First American Title™
NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Contracts of Sale/Caveat Emptor/Merger

In 2006, the Plaintiffs purchased three commercial properties from the Defendants. In 2012, the Plaintiffs commenced an action seeking damages for fraud and deceit, misrepresentation and breach of contract, asserting that the Defendants had withheld that the master tenant of one of the properties had informed the Defendants that the master tenant was experiencing financial difficulties and, absent rent concessions, the master tenant would breach its lease and vacate the property, that the only asset of the master tenant was its lease, and that a bankruptcy court had relieved all prior assignees of the lease from liability notwithstanding that the terms of the lease provided they had liability. The Appellate Division, Second Department, affirmed the Supreme Court, Queens County's grant of the Defendants' motion for summary judgment dismissing the complaint. According to the Appellate Division,

> *"…the facts alleged to have been misrepresented and/or improperly concealed were not matters peculiarly within the defendants' knowledge which could not have been discovered by the plaintiffs by the exercise of ordinary intelligence and/or which thwarted the plaintiffs in their efforts to fulfill their responsibilities imposed by the doctrine of caveat emptor [citations omitted]…[Further]…the contract demonstrated that the parties did not intend that any provision of the contract would survive delivery of the deed, [and, therefore,] the doctrine of merger extinguished any claim the plaintiffs may have had regarding the contract of sale [citations omitted]."*

R. Vig Properties, LLC v. Rahimzada, 2023 NY Slip Op 00887, decided February 15, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00887.htm.

Contracts of Sale/Time of the Essence

The mortgage contingency clause in a contract of sale afforded the Plaintiff-purchaser 60 days from the contract date to obtain a mortgage commitment. If the purchaser was unable to obtain a mortgage commitment before the 60-day period expired, he could cancel the contract and request a return of the contract deposit. The purchaser did not obtain a mortgage commitment, did not request a return of his down payment, and did not close on the contract's closing date. The Defendant-seller sent a time of the essence letter setting a closing date. The Plaintiff's request for a 10-day extension to close was denied, and no closing took place. The Plaintiff sued for specific performance and breach of contract. The Supreme Court, Kings County, denied the Plaintiff's motion for summary judgment and granted the Defendant's motion to dismiss.

The Plaintiff contended that the time of the essence letter was defective because "'it was made with actual knowledge that [the Plaintiff] would need another few days to be ready to close.'" However, according to the Court, "there is no requirement that a time of the essence letter must consider the purchaser's ability to close by that date." Further, although the contract afforded the purchaser, on failing to close. ten days after notice from the seller to cure the purchaser's default, that "clause only applies after a scheduled closing has not occurred due to the purchaser's default…[W]here a time of the essence letter has been duly served and purchaser fails to abide by those terms the purchaser is not afforded another ten days in addition to the time provided by the time of the essence letter." Fink v. 218 Hamilton LLC, 2023 NY Slip Op 30092, decided January 4, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30092.pdf.

Debtor and Creditor Law/Fraudulent Transfer

In 2019, a week after the Plaintiffs had obtained an arbitration award against Michael Nussen, he conveyed for no consideration real property to his father, William. The Supreme Court, Kings County, agreed with the Plaintiffs that the transfer to William was a fraudulent conveyance under Debtor and Creditor Law Sections 273-a ("Transfer or obligations voidable as to present or future creditor"), 274 ("Transfer or obligations voidable as to present creditor"), 275 ("When transfer is made or obligation is incurred"), 276 ("Remedies of creditor") and 276-a ("Attorney's fees in action or special proceeding under this article to avoid a transfer"). The Court found that when Michael purchased the property he executed a note and a mortgage in his individual capacity, not as the agent for William. According to the Court,

> *"Michael can hardly be termed a nominal owner and it can hardly be asserted that William is the true owner considering the note and mortgage executed by Michael. Therefore, the inescapable conclusion that must be drawn is that Michael owned the property and the transfer from Michael to William amounted to a fraudulent conveyance. Further, there has been no evidence of any consideration regarding the transfer and a presumption exists, which has not been overcome, that the transfer rendered Michael insolvent."*

Michael and William claimed that their written agreement, providing that William would deliver to Michael funds to enable the purchase of the apartment, supported a principal and nominee relationship. However, the agreement also stated that the house belonged to Michael alone and that William had no right to use or encumber the property. SRW Equities LLC v. Nussen, 2023 NY Slip Op 30088, decided January 4, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30088.pdf.

Easements/Abandonment

The Supreme Court, Wayne County, held that an easement recorded in 1979, granting a right of ingress and egress over the Defendant's property for the benefit of the Plaintiff's adjoining property, had been abandoned. The easement had not been used as a means of access to the Plaintiff's property since at least 1996 and the Plaintiff had another means of access to a public street. Further, the easement area had not been maintained since at least 1996 and it has been overgrown by vegetation for an extended period, the entrance to the easement had been blocked by a stockade fence since before 2014, and no steps had been taken to dedicate the easement to the Town as a public highway. Ontario TK Owner, LLC v Fedyk Builders, Inc., 2023 NY Slip Op 30149, decided January 17, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30149.pdf.

Lien Law/Extension of Mechanic's Lien

Under Lien Law Section 17 ("Duration of Lien"), a filed notice of a mechanic's lien remains a lien for only one year "unless within that time an action is commenced to foreclose the lien…or unless an extension to such lien, except for a lien on real property improved or to be improved with a single family dwelling, is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien…A lien on real property improved or to be improved with a single-family dwelling may only be extended by an order of a court of record, or a judge or justice thereof."

In 9 Vandam Street Borrower 2, LLC v. New York Pile & Concrete Structures, Corp., 2023 NY Slip Op 30459, decided February 14, 2023, a notice of mechanic's lien was filed on March 17, 2021 against property improved by a single-family dwelling, and an amended lien was filed on or about May 11, 2021. On or about May 6, 2022, the lienor filed an extension of the lien without obtaining a court order. Petitioners sought an Order vacating the lien and canceling the bond that was issued to discharge the lien. The lienor cross-moved to have its mechanic's lien extended nunc pro tunc. The Supreme Court, New York County, denying the cross-motion, vacated the lien and cancelled the bond. According to the Court,

> *"[h]ere, the Lien on the single-family Property was filed on March 17, 2021. As such, Respondent was required, by statute, to either obtain an order from this Court to extend the Lien or commence an action to foreclose the Lien before March 17, 2021. Respondent did neither…Moreover, for this Court to grant Respondent's application to revive the Lien nunc pro tunc, Respondent was required to have a least filed the extension within one year from the date the original Lien was filed, which Respondent failed to do [citation omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30459.pdf.

Lien Law/Necessary Parties

A subcontractor whose mechanic's lien was bonded commenced an action seeking payment under the bond. Defendants, the general contractor and the insurance company providing bonds for the Plaintiff's lien and other filed mechanics' liens, contended that the action should be dismissed for the failure to join the other lienholders, who are necessary parties under Lien Law Section 44 ("Necessary parties…"). The Supreme Court, New York County, denied the motion to dismiss as the Plaintiff was seeking leave to amend its complaint to add all necessary parties. US Concrete, Inc.-NYC Division v. The Rinaldi Group, LLC, 2023 NY Slip Op 30296, decided January 30, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30296.pdf.

Mortgage Foreclosures/Deficiency Judgments

The Defendant-borrower moved to vacate a judgment of foreclosure and sale entered in 2017 and to dismiss the complaint for lack of personal jurisdiction. On the foreclosing Plaintiff's motion, the Supreme Court, Kings County, vacated the judgment, amended the caption of the action to omit the borrower as a defendant, and granted a new judgment of foreclosure and sale. The Appellate Division, Second Department, affirmed the lower court's ruling, noting that the borrower had conveyed the property to a non-party to the action in 2011. According to the Appellate Division,

> *"[a] mortgagor who has made an absolute conveyance of all of his or her interest in the mortgaged premises is not a necessary party to a foreclosure action unless a deficiency judgment is sought [citations omitted]. Here, the borrower conveyed his interest in the mortgaged premises…in a deed recorded on December 30, 2013. In addition, the plaintiff waived its right to seek a deficiency judgment against the borrower. Moreover, the plaintiff was precluded from seeking a deficiency judgment against the borrower due to his Chapter 7 bankruptcy discharge [citation omitted]. Thus, the borrower is not a necessary party to this foreclosure action. Accordingly, he was not entitled to vacatur or dismissal of the complaint based on lack of personal jurisdiction [citation omitted]. Moreover, the borrower has no standing to challenge the plaintiff's request for a judgment of foreclosure and sale [citations omitted]."*

Citimortgage, Inc. v. Warsi, 2023 NY Slip Op 00074, decided January 11, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00074.htm.

Mortgage Foreclosures/Notices - RPAPL Section 1304

Real Property Actions and Proceedings Law ("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. Section 1304 also states that "the notices required by this section shall be sent…in a separate envelope from any other mailing or notice."

As reported in Current Developments, New York courts have strictly applied Section 1304's requirement that a notice other than the Section 1304 notice be sent to a borrower in a "separate envelope". For example, in US Bank National Association v. Drakakis, 2022 NY Slip Op 03022, decided May 4, 2022, the Appellate Division, Second Department, reversed the grant of a foreclosing mortgagee's motion for summary judgment because a "Consumer Notice", required by 15 U.S.C. Section 1692g ("Validation of debts"), was in the same envelope as the Section 1304 notice.

In Bank of America, N.A. v. Kessler, 2023 NY Slip Op 00804, decided February 14, 2023, New York's Court of Appeals held that "section 1304 does not prohibit the inclusion of additional information that may help borrowers avoid foreclosure and is not false or misleading." According to the Court of Appeals,

> *"…accurate statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute an 'other notice'."*

In this case, the last page of the Section 1304 notice included paragraphs addressing protections afforded a borrower under bankruptcy law and rights under the federal Servicemembers Civil Relief Act and comparable state laws.

The Court reversed the ruling of the Appellate Division, Second Department, which had affirmed dismissal of the foreclosing Plaintiff's complaint on the ground that the inclusion of the other text in the Section 1304 notice violated the separate envelope requirement of the statute. The Court of Appeals granted the Plaintiff's motion for summary judgment, and remitted the case to the Supreme Court, Westchester County, for further proceedings in accordance with its opinion. This decision, reported at 2023 N.Y. LEXIS 162, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00804.htm.

Mortgage Foreclosures/Standing

In 2016, the Supreme Court, Putnam County, dismissed an action to foreclose a mortgage. finding that the Plaintiff lacking standing. In a new foreclosure commenced in 2019, the Defendants asserted that the statute of limitations to foreclose had expired. The Supreme Court denied the Defendants' motion to dismiss, holding that the loan had not been accelerated by the prior action because it was dismissed for lack of standing.

In 2022, New York enacted the "Foreclosure Abuse Prevention Act", Chapter 821 of the Laws of 2022. Based on that Act, the Defendants sought an order vacating the judgment of foreclosure and sale and dismissing the action; they claimed that Chapter 821 estopped the Plaintiff from asserting that the mortgage debt had not been accelerated.

The Foreclosure Abuse Prevention Act amended subdivision 4 of Civil Practice Laws and Rules Section 213 ("Actions to be commenced within six years") to read as follows:

> *"…if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an express judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated."*

Chapter 821, effective December 30, 2022, applies "to all actions commenced…in which a final judgment of foreclosure and sale has not been enforced."

The Plaintiff argued that the dismissal of the foreclosure in 2016 for lack of standing was effectively a determination that the debt had not been validly accelerated. The Supreme Court, Putnam County, stating that this issue appeared "to be one of first impression", denied the relief requested by the Defendants. According to the Court,

> *"(1) A timely interposed challenge in the prior action to the foreclosing party's standing, and a dismissal of that action based on a judicial determination that the plaintiff lacked standing to foreclose, is tantamount to a defense, and a determination, that the mortgage 'instrument was not validly accelerated' within the meaning of CPLR 213(4)(a); and therefore (2) in such circumstances, the foreclosing party in the second action is not estopped by virtue of Section 213(4)(a) from avoiding a statute of limitations defense by asserting that the mortgage was not validly accelerated in the prior action…[T]he Defendants' statute of limitations defense has already been definitively rejected in this action…"*

Wilmington Savings Fund Society, FSB v. Madden, 2023 NY Slip Op 23044, decided February 10, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_23044.htm.

Mortgage Foreclosures/Undisclosed Senior Lien

After the auction sale for the foreclosure of a condominium common charge lien, the successful bidder ordered a title search which disclosed a recorded senior mortgage against the condominium unit. The successful bidder, intervening in the action, moved to have the sale vacated and the down payment returned to it. The Supreme Court, Kings County, granted the branch of the intervenor's motion setting aside the sale, denied that part of its motion seeking the return of the down payment, directed that the down payment be returned to the intervenor. and granted the branch of the foreclosing Plaintiff's cross-motion to have the down payment released to it.

The Appellate Division, Second Department, finding that the senior mortgage was not disclosed in the complaint, in the foreclosure judgment, or in the terms of sale, ordered that the down payment be returned to the successful bidder. According to the Appellate Division,

> *"[b]ut setting aside the subject sale, the Supreme Court, in effect, determined that the plaintiff's failure to set disclose the senior mortgage…cast 'suspicion on the fairness of the sale' [citations omitted]. Given that determination, the court also should have granted that branch of the intervenor's motion which was to direct the referee to return its down payment, and should have denied that branch of the plaintiff's cross motion which was, in effect, to direct the referee to release the down payment to the plaintiff, since the intervenor had a 'lawful excuse' for refusing to perform the contract [citations omitted]."*

As to the Plaintiff's claim that the intervenor failed to exercise due diligence, "'[t]he rule that a buyer must protect himself [or herself] against all defects does not apply in all strictness to a purchaser at a judicial sale' [citation omitted]." Board of Managers of the St. Marks Avenue Condominium v. Milord, 2023 NY Slip Op 00296, decided January 25, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00296.htm.

Notices of Pendency

The Supreme Court, New York County, granting the Defendants' motion, directed the County Clerk of New York County to cancel the original notice of pendency filed for an action seeking only to recover money damages, and an amended notice of pendency, filed for an amended complaint seeking to also impose and foreclose an equitable mortgage. The filing of the amended complaint did not "justify an earlier filed and defective notice of pendency." Further, according to the Court,

> *"…plaintiff is not entitled to file an amended notice of pendency based upon the amended complaint. Successive notices of pendency are forbidden by statute, save for one exception not applicable herein (CPLR 6516[c]). Where a party has filed an improper notice of pendency, that party may not, by filing an amended pleading, file a successive notice of pendency [citation omitted]."*

Under subdivision [c] of CPLR Section 6516["Successive notices of pendency"], "[e]xcept as provided in subdivision (a) of this section [authorizing a successive notice of pendency to be filed in a foreclosure action to comply with RPAPL Section 1331], a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective." Bingzhe Liu v. Jing Guo, 2023 NY Slip Op 30099, decided January 9, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30099.pdf.

Real Estate Taxes/Not-for-Profit

Under Real Property Tax Law ("RPTL") Section 420-a ("Nonprofit organizations; mandatory class"), as applicable to this case, "(a) Real property owned by a corporation or association organized or conducted exclusively for…educational…purposes…shall be exempt from taxation as provided in this section."

In 2015, the Rye Country Day School ("RCDS") purchased property containing six townhouses in the City of Rye and, in 2018, all of the townhouses were occupied by faculty of the school. RCDS's application for a tax exemption pursuant to RPTL Section 420-a was denied by the City Assessor on the ground that RCDS "did not sufficiently establish that the Property is an integral part of the education process." Rye's Board of Assessment Review also denied the application for the tax exemption. The Supreme Court, Westchester County, dismissed an Article 78 proceeding commenced by the school.

The Appellate Division, Second Department, annulled the lower court's ruling and remitted the matter to Rye's Board of Assessment Review for it to grant RCDS's application for the tax exemption for the tax year 2018 and indicate on the assessment roll that the real property in question is tax exempt. According to the Appellate Division, "RCDS demonstrated that the 'primary use' of the faculty-occupied townhouses furthered its 'primary purpose' of operating as a school [citation omitted]." Further,

> *"…New York has long recognized that residential property used for housing an educational institution's faculty and staff is entitled to a tax exemption under RPRL 420-a or similar statute [citations omitted]. Here, it is undisputed that RCDS received tax exemptions for several residential properties occupied by faculty or administrators for at least 25 years, and that, by May 1, 2018, all of the townhouses on the property were occupied by full-time RCDS faculty or administrators. The respondents failed to show a meaningful distinction between the townhouses and RCDS's other tax-exempt properties used for housing faculty and administrators."*

Matter of Rye Country Day School v. Whitty, 2023 NY Slip Op 00323, decided January 25, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00323.htm.

Tax Lien Sales/Notices

In Hetelekides v. County of Ontario, 2023 NY Slip Op 00803, decided February 14, 2023, New York's Court of Appeals declined to follow the ruling of the Appellate Division, Second Department, in Matter of Foreclosure of Tax Liens (Goldman) (165 AD3d 1112), in which the Appellate Division held that a tax foreclosure proceeding may not be maintained against a deceased person.

In Hetelekides, the Supreme Court, Ontario County, held that the Treasurer's mailings failed to comply with the requirements of Real Property Tax Law ("RPTL") Section 1125 because they were sent to a deceased owner of the property. The Appellate Division, Fourth Department, vacated those parts of the lower court's Order holding that the foreclosure was a nullity. The Court of Appeals, affirming the Appellate court's ruling, stated

> *"[i]f the [tax] authority learns of the death of an owner, the authority must determine whether, in the unique circumstances of each case, due process requires additional reasonable efforts to identify interested parties and, if so, attempt to provide those interested parties with notice of the pending foreclosure."*

The Court of Appeals, applying that standard, held that the Treasurer had complied with the statutory notice requirements of RPTL Section 1125 ("Personal notice of commencement of foreclosure proceeding"). According to the Court of Appeals, "under the circumstances presented here, defendants made an adequate attempt at service, satisfying due process requirements."

> *"Upon learning that a person listed as an owner died before the notices were issued, defendant County Treasurer also personally contacted the sole business located on the property in an effort to identify and personally inform a manager, owner, or any person in charge of the pending foreclosure proceeding."*

The Court of Appeals rejected the argument that a taxing authority should have an administrator appointed for a deceased taxpayer. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00803.htm.

In Nassau Property Investors, LLC v. Goffe, 2023 NY Slip Op 00429, decided February 1, 2023, after the two year period in which the property could be redeemed from a tax lien sale had expired, the Village of Hempstead's Treasurer conveyed the property to the lien sale purchaser. The property was reconveyed to the Plaintiff ,who commenced an action under RPAPL Article 15 ("Action to compel the determination of a claim to real property") seeking a judgment that the Plaintiff owned the property free and clear of all liens and encumbrances.

The foreclosed owner asserted that the Treasurer's deed should be void, claiming violations of due process and that there was an unconstitutional forfeiture. The Appellate Division, Second Department, affirmed the ruling of the Supreme Court, Nassau County, which, in granting the Plaintiff's motion, held that the Plaintiff owned the property free and clear of all liens and encumbrances. The Appellate Division found that the Plaintiff had established, prima facie, that notice of the tax lien sale was mailed to the Defendant and, according to the Appellate Division,

> *"Proof that a notice was properly addressed and mailed gives rise to a rebuttable presumption that the notice was received [citations omitted]…[The Defendant's] bare denial of receipt of the notice was insufficient to rebut the presumption of delivery [citations omitted]…Notice of the tax lien sale by publication…supplemented by the unreturned notice by first class mail to the defendant's admitted home address, complied with constitutional requirements for due process…Similarly, service of the notice to redeem by certified and first-class mail complied with due process."*

The Appellate Division also held that the Defendant's loss of his equity in the property "was not subject to the Excessive Fines Clause of the Eighth Amendment [to the United States Constitution], as incorporated by the Fourteenth Amendment, as the loss of equity from the tax sale was not punitive [citations omitted]." The Eighth Amendment states, in part, "[e]xcessive bail shall not be required, nor excessive fines imposed…" This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00429.htm.

Title Insurance

The Appellate Division, First Department, affirmed the Supreme Court, New York County's grant of the Defendant title insurer's motion for summary judgment because the title policy excepted the "rights of tenants in possession" and the policy contained exclusions for adverse matters "assumed" by the insured and matters affecting title known to the insured but not disclosed to the insurer. Although a deed to a Milton Wilson, a non-party to the action, was not recorded when the Plaintiff purchased the property, Wilson was in possession of the premises. Further, a tax lien held by the non-party and a notice of pendency were exceptions from the coverage of the Policy. In addition, the Plaintiff was aware, prior to closing, that Wilson was "'placing tenants and collecting rents' at the premises, which should have triggered the duty to inquire of a possessor [citation omitted]." Zucker Real Estate Corp. v. Old Republic National Title Insurance Company, 2023 NY Slip Op 00973, decided February 21, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00973.htm.

Voluntary Payment Doctrine/Legal Fees

A judgment of foreclosure and sale awarded the foreclosing Plaintiff "reasonable legal fees" of $27,500. However, when the Defendant exercised its right of redemption in 2016, the payoff letter required the payment of legal fees of $130,754.51. The Defendant paid the full payoff amount, including the legal fees, without objection. In 2019, the Plaintiff moved for reimbursement of the legal fees it had paid above the amount awarded in the foreclosure judgment. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Kings County, denying that branch of the Defendant's motion seeking reimbursement of legal fees. According to the Appellate Division,

> *"'[T]he voluntary payment doctrine…bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law' [citations omitted]…'Additionally, in order for a protest of payments to be characterized as appropriate, it must be in writing and made at the time of payment' [citations omitted]."*
>
> *"Here, the defendant does not claim that the plaintiff engaged in fraud, that there was a mistake of law or fact, or that it levied a protest, in writing or otherwise, at any time prior to making its motion, inter alia, for reimbursement of the subject legal fees. Thus, the voluntary payment doctrine bars the defendant's recovery of payments it voluntarily made in connection with the plaintiff's payoff demand [citation omitted]."*

ECI Financial Corporation v. Resurrection Temple of Our Lord, Inc., 2023 NY Slip Op 00649, decided February 8, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_00649.htm.

Zoning/South Street Seaport

As reported in Current Developments dated November 9, 2022, 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, in South Street Seaport Coalition, Inc. v. City of New York, 2022 NY Slip Op 32645, decided August 5, 2022, dismissed the petition. According to Justice Arthur Engoron, in the related, later decision discussed below,

> *"this Court denied and dismissed a petition against the City Planning Commission and the City Council, seeking to prevent construction of the subject proposal, essentially on the ground that as the City's ultimate legislative body, within certain guidelines the City Council can approve whatever building it wants, particularly because the City Council controls zoning."*

The 2022 decision, reported at 2022 N.Y. Misc. LEXIS 3998, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_32645.pdf.

However, Justice Engoron, in South Street Seaport Coalition, Inc. v. Landmarks Preservation Commission of the City of New York, 2023 NY Slip Op 30104, decided January 11, 2023, granted the Petitioners' motion to declare null and void and to vacate the Certificate of Appropriateness the Commission had issued for the construction of the tower at 250 Water Street. He also ordered the Respondent to cease construction at the site. According to the Court,

> *"[s]ince the creation of the [South Street Seaport] Historic District, 250 Water Street has been a parking lot. At the time of its creation, the then-owner of 250 Water Street advocated for its removal from the Historic District for the very reason that it was a parking lot; LPC rejected this argument wholesale. LPC repeatedly rejected prior proposals to build high-rise towers at 250 Water Street…If LPC wanted to change its position and determine that a parking lot in a historic district could now be converted into a 324-foot tower, that is LPC's prerogative; however, it had a legal duty to acknowledge the departure and explain its reasoning. LPC's May 4, 2021 findings are completely silent as to this reversal and the overall record fails to explain why a parking lot that was previously repeatedly found to be part of the Historic District could now appropriately be the site of a high-rise tower that would loom over the remainder of the protected neighborhood."*

Further, noting that a proposal for the funding for the Seaport Museum and the approval for the tower were "presented and considered in tandem", the Court found that there was support for the Petitioners' argument that "the Tower's approval was the result of an impermissible quid pro quo."

> *"Petitioners' assert that allowing Hughes Corp. [of which the developer is affiliated] to consolidate the application for the Tower with the Museum's application was improper and that it influenced the LPC to consider the potential benefits for the museum in approving the Tower, rather than considering the appropriateness of the tower on its own merits. That argument is supported by the record, which demonstrates extensive coordination between LPC and Hughes Corp. on how to provide 'political cover' for the project."*

This decision, available at 2023 NYLJ LEXIS 133, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30104.pdf.

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