First American Title™
NATIONAL COMMERCIAL SERVICES

NEWSLETTER ▸ NO. 233 | MAY 3, 2023

Current Developments

First American Title National Commercial Services

By Michael J. Berey
Senior Underwriter

Adverse Possession

Two adjoining parcels separated by a strip of land were acquired by the Plaintiffs' predecessor in title in the 1990s. The Plaintiffs claimed that they had title to that strip of land, the former bed of an abandoned trolley line, by adverse possession. The Defendants, owners of property perpendicular to the strip of land, claimed ownership based on the tax map. The Appellate Division, Third Department, affirmed the grant of the Plaintiffs' motion for summary judgment and the dismissal of the Defendants' counterclaim by the Supreme Court, Schenectady County. According to the Appellate Division,

> *"…plaintiffs satisfied their prima facie burden on their cause of action to quiet title. [The prior owner's] affidavit makes clear that he continually possessed, cultivated, maintained and used the disputed area under a claim of right and to the exclusion of others, from 1991 to 2006. The manner in which he conveyed his claim of ownership – by mowing the lawn and constructing and plowing a driveway – would have been open and notorious to nearby property owners [citation omitted]. In light of the foregoing, a presumption of hostility arose and plaintiffs established, on a prima facie basis, that title to the disputed area vested in [the prior owner] by adverse possession in 2001 [citations omitted], and then transferred to plaintiffs when they purchased their properties [citation omitted]."*

Hamil v. Casadei, 2023 NY Slip Op 01338, decided March 16, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01338.htm.

Contracts of Sale/Certificate of Occupancy

The Plaintiffs, purchasers under a contract for the sale of a condominium unit, rejected a time of the essence letter sent by the seller's counsel, claiming that they were not required to close until a final certificate of occupancy was issued for the building. Twenty-five successive temporary certificates of occupancy had been issued. The Plaintiffs, also alleging that there was some water damage to the unit, terminated the contract and sued the seller for the return of their down payment. The Supreme Court, New York County, held that the Plaintiffs had breached the contract without a lawful excuse and, therefore, the Defendant-seller was entitled to receive the contract deposit from escrow and its attorneys' fees, the amount to be determined at a hearing.

The contract included the following relevant provisions:

> *"'Seller represents to the best of Seller's knowledge that the Building and Unit respectively have valid and subsisting certificates of occupancy…'"*

> *"'To the best of Seller's knowledge, there have been no leaks into or emanating from the Unit during the twenty-four (24) months prior to the date of this Contract.'."*

As to the need for a final certificate of occupancy, noting that no case on whether the issuance of a temporary certificate of occupancy satisfies a contract requirement that there be a "valid and subsisting certificate of occupancy" was cited by the parties, the Court stated:

> *"…a 'valid and subsisting' certificate of occupancy cannot be construed to be one and the same as a final certificate of occupancy…To hold otherwise – that 'valid and subsisting' only applies to final certificates – would require the court to insert into the contract the term 'final' where it has otherwise been excluded, distort the meaning of the provision, and imply an obligation where none existed."*

As to the claim that there was a water leak in the unit which allowed the Plaintiffs to terminate the contract,

> *"[t]o show defendant made representations as to the apartment's history of water leaks, plaintiffs must show that, among other things, defendants made statement of material fact it knew to be false when made [citation omitted]…The sole piece of evidence submitted in support of their motion – the email from the condominium's superintendent – is dated after defendants entered into the contract, so it provides no evidence of plaintiffs' knowledge at the time the parties entered into the contract…Such a dearth of information as to the origin and nature of the damage makes it impossible to determine the state of defendant's knowledge when entering into the contract, let alone that a breach occurred."*

Sherman v. NYC 15th Street LLC, 2023 NY Slip Op 30560, decided February 10, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30560.pdf.

Deeds/Forgery

In Amzalag v. ZBT Holdings Inc., 2023 NY Slip Op 30593, decided February 28, 2023, the Supreme Court, Kings County, held that the Plaintiff's signature on a deed executed in 2005 was forged and, therefore, that deed and subsequent deeds further conveying the property were void ab initio. The Court directed the City Register's office to strike those deeds from the record. The current owner's claim of title by adverse possession was denied because a "claim of right", an element to establish title by adverse possession, cannot be asserted when title is acquired as a result of a forgery. The Court also held that a mortgage executed in 2006, held by an assignee and refinanced, was void ab initio and directed the City Register's office to record the Court's ruling against the property's block and lot. According to the Court, "a forged deed is void ab initio and, as such, any mortgage or encumbrance on real property based on a forged deed is also void (see Faison v. Lewis, 25 NY3d 220 [2015])."

The Court further ruled that an inquest was required to determine the amount of any rents and profits due to the Plaintiff. This decision is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30593.pdf.

Easements

In Ciminello Property Associates v. New 970 Colgate Avenue Corp., 2023 NY Slip Op 01230, decided March 9, 2023, the Supreme Court, Bronx County, granted the Defendants' motion for summary judgment dismissing the complaint in an action seeking a a declaration that the Plaintiff had a prescriptive easement over Close Avenue. According to the Appellate Division, First Department, in affirming the lower court's Order,

> *"Plaintiff failed to establish the requisite elements of exclusivity and hostility required for a prescriptive easement [citation omitted]… [S]ince at least 1999, defendants had controlled access to the south gate at Story Avenue, and that plaintiff and its tenants' use of the disputed portion of Close Avenue had been permissive [citation omitted]. The testimony of plaintiffs' tenants further established that they permitted members of the general public to access Close Avenue…[N]othing about plaintiff's historical use of Close Avenue suggested that it excluded defendants from using the disputed portion of the road, or that its use constituted 'an actual invasion of or infringement upon the owner's rights' so as to raise a question of fact as to the element of hostility [citation omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01230.htm.

Eminent Domain/Inverse Condemnation

In a proceeding to determine the value of the Claimant's property taken by New York City through eminent domain in 2016, the Claimant argued that the mapping of their property as parkland in 2009 was an inverse condemnation because a permit could not be issued to allow construction on land designated as parkland. New York City contended that there could not be an inverse condemnation as the Claimant had not been denied a building permit for the remainder of its property not designated as parkland and that the claim for inverse condemnation was time barred. The Supreme Court, Kings County, held that no valid cause of action for inverse condemnation had been shown. Even with testimony that the part of the land designated as parkland could not be developed, that was "not sufficient to establish a significant diminution in value or an interference with investment backed expectations that would constitute a taking under Penn Central." "A mere diminution of value is not sufficient to constitute a taking (Penn Central 438 US 104 [1978])."

The Court further found that although the Claimant could not build on the parkland, "they could use development rights from that portion on the remainder of the property." In addition, there was no evidence that the mapping of a portion of the Claimant's property as parkland interfered with any plans for development and "[g]iven that only a portion of the property was mapped as parkland, it is not evident that even a total ban on building on that portion would have prevented development on the remainder of the property."

Lastly, since the mapping of the property occurred in 2009, the claim of inverse condemnation was barred by Civil Practice Law and Rules ("CPLR") Section 214 ("Actions to be commenced within three years…"). Section 214(4) sets forth a three-year statute of limitations for "an action to recover for an injury to property…"

Matter of City of New York (Coney Island Plan – Stage 1), 2023 NY Slip Op 51048, decided February 28, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_50148.htm.

Lien Law/Verified Statement

Under Lien Law Section 76 ("Right of beneficiaries…to receive statement'), "[a]ny beneficiary of the [Lien Law] trust holding a trust claim shall be entitled, upon request, after the expiration of thirty days from his trust claim became payable, and thereafter not oftener than once in each month…(b) at the beneficiary's option to receive a verified statement setting forth the entries with respect to the trust contained in [the trustee's] books or records."

In Matter of DCG New York Inc. v. 244 E 52 Owner LLC, 2023 NY Slip Op 30576, decided February 27, 2023, the construction manager for a project at the Respondent's property, claiming that it was owed monies for its work, applied for an order directing the Respondent to furnish a verified statement under Lien Law Section 76. The Supreme Court, New York County, denied the petition, without prejudice. According to the Court,

> *"[o]n the record before the Court, petitioner has not demonstrated that it is a trust beneficiary entitled to invoke the provisions of Lien Law Section 76. Petitioner has not submitted proof that respondent is obligated to petitioner, either by contract or mechanic's lien [citations omitted]. Petitioner fails to include an affidavit from the petitioner attesting to its relationship with respondent, as required by Lien Law Section 76(5) [citation omitted] but instead relies solely on its petition. However, as this petition is verified only by counsel it is of no probative value [citation omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30576.pdf.

Mortgage Foreclosures/CPLR Section 205-a

New York's Foreclosure Abuse Prevention Act, Chapter 821 of the Laws of 2022, added CPLR Section 205-a ("Termination of certain actions related to real property"), effective December 30, 2022. Under Section 205-a, "(i)f an action …is timely commenced and is terminated in any manner other than…a dismissal of the complaint for any form of neglect,…the original plaintiff…may commence a new action upon the same transaction… within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period…"

In U.S. Bank N.A. v. Pierre, 2023 NY Slip Op 23053, decided February 23, 2023, in September 2022 the Supreme Court, Suffolk County dismissed an action commenced in 2013 to foreclose a mortgage due to the Plaintiff's failure to comply with the notice requirements of Real Property Actions and Proceedings Law ("RPAPL") Section 1304 ("Required prior notices"). The mortgagor commenced a new action to foreclose the mortgage in December 2022. The Defendant moved to dismiss the action based on the expiration of the statute of limitations and the failure to serve the notice required under RPAPL Section 1304. The Supreme Court, Suffolk County, denied the Defendant's motion to dismiss. According to the Court,

> *"the…Foreclosure Abuse Protection Act [,] applies to all action[s in] which a final judgment of foreclosure and sale has not been enforced…However, even applying the new statute, the dismissal under RPAPL Section 1304 is not neglect so that the plaintiff does receive the six month saving period [citations omitted]. As the action was commenced within the six month saving period, the part of the motion to dismiss based upon the statute of limitations must be denied."*

The Court also rejected the Defendant's claim that the Plaintiff failed to comply with RPAPL Section 1304. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_23053.htm.

Mortgage Foreclosures/Equitable Mortgage

The Defendant in a mortgage foreclosure sought to have the cause of action for reformation of the mortgage dismissed. The Supreme Court, Suffolk County, in denying the motion to dismiss, stated that "[t]he statute of limitations on a claim to reform a recorded instrument based on mistake is six years and applies to scrivener's errors [citation omitted]. Notwithstanding, plaintiff would still be entitled to enforce its mortgage despite the scrivener's error, as equity would impress an equitable lien in plaintiff's favor upon proof that there was an express or implied agreement that there should be a lien on the subject property [citations omitted]." Yatke Properties, LLC v. Rattoo, 2023 NY Slip Op 30721, decided March 6, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30721.pdf.

Mortgage Foreclosures/Dismissal Sua Sponte

The Supreme Court, Queens County, directed the foreclosing Plaintiff to "'file an application for a [j]udgment of [f]oreclosure [and] sale'" by June 7, 2017. The Plaintiff failing to do so, the Court, sua sponte, dismissed the complaint and cancelled the notice of pendency. The Appellate Division, Second Department, reversed the lower court's Order, directing the Supreme Court to restore the action to the court's active calendar and appoint a substitute referee to compute. According to the Appellate Division,

> *"[a] court's power to dismiss an action, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal [citations omitted]. Here, the plaintiff's failure to move for a judgment of foreclosure and sale…was not a sufficient ground upon which to sua sponte direct dismissal of the complaint and cancellation of the notice of pendency [citations omitted]."*

Deutsche Bank Trust Company Americas v. Martinez, 2023 NY Slip Op 01179, decided March 8, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01179.htm.

Mortgage Foreclosures/Forbearance Agreement/CPLR Section 5019

A judgment of foreclosure and sale was entered on the mortgagors' default in answering the complaint. The mortgagors and the mortgage loan servicer then entered into a forbearance agreement under which the mortgagors were to pay the amounts owed by June 30, 2014. It was further agreed that if there was a default under the agreement a foreclosure sale could be scheduled and that no defense to the foreclosure would be raised. In or around 2019, after a notice of sale was issued due to an alleged default, the mortgagors commenced an action seeking damages for breach of contract and for an accounting and moved for the issuance of a preliminary injunction enjoining the loan servicer from conducting the sale. The Supreme Court, Queens County's denial of the motion was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"[t]he plaintiffs failed to demonstrate irreparable injury absent a preliminary injunction because, based on the injuries alleged, the plaintiffs can be adequately compensated by money damages…Further, pursuant to the forbearance agreement, the plaintiffs specifically consented to [the loan servicer] scheduling a foreclosure sale in the event that the plaintiffs defaulted under the forbearance agreement and further agreed that, in the event of a default, they would not interpose any defenses."*

The Plaintiffs alleged that the loan servicer's failure to comply with CPLR Section 5019 ("Validity and correction of judgment or order") prohibited the servicer from enforcing the judgment of foreclosure and sale. Under Section 5019(c), "[a] person other than the party recovering a judgment who becomes entitled to enforce it, shall file…a copy of the instrument on which his authority is based…" The Plaintiffs contended that the loan servicer lacked standing to enforce the foreclosure judgment because it had not filed, in proper form, an assignment of judgment to it or a similar judgment with the County Clerk. However, according to the Appellate Division,

> *"[a]ssuming, arguendo, that [the loan servicer] failed to properly comply with the filing requirement of CPLR 5019(c), that provision is 'not meant to benefit the debtor, should the assignment not be recorded [citation omitted] but rather 'is clearly intended for the benefit of the assignee, being designed to protect him [or her] against payment of the judgment to the wrong party' [citations omitted]."*

Benaim v. S2 Corona, LLC, 2023 NY Slip Op 01274, decided March 15, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01274.htm.

Mortgage Payoffs/Wire Transfers

Payoff funds to satisfy a mortgage were electronically transferred for closing pursuant to the instructions of Ocwen Loan Servicing, LLC, the loan's servicer. However, the funds were transferred to an incorrect account number at Wells Fargo Bank, N.A., the bank designated by the loan servicer to receive the payoff. The lender proceeded to foreclose on its mortgage.

The Supreme Court, Suffolk County, granted the Defendant-purchaser's motion for summary judgment dismissing the complaint as to him. The Court found that "the error was either the fault of Wells Fargo's attorney who initiated the wire transfer, or Wells Fargo which processed the wire transfer and credited the wrong account." The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division, wire transfers are subject to Uniform Commercial Code Article 4-A ("Funds transfer"). Under UCC Section 4A-406 ("Payment by originator to beneficiary; discharge of underlying obligation"),

> *"(a)…the originator of a funds transfer pays the beneficiary of the originator's payment order (i) at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer and (ii) in an amount equal to the amount equal to the amount of the order accepted by the beneficiary's bank…(b) If payment under subsection (a) is made to satisfy an obligation, the obligation is discharged to the same extent discharge would result from payment to the beneficiary of the same amount in money…[with exceptions not relevant to this case]."*

According to the Appellate Division,

> *"[h]ere, Faria [the attorney for the purchaser] was the originator, TD Bank [the purchaser's lender] was the receiving (also known as the originator's) bank, Ocwen [the servicer of the loan being paid off] was the beneficiary, and Wells Fargo was the beneficiary's bank…*
>
> *"It is undisputed that the payoff funds were transferred to a bank account at Ocwen's bank, Wells Fargo, even though the funds ended up in the wrong account, and the parties dispute who is at fault for the error. Faria initiated the transfer of the payoff funds via a payment order originating at TD Bank. The fact that Faria may have been acting at the behest of TD Bank, and not Wells Fargo, did not create a triable issue of fact relevant to [the purchaser's] defense of payment…"*

U.S. Bank, N.A. v. Zaccagnino, 2023 NY Slip Op 01208, decided March 8, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01208.htm.

Pandemic/Impossibility of Performance

In an action to recover unpaid rent, the Defendant-tenant asserted that performance of the lease was not possible due to pandemic-related regulations. The lease provided for an abatement of rent while the tenant was "prevented from conducting its business in the demised premises by…Governmental Authority." The Appellate Division, First Department, affirmed the Supreme Court, New York County's entry of a default judgment against the Defendant and its denial of the Defendant's cross-motion to vacate the Defendant's default. According to the Appellate Division,

"…defendant's principal did not aver in his affidavit that defendant's businesss was shut down due to pandemic-related executive orders; he claimed only that its revenues decreased significantly. Further, it is undisputed that defendant did not resume paying rent even after the governmental restrictions were lifted. Because defendant was able to continue operations, albeit in a limited capacity, its performance of the lease was not rendered impossible by the pandemic-related regulations [citations omitted]. For similar reasons, the court also rejected defendant's frustration of purpose defense [citation omitted]."

902 Associates v. Union Square 902 Suites, 2023 NY Slip Op 01734, decided March 30, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01734.htm.

Pandemic/Lease Guarantees

In Melendez v. The City of New York (20-CV-5301), Judge Ronnie Abrams of the United States Federal District Court for the Southern District of New York held that New York City's Local Law No. 55-2020, known generally as the "Guaranty Law", which added Section 22-1005, ("Personal liability provisions in commercial leases") to New York City's Administrative Code, violates the Contracts Clause of the United States Constitution. According to the Court, "the Law violates the Contracts Clause by rendering the guaranty clauses in Plaintiffs' commercial leases unenforceable for unpaid rent during the covered period, March 7, 2020 and June 30, 2021, and that Plaintiffs are entitled to summary judgment."

The Guaranty Law provides, in part, that "[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."

Judge Abrams' Opinion and Order, dated March 31, 2023, can be found at 2023 U.S. LEXIS 57050.

Pre-Judgment Attachment

The Plaintiff, seeking a judgment for damages allegedly sustained at its property by renovations being undertaken at a Defendant's adjoining property, moved for a pre-judgment attachment of the Defendant's property pursuant to subsection 3 of CPLR Section 6201 ("Grounds for attachment"). Under CPRL Section 6201(3), an order of attachment may be granted when "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts…" The Supreme Court, Kings County, denied the motion. According to the Court,

> *"[w]here an attachment is sought pursuant to CPLR 6201(3), the plaintiff must demonstrate that the defendant has concealed or is about to conceal property in one or more of several enumerated ways, and has acted or will act with the intent to defraud creditors or to frustrate the enforcement of a judgment that might rendered in favor of the plaintiff [citation omitted]. Affidavits containing allegations raising a mere suspicion of an intent to defraud are insufficient…No evidence was submitted that the [Defendant's] building is under foreclosure. None of Plaintiff's assertions establish conclusively that [the Defendant property owner or its principal] intend to defraud their creditors, frustrate the enforcement of a potential judgment in Plaintiff's favor, or assign, dispose of, encumber, secret [sic], or remove property. The fact that [the Defendant's building] is undergoing renovation may actually enhance the value of the building so as to be able to satisfy a judgment."*

St. John's Capital Corp. v. 1365-1369 St. Johns Place LLC, 2023 NY Slip Op 50215, decided March 20, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_50215.htm.

Real Property Tax Law ("RPTL")/Notices

Under RPTL Section 1125 ("Personal notice of commencement of foreclosure proceeding"), notices of a proceeding to foreclose delinquent real estate taxes is to be mailed to "each owner and any other person" with an interest in the property of record "which right, title or interest will be affected by the termination of the redemption period, and whose name and address are reasonably ascertainable from the public record." Further, under RPTL Section 1125(1)(b) ("Notification method"),

> *"(i)Such notice shall be sent to each such party both by certified mail and ordinary first class mail…The notice shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States postal service within forty-five days after being mailed. In that event, the enforcing officer or his or her agent shall attempt to obtain an alternative mailing address from the United States postal service…"*

The Plaintiff in James B. Nutter & Company v. County of Saratoga, 2023 NY Slip Op 01469, decided March 21, 2023, the holder of a mortgage on the property affected by the tax foreclosure, claimed that it had not received notice of the tax foreclosure and sought to have vacated the default judgment in the tax foreclosure, the deed conveying the property to the County and the subsequent conveyances of the property. The Appellate Division, Third Department, affirmed the dismissal of the complaint by the Supreme Court, Saratoga County, because the County had established that notice had been mailed to the Plaintiff as required by the statute and that no notices were returned. New York's Court of Appeals reversed the Appellate Division's Order and remitted the case to the Appellate Division,

New York's Court of Appeals held that "an interested party [here the foreclosing Plaintiff] is permitted to establish that a taxing authority failed to comply with the notice requirements set forth in RPTL 1125(1)(b), even when the taxing authority submits proof that notice that was allegedly sent by both certified and first class mail is not returned", provided that the statute of limitations had not expired.

According to the Court of Appeals,

> *"Reading RPTL 1125 ["Personal notice of commencement of foreclosure proceeding"], 1134 ["Presumption of validity"] and 1137 ["Statute of limitations"] together reinforces the conclusion that compliance with the statutory mailing requirements may be challenged during the two-year period following the recording of the deed after the tax sale (id Section 1137) even if the taxing authority has submitted the required affidavits of mailing (id. Section 1125[3][a]) and evidence that the mailings were not returned (id. Section 1125 [1][b][i])…[and]…an interested party is permitted to establish that a taxing authority failed to comply with the notice requirements set forth in RPTL 1125 (1)(b)…"*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01469.htm.

Restrictive Covenants

A Declaration of Restrictions affecting a subdivision, which includes parcels of land owned by each of the Plaintiff and the Defendants improved by single-family homes, requires that the properties in the subdivision "shall be used only for single family residential purposes" and shall not be used for commercial activity. The restriction ran with the land and was set forth in the deeds out of the common grantor and in all subsequent deeds.

The Declaration allows for an owner to rent out its property. However, the Plaintiff's use of its parcel was for "ongoing, short-term rentals of its property that appear to range in duration from a weekend to a couple of weeks." Among other issues presented, the Supreme Court, Warren County, ruled on whether that use of the Plaintiff's property was consistent with the restriction. (Causes of action raised by the Plaintiff and other counterclaims of the Defendant were not ruled upon in this decision).

Noting that "…the court's research confirms a dearth of authority in New York State on the construction to be given to the phrase 'single family residential purposes' when such appears in a deed covenant or restrictive declaration affecting property", the Court ruled in favor of the Defendants, holding that the Plaintiff's use of its property "for ongoing, repeated, short-term rentals to transient tenants is in violation of the restrictive covenants in its deed and the declaration of restrictions that burdens the property…" The Court enjoined the Plaintiff from continuing that use of its property.

The Court referenced a decision of the Appellate Division, Third Department, which held that "[t]ransient living…falls outside the scope of a single-family residential use…"

West Mountain Assets LLC v. Dobkowski, 2023 NY Slip Op 23064, decided March 7, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_23064.htm.

Transfer Tax/Peconic Bay Region Community Preservation Fund

As reported in Current Developments, the Peconic Bay Transfer Tax was increased to 2% of consideration effective April 1, 2023 in the Towns of East Hampton, Shelter Island, Southampton and Southold (not in the Town of Riverhead). "Allowances", that reduce the amount of taxable consideration, were also modified and, in some cases eliminated, effective April 1, 2023. The increased rate does 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."

A notice issued by the office of the Suffolk County Clerk on March 27, 2023 on "CPF [Community Preservation Fund] Tax Rate & Allowance Changes" states, in part, the following:

> *"Where a contract for the sale of property was entered into prior to April 1, 2023 but the deed will be recorded on or after April 1, 2023, the parties may elect to utilize the old allowances and 2% rate by attaching a copy of the sales contract dated prior to April 1, 2023 with the CPF form when recording. [Underlining added]*
>
> *"If you are using the old rate for transactions that have commenced prior to April 1, we ask that you continue to use the old CPF form. For transactions after April 1 where the new rate is used we ask that you begin to use the new form."*

Michael J. Berey
Current Developments since 1997
No. 233
May 3, 2023

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