Second Department, held that the Supreme Court, Queens County should have denied the foreclosing Plaintiff's motion for summary judgment. It was not "apparent upon review of the copy of the RPAPL 1303 notice served upon the defendant that the correct typeface was utilized. In addition, the process server's affidavit did not indicate that the notice…complied with all of the requirements of RPAPL 1303, including the proper typeface [citations omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_06000.htm.

Mortgage Foreclosures/Notices – RPAPL Section 1304

A RPAPL Section 1304 ("Required prior notices") notice is required to "contain a list of at least five housing counseling agencies serving the county in which the property is located." In Bank of New York Mellon v. Maldonado, 2022 NY Slip Op 05974, decided October 26, 2022, the Appellate Division, Second Department, reversed the grant by the Supreme Court, Nassau County of the Plaintiff's motion for summary judgment, holding that "the plaintiff failed to establish, prima facie…that the five entities listed on the 90-day notices sent to the defendant were designated by the DHCR (the New York State Division of Housing and Community Renewal) as of when the notices were sent…" This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05974.htm.

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

A RPAPL Section 1304 notice is required to be sent by a foreclosing Plaintiff to the borrower when the mortgage secures a "Home loan", which is defined in Section 1304 as a loan to a "natural person" which is incurred "primarily for personal, family or household purposes", and secured by a mortgage on property "improved by a one to four family dwelling, or a condominium unit…used or occupied, or intended to be used or occupied wholly or partly, as the home or residence or one or more persons and which is or will be occupied by the borrower as the borrower's principal residence." In Wells Fargo Bank, N.A. v. Rodriguez, 2022 NY Slip Op 06157, decided November 2, 2022, the Appellate Division, Second Department, ruled that the Supreme Court, Nassau County erred in granting the Plaintiff's motion for summary judgment because the Plaintiff had not established, prima facie, its compliance with Section 1304. As to whether the notice was required in this case,

> *"[c]ontrary to the Supreme Court's determination, the plaintiff also failed to establish that, pursuant to RPAPL 1304, the subject mortgage loan no longer qualified as a 'home loan' because two years after taking the loan the defendant separated from his wife and moved from the mortgaged premises. The fact that the borrower no longer occupies the residence as his or her principal dwelling does not relieve the plaintiff of the obligation to send and RPAPL 1304 notice prior to commencing the foreclosure action [citation omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06157.htm.

Mortgage Foreclosures/One-Action-Rule

RPAPL Section 1301 ("Separate action for mortgage debt") states, in part, that "[w]hile an action to foreclose a mortgage is pending or after final judgment for the plaintiff therein, no other action shall be commenced…to recover any part of the mortgage debt, without leave of the court in which the former action was brought." In the foreclosure of a mortgage, the Defendant moved for summary judgment dismissing the complaint, asserting the Plaintiff's lack of standing pursuant to RPAPL Section 1301 on the grounds that only a notice of voluntary dismissal of, and a notice to cancel the lis pendens for, a prior foreclosure had been filed. The Appellate Division, Second Department, affirmed the denial of the Defendant's motion by the Supreme Court, Queens County. The lower court "properly determined that the defendant was not prejudiced by the plaintiff's failure to comply with RPAPL 1301(3), as the record reflects that the 2014 action had been effectively abandoned since April 2017 [citation omitted]." Wilmington Savings Fund Society, FSB v. Hack, 2022 NY Slip Op 05736, decided October 12, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05736.htm.

Mortgage Foreclosures/Standing

The Appellate Division, Second Department, reversed the grant of a foreclosing Plaintiff's motion for summary judgment by the Supreme Court, Kings County because there was a triable issue of fact as to whether the Plaintiff held the note by assignment when the action was commenced. The affidavit of an employee of the loan servicer and his accompanying business records did not establish the Plaintiff's standing. Although his affidavit "stated that Wells Fargo [the custodian of the note] had possession of the note on the plaintiff's behalf at the time the action was commenced, the documents attached to [the] affidavit failed to establish this fact." "'[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted'[citation omitted]." Bank of New York Mellon Trust Company, N.A. v. Andersen, 2022 NY Slip Op 05827, decided October 19, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_05827.htm.

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

A further decision of the Appellate Division, Second Department, holding that standing is not established by the mere submission of an affidavit attesting that the original note, endorsed in blank, was delivered to the foreclosing mortgagee without the submission of supporting business records is One West Bank, FSB v. Fraiser, 2022 NY Slip Op 06708, decided November 23, 2022, posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06708.htm.

Real Estate Taxes/New York City

The owner of vacant, unimproved property in Kings County claimed that New York City's Department of Finance ("DOF") erroneously classified the property as Building Class VI (Zoned Commercial or Manhattan Residential), which is a Tax Class 4 commercial property, when the property should have been classified as Building Class V0 (Zoned Residential; Not Manhattan) and Tax Class I (Residential). The DOF denied the Petitioner's request to fix the alleged error, arguing that the property was properly classified because "[v] acant land zoned with commercial overlay greater than 50% are correctly classified as V1/TC 4."

The Supreme Court, Kings County, holding that denying the Petitioner's request for a correction was 'arbitrary and capricious", declared that the property was to be assessed and classified as Building Class V0 (Zoned Residential; Not Manhattan) and Tax Class I (Residential Property) and directed DOF "to refund or credit the difference between the taxes computed on the erroneous and corrected assessments." According to the Court,

> *"[s]ince the subject vacant property is not in a commercial zone, but rather a residential one, DOF committed an error in classifying the property as Building Class VI rather than Building Class V0). Moreover, the DOF has not presented any authority which allows it to classify vacant properties outside of Manhattan located in a residential zone in the same category as vacant properties outside of Manhattan in a commercial zone simply because those vacant properties are located in a commercial overlay district."*

The Court further held that the Petitioner properly sought to have the classification and assessment corrected under New York City Administrative Code Section 11-206 ("Power of the tax commissioner of finance to correct errors") and that the Petitioner was not required, as asserted by the DOF, to commence a tax certiorari proceeding under Article 7 ("Judicial review") of New York State's Real Property Tax Law. "RPTL 700 [Proceeding to review an assessment of real property…") itself makes clear that a tax certiorari proceeding is not a taxpayer's exclusive remedy for seeking review of an excessive assessment." Matter of MLK LY LLC v. Commissioner of Finance of the City of New York, 2022 NY Slip Op 33386, decided October 6, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_33386.pdf.

Recording Act

In an action to quiet title, the Appellate Division, Second Department, affirming the ruling of the Supreme Court, New York County, upheld the Plaintiff's title, which the Plaintiff had acquired by a deed from the grantee of the mortgage lender which lender had acquired the property at a foreclosure sale. These courts, in granting summary judgment for the Plaintiff, held that a deed, executed after the foreclosure sale by the sole surviving distributees of the Estate of the foreclosed owner, and deeds from the grantee of the distributees to successor grantees, were null and void. 702 DeKalb Residence, LLC v. SSLiberty, Inc., 2022 NY Slip Op 05971, decided October 26, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_05971.htm.

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Recording Act/Bona Fide Encumbrancer

A mortgage was executed and recorded in 2007. After a satisfaction of the 2007 mortgage was recorded in May 2009, a new mortgage was executed in October 2009; the 2009 mortgage was assigned to Wells Fargo Bank, N.A. Plaintiff, the assignee of the 2007 mortgage, alleged that the satisfaction of its mortgage was unauthorized and fraudulent and, in an action to quiet title commenced by the holder of the 2009 mortgage, sought a ruling that the 2007 mortgage remained a "first position lien". The Supreme Court, Queens County, denied the Plaintiff's motion for summary judgment and Wells Fargo's motion for summary judgment dismissing the complaint. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division, the Plaintiff had not established, prima facie, that the satisfaction was unauthorized. As to Wells Fargo's motion for summary judgment,

> *"Wells Fargo had the burden on its cross-motion to establish, prima facie, 'that it had 'no knowledge of the alleged fraud or of facts that would have led a reasonable mortgagee to make inquiry of the possible fraud' [citation omitted]. Where such facts exist, '[a] mortgagee who fails to make such an inquiry is not a bona fide encumbrancer for value' [citation omitted]. Wells Fargo failed to establish, prima facie, that its assignor had no knowledge of facts that would have led a reasonable mortgagee to make inquiry of possible fraud [citations omitted]."*

Deutsche Bank National Trust Company v. Hossain, 2022 NY Slip Op 06110, decided November 2, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06110.htm.

Restrictive Covenants

An approximately 130-acre parcel of land in White Plains was purchased in 2011 by Defendant French-American School of New York ("FASNY"). A 1925 deed in the chain of title to that land included a restrictive covenant stating, in part, that "neither the grantee nor its successors or assigns, shall at any time hereafter erect, make, carry on, suffer or permit any manner upon any portion of the premises…any brewery, distillery…or any institution, other than a club, or any asylum…or any noxious, offensive, undesirable or dangerous trade, manufactory or occupation or any nuisance whatsoever."

Owners of homes near the property sought a ruling that the term "or any institution" barred FASNY from operating an educational institution. The Supreme Court, Westchester County, granted FASNY's motion to dismiss the complaint; the Appellate Division, Second Department, modified the lower court's Order to add a provision declaring that the restrictive covenant did not bar the use of the property as an educational institution. According to the Appellate Division,

> *"'[r]estrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy' [citation omitted]…Here,…the operative language in the restrictive covenant…'or any institution' is capable of more than one interpretation, including the interpretation advocated by the plaintiffs…, and the interpretation advocated by FASNY that does not bar such use, given the absence of any specific provision against operating a private school campus on the subject property and the nature of the specifically identified prohibited uses of the subject property preceding and following 'or any institution'. Accordingly…the Supreme Court correctly adopted the interpretation adopted by FASNY that limits the subject restriction."*

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

The matter was remitted to the Supreme Court, Westchester County, for entry of a judgment declaring that the restrictive covenant did not bar FASNY from operating an educational institution on the land. Matter of Gedney Association, Inc. v. Common Council of the City of White Plains, 2022 NY Slip Op 06005, decided October 26, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06005.htm.

Statute of Limitations

The Appellate Division, First Department, affirming the ruling of the Supreme Court, New York County, granting the foreclosing Plaintiff's motion for summary judgment, held that the action was timely and not barred by the statute of limitations. The Plaintiff "clearly and validly revoked the acceleration of the loan [in a prior foreclosure], when it sent a letter informing the mortgagor that the loan was 'hereby de-accelerated' and that 'immediate payment of all sums owed is hereby withdrawn and the Loan is re-instituted as an installment loan' [citations omitted]." 21st Mortgage Corporation v. Lin, 2022 NY Slip Op 06076, decided November 1, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06076.htm.

Statute of Limitations/Collateral Estoppel

The Appellate Division, Second Department affirmed a ruling of the Supreme Court, Kings County, granting the Plaintiff's motion for summary judgment in an action to cancel and discharge a mortgage. In 2015, the lower court had dismissed the second foreclosure of the mortgage for being time-barred, finding that the mortgage debt, accelerated in a foreclosure commenced in 2009, had not been deaccelerated. According to the Appellate Division,

> *"…the [Plaintiff] correctly contends that the doctrine of collateral estoppel barred Deutsche Bank from relitigating the issue of whether the statute of limitations for commencing a foreclosure action had expired…Accordingly, because the time in which to commence an action to foreclose the mortgage had expired, the [Plaintiff] was entitled to summary judgment on the complaint in an action to cancel and discharge of record the mortgage (see RPAPL 1501[4])."*

9th St., LLC v. Deutsche Bank National Trust Company, 2022 NY Slip Op 06097, decided November 2, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06097.htm.

Statute of Limitations/Contract of Sale

In 2012, the Plaintiff entered into a contract to purchase a condominium unit being offered for sale under an Offering Plan which had been accepted by New York State's Attorney General in 2010 and declared effective in 2013. On April 22, 2013, the Defendant-Sponsor advised the Plaintiff that the Offering Plan was being abandoned and the contract of sale was being terminated. In 2014, the Sponsor sold the building to other Defendants in the action. The Plaintiff, in this action commenced in 2020, argued that the new owners stepped into the shoes of the Sponsor and were required to sell the units under the Offering Plan. The Supreme Court, Kings County, granted the Defendants' motions to dismiss. According to the Court,

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

"…the statute of limitations on Plaintiff's breach of contract claim began to accrue no later than April 22, 2013, when Defendant [Sponsor] informed the Plaintiff that they decided to keep the building as a rental…[The] statement to the Plaintiff constitutes an unequivocal repudiation of the contract… Accordingly, Plaintiff's breach of contract claim began to run no later than April 22, 2013, and expired on April 22, 2019."

"Similarly, Plaintiff's fraud claim is also-time barred…[The Sponsor] informed Plaintiff on April 22, 2013, that the building was remaining a rental…[O]n May 13, 2013, [the Plaintiff] received an e-mail from [the Sponsor] which indicated that issues arose with respect to the certificate of occupancy, as well as plumbing and electrical sign offs…Any viable fraud claim would have begun to accrue no later than May 13, 2013, at which point, Plaintiff possessed enough knowledge of facts to have discovered any fraud with reasonable diligence…Since Plaintiff did not commence this action until November 4, 2020, the fraud claim is deemed untimely."

The Court held that the "continuous wrong doctrine" did not save the fraud claim. Yudkin v. Evergreen Terrace 888 Corp., 2022 NY Slip Op 33627, decided October 7, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_33627.pdf.

Transfer Tax/Peconic Bay Region Community Preservation Fund

Under New York State Tax Law Article 31-D ("Tax on real estate transfers in towns in the Peconic Bay Region") the conveyance of real property or an interest therein in the towns of East Hampton, Riverhead, Shelter Island, Southampton, and Southold have been subject to a Peconic Bay Transfer Tax of 2% of consideration when the consideration exceeds $500. This tax is payable by the grantee within 15 days of the date of the transfer. Exemptions apply to the transfer of certain agricultural land and, subject to limits on the purchase price and on the buyer's income, on the purchase by a first-time homebuyers of a one-or-two family home, a townhouse or a condominium. In other cases, the taxable amount of consideration may be reduced by amounts known as "allowances".

Chapter 445 of the Laws of 2021 amended Tax Law Section 1449-bb ("Imposition of tax") to allow any town in the Peconic Bay Region to adopt, subject to approval by referendum, a local law imposing a supplemental tax of one-half of one percent of consideration when consideration exceeds $500. On December 27, 2022, the office of the Suffolk County Clerk issued a notice that the one-half of one percent increase in the Peconic Bay Transfer Tax will take effect in each town other than the town of Riverhead on April 1, 2023.

Chapter 445 of the Laws of 2021 provides that the increased rate "shall not apply to conveyances made on or after [April 1, 2023] pursuant to binding written contracts entered into prior to such date, provided that the date of execution of such contract is confirmed by independent evidence such as the recording of the contract, payment of a deposit or other facts and circumstances as determined by the treasurer."

According to the County's memo, allowances are modified, and in some cases eliminated, effective January 1, 2023, as follows:

East Hampton, Shelter Island and Southampton - $400,000 – Improved $100,000 Vacant (Unimproved). No exemption on conveyances $2,000,000 or greater

Riverhead - $150,000 – Improved $750,000 Vacant (Unimproved)

Southold - $200,000 – Improved $75,000 Vacant (Unimproved)

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Zoning Lots/Expansion

In Little Cherry, LLC v. Cherry Street Owner LLC, 2021 NY Slip Op 31225, decided April 9, 2021, reported in Current Developments dated June 28, 2021, the Supreme Court, New York County, enjoined construction by the Defendants because the Plaintiffs, the ground lessee of property adjoining the Defendants' property and its leasehold mortgagee, had not consented to the Defendants' further expansion of an existing merged zoning lot which included the Defendants' parcels. Waivers, executed by the Plaintiffs when their properties were included in the prior zoning lot merger, did not address whether the zoning lot could be further expanded. In a ruling dated November 10, 2022, the Appellate Division, First Department, affirmed the lower court's ruling. According to the Appellate Division, "that plaintiffs did not waive their rights to consent to future enlargements of the Combined Zoning Lot."

Further, "[t[he doctrine of law of the case [precluded] defendants from relitigating the issue whether [the Plaintiffs] are 'parties-in-interest' who must consent to the zoning lot merger [citations omitted]" and [the Appellate Division had previously] affirmed the IAS Court's previous determination that they were parties-in-interest (Little Cherry, LLC v. Cherry St. Owner LLC, 174 Ad3d 445 [1st Dept 2019])."

The Defendants were not enjoined from proceeding with their project within the existing expanded zoning lot "as long as they do not require a further zoning lot merger or otherwise affect plaintiffs' property rights." Little Cherry, LLC v. Cherry Street Owner, LLC, 2022 NY Slip Op 06322, decided November 10, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03622.htm. The lower court's decision is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_31225.pdf.

Michael J. Berey
Current Developments since 1997
No. 230
January 7, 2023

PRIOR ISSUES OF CURRENT DEVELOPMENTS AT
www.firstam.com/title/commercial/ny/current-developments.html

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.