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Current Developments

First American Title National Commercial Services

By Michael J. Berey
Senior Underwriter

Adjoining Owners/Trespass

The Plaintiffs and the Defendants own adjoining homes. A staircase is located on both properties and the properties have been separated by a metal railing and a non-weightbearing wall with columns. The Plaintiffs alleged that the Defendants installed a gate with a lock at the bottom of the staircase, removed the railing and built a wall on top of the existing wall. The Plaintiffs sought to have the Defendants ejected from the Plaintiffs' property and to recover damages for trespass, unjust enrichment and assault, alleging that the Defendants and their agents threatened violence if the Plaintiffs came near the gate. The Supreme Court, Richmond County, granted the Defendants' motion to dismiss the complaint, holding that the Plaintiffs had not established prima facie their record ownership, which is required to recover damages for trespass. According to the Court,

> *"[p]laintiffs inclusion of a 2014 survey…is insufficient to support the Plaintiffs' claim of title to the disputed property because it is not a deed…Plaintiffs must present evidence of an ownership interest in the disputed property by means of a deed and current land survey, to properly plead and show standing to bring an action in trespass…The only document provided is a survey that is almost ten years old. A deed is legal evidence of title and provides the metes and bounds of a specific piece of property, in a Schedule A. Plaintiffs failed to establish that they are entitled to possess the property in the alley. This is a fatal error in a Trespass action."*

Noel v. Lorrius, 2023 NY Slip Op 50348, decided April 18, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_50348.htm.

Adverse Possession/Easements

The owners of adjoining homes use a common driveway to access their garages. The dividing line between their parcels runs along the entire length of the driveway. Seven feet of the driveway's width is within the Plaintiffs' property; the remaining 10 feet of the driveway's width is withing the Defendants' property. There is no written agreement as to the use of the driveway. The Plaintiffs asserted that they had a right to use the part of the driveway within the Defendants' property based on their claim of having an easement by prescription or an easement by necessity.

In addition, the Plaintiffs had installed a fence in a space between the garages which encroached approximately five inches onto the Defendants' property; the Plaintiffs claimed that they had title to that five-inch strip by adverse possession. The Defendants asserted a counterclaim to compel the Defendants to remove the fence.

The Supreme Court, Kings County, held that the Plaintiffs had neither title to the five-inch strip by adverse possession or an easement by prescription. The Appellate Division, Second Department, affirmed the lower court's Order and remitted the matter for entry of a judgment declaring that the Plaintiffs did not have an easement by prescription or necessity and did not acquire title to the five-inch strip by adverse possession.

As to the claim of adverse possession, applying Real Property Actions and Proceedings Law ("RPAPL") Article 5 ("Adverse possession") prior to its being amended in 2008, the Appellate Division found that the fence was not a substantial enclosure and the five-inch strip was not usually cultivated or improved. Under Article 5, "… where, as here, the adverse possession is not founded upon a written instrument, the possessor must also establish, in accordance with the law in effect at the relevant time, 'that the disputed property was either 'usually cultivated or improved' or 'protected by a substantial inclosure' [citation omitted]."

As to the claim of a prescriptive easement, according to the Appellate Division, "[e]ven if the plaintiffs established that their use of the driveway on the defendants' property was open and notorious, and continuous, the defendants demonstrated that they permitted such use because…they preferred to be 'good, accommodating neighbors'."

Lastly, as to the claim of an easement by necessity, according to the Appellate Division, "courts have repeatedly rejected claims to an easement by necessity over a driveway where the 'sole claimed 'necessity' for the easement is the 'need' to access off-street parking,' as '[t]hat purported need is nothing more than a mere convenience' [citations omitted]." Bolognese v. Bantis, 2023 NY Slip Op 01771, decided April 5, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01771.htm.

Condominiums/Common Elements/Easements

A condominium unit owner claimed that the Board of Managers improperly sold, in the form of an easement, four thousand square feet of rights to the roof of the building. The roof is a common element of the condominium. The Supreme Court, New York County, dismissed the complaint, holding that the Plaintiff had failed to state a claim. First, the Court found that the Plaintiff lacked standing; under New York law, individual unit owners are unable to sue for injury to common elements and the Plaintiff could not maintain a derivative action on the condominium's behalf because the complaint did not "plead with particularity the reasons why a demand upon the Board would have been futile, and therefore excused due to futility." Second, the Board's decision was protected under the business judgment rule. Lastly, the Court found that the Board members could not be personally liable "because they have not acted in bad faith or displayed willful misconduct" [citation omitted]. Kazoku, LLC. v. Board of Managers of the Museum Building and Condominium, 2023 N.Y. Misc. LEXIS 1322, 2023 NY Slip Op 30932, decided March 22, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_30932.pdf.

Contracts of Sale/Estoppels

The Supreme Court, New York County, granted the Plaintiff-purchaser's motion for summary judgment, holding that the Plaintiff was entitled to the return of its contract deposit because the Defendant-seller had not provided tenant estoppel certificates in the form required by multiple contracts of sale between the parties which contemplated simultaneous closings. The estoppel certificates were required to include a certification that "[n]either Tenant nor Owner-Landlord is in breach or default under the Lease…" The Appellate Division, First Department, affirmed the lower court's ruling. According to the Appellate Division, "[t]he seller estoppel certificates stated that the owner-landlord was not in default under the lease, but…omitted the language that the tenants were not in breach or default of the lease." Therefore, the Defendants had "breached a material obligation under the PSAs, by failing to provide estoppel certificates conforming to the requirements of the PSAs [citations omitted]". Angelo Gordon Real Estate Inc. v. Benlab Realty, LLC, 2023 NY Slip Op 02377, decided May 4, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02377.htm.

Cooperatives/Roof Rights

On March 3, 2023, a cooperative corporation's board of directors amended the by-laws of the corporation to reduce percentage of outstanding shares in the corporation required to approve a sale or transfer of roof space from 100% to 51%. The Plaintiff, the owner of a cooperative unit in the building, sought a preliminary injunction enjoining the board from holding a special meeting to approve the extension of a 2001 lease allowing a penthouse unit owner to use approximately 24% of the building's roof. On March 22, 2023, at a special meeting, 53.5% of the outstanding shares voted to extend the Plaintiff's lease. The Plaintiff sought a declaratory judgment rendering the by-laws amendment void and holding that the by-law provision and roof rights could not be changed without 100% shareholder approval. The Supreme Court, New York County, denied the Plaintiff's motion for an injunction.

According to the Court, the Plaintiff had not shown a likelihood of success on the merits; the Board acted as authorized by the by-laws and proprietary leases. Second, the Plaintiff had not shown that he would suffer any irreparable injury absent an injunction; the extension of the roof lease maintained the status quo. Lastly, the balance of the equities favored the Defendants, the cooperative corporation, the Board of Directors, and the penthouse unit owner. According to the Court,

> *"[t]he roof lease has been in effect for over two decades and nothing in the record indicates that the lease has been problematic for the Building…Moreover, an extension of the lease will result in a monetary payment to the Building that benefits its maintenance and operation. In contrast, plaintiff fails to show any specific and imminent harm that he or the Corporation would suffer as the result of the by-law's amendments or the extension of the roof lease."*

Schmidt v. Board of Directors of Duane Owners, Inc., 2023 NY Slip Op 31024, decided March 31, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31024.pdf.

Easements/Condominium Units

A declaration of condominium was amended in 2010 to reflect the subdivision of a commercial unit into four separate commercial units. The Plaintiff, which in 2011 acquired title to one of the resulting Units, Unit 4, alleged that a demising wall between Unit 4 and Sponsor owned Unit 2, which Unit 2 is leased to a tenant which is also a Defendant, was incorrectly placed, depriving the Plaintiff of the use of part of its property. The Plaintiff sought a declaration that the wall encroached onto its premises and an Order directing the Defendants, the Sponsor which owns Unit 2 and its tenant, to remove the encroachment.

The Supreme Court, New York County, granting the Sponsor's motion to dismiss the complaint as to it, held that Unit 2 had an easement over the Plaintiff's Unit 4, that the demising wall may remain in its present location, and that any encroachment onto Unit 4 may be maintained pursuant to the easement. The deed to the Defendants' Unit stated that it was taken "TOGETHER with an easement for the continuance of all encroachments by the Unit on any adjoining Units or Common Elements now existing as a result of the construction of rehabilitation of the Building", and Unit 4 was conveyed to the Plaintiff "SUBJECT to easements in favor of adjoining units… for the continuance of all encroachments of such adjoining units…now existing as a result of the construction or rehabilitation of the Building…so that any such encroachments may remain so long as the Building shall stand." DLK, LLC v. Kireland-B LLC, 2023 NY Slip Op 31160, decided April 13, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31160.pdf.

Home Equity Theft Prevention Act

The Home Equity Theft Prevention Act, Chapter 308 of the Laws of 2006 effective February 1, 2007, adding Section 265-a ("Home Equity Theft Prevention") to the Real Property Law ("RPL"). Section 265-a, applies when a natural person owning a one-to-four family home, occupied as his or her personal residence, when he or she is two or more months behind in mortgage payments or the property is being foreclosed, enters into an agreement (a "Covered Contract") to transfer title to an "Equity Purchaser" and the Covered Contract provides for the reconveyance of the property to the transferor. Among other provisions, RPL Section 265-a requires that the transferor be afforded a right to cancel the arrangement and there can be no transfer or encumbrance of the residence until midnight of the fifth business day after the date on which the Covered Contract is signed. A transaction in "material violation" of the requirements of Section 265-a is voidable and may be rescinded within two years of the recording of the conveyance to the "Equity Purchaser."

In Pelletier v. Morgan, 2023 NY Slip Op 02044, decided April 20, 2023, the Plaintiff took possession under a land installment contract executed in October 2017, and replaced in November 2017, providing for the payment of the purchase price in installments over twenty years, at the end of which period, assuming all payments were made, the property would be conveyed to the Plaintiff. The Plaintiff having missed several payments, the Plaintiff and the Defendants-sellers terminated the October 2017 contract and agreed that the Plaintiff would vacate the premises by June 30, 2019.

The Plaintiff, alleging violations of RPL Section 265-a sought the rescission of the agreement terminating the land contract and damages. The Appellate Division, Third Department, affirmed the denial by the Supreme Court, Tompkins County, of the Defendants' motion for partial summary judgment. According to the Appellate Division,

> *"[a]s the November 2017 land contract granted plaintiff equitable title and legal title in trust of the residential property, she was a 'property owner or homeowner at the time' of the 2019 termination agreement and an equity seller [citations omitted], while the efforts of [the Defendants] to terminate that agreement and recover her ownership interest rendered them equity purchasers [citation omitted]…It follows from [the Plaintiff's default in making payments 'for two months or more'], in conjunction with the fact that the 2019 termination agreement seemingly contemplated a cancellation of the November 2017 land contract that would result in the reconveyance of plaintiff's 'legal or equitable title to all or part of the property' to [the Defendants], that the 2019 termination agreement constituted a covered contract to which the protections of Real Property Law Section 265-a applied [citations omitted]."*

The Defendants had not shown, on their motion for summary judgment, that RPL Section 265-a did not apply to the 2019 agreement terminating the land contract. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02044.htm.

Husband and Wife/Separation Agreement

Pursuant to a 1998 separation agreement, incorporated into a judgment of divorce, the husband conveyed the marital residence to his wife who, in turn, agreed to pay him $75,000. If the wife later resold the home, the husband had a right of first refusal to purchase the property for one-half of its fair market value "less the balance owed to him on the wife's initial purchase price from him of $75,000." If the husband chose not to buy the house, the wife was to give the husband one half of the selling price, reduced by $75,000 or whatever portion of that amount that had been paid. In 2017 the wife sold the property. The Executor and Administrator of the husband's estate sued to recover 50% of the proceeds from the sale less $75,000, which had previously been paid.

The wife contended that under the settlement agreement the fifty-fifty split of sale proceeds applied only if a sale took place before the $75,000 was paid. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment. According to the Court, "…defendant's obligations under the settlement agreement did not end upon her payment to decedent of the full $75,000 because defendant subsequently decided to sell the house thereby triggering the provision obligating her to pay decedent half of the purchase price she received for the house." Gollub v. Gollub, 2023 NY Slip Op 31220, decided April 18, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31220.pdf.

Lien Law/Equitable Lien

A mechanic's lien, filed claiming monies were owed for the making of improvements was discharged by the Supreme Court, Richmond County; the lien had not been foreclosed or extended as required by the Lien Law. The Plaintiff then sought recovery under the theory that there was an equitable lien, as well as under causes of action for breach of contract and quantum meruit. The Supreme Court, Richmond County, granted the Defendant's motion to dismiss the cause of action for an equitable lien, with prejudice and without leave to replead. According to the Court, in order to establish an equitable lien

> *"'[an] agreement must deal with some particular property either by identifying it or by so describing it that it can be identified and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for the obligation.' [citation omitted]. A plaintiff asserting a cause of action for an equitable lien must plead facts suggesting that such an agreement existed. The alleged contract between the parties merely lists work to be performed with no reference to the property serving as security for payment."*

Imperial Building & Restoration Inc. v. Lin-Abcede, 2023 NY Slip Op 50388, decided April 27, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_50388.htm.

Lien Law/Payment to General Contractor

The Appellate Division, First Department, vacated entry of a judgment in favor of the Plaintiff, a materialman foreclosing its filed mechanic's lien, and dismissed the complaint, as it was not shown that money was owed to the general contractor. According to the Appellate Division, "defendants were entitled to a directed verdict dismissing the lien foreclosure claim...Without a showing that the property owner owed and money to the [Defendant-general contractor] when the lien was filed, there was nothing to which the lien could attach. [citations omitted]" In Kamco Supply Corp. v. Nastasi & Associates, 2023 NY Slip Op 02459, decided May 9, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02459.htm.

Lien Law/Surety Bond

In Kronick v. RP Wimbledon Owner LLC, 2023 NY Slip Op 31188, decided April 5, 2023, the Supreme Court, New York County, discharged a mechanic's lien because it had expired pursuant to Lien Law Section 17 ("Duration of lien") before an action was commenced to foreclose the lien. The Court also dismissed causes of action to foreclose on the lien and to recover under the surety bond filed in connection with the lien. According to the Court, "…the surety bond is discharged because this lien foreclosure is untimely." However, causes of action for breach of contract, unjust enrichment, quantum meruit and an account stated, not affected by the expiration of the mechanic's lien, remained. This decision is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31188.pdf.

Mortgage Foreclosures/Appointment of Receiver

Under paragraph 10 ("Mortgagee entitled to appointment of receiver") of RPL Section 254 ("Construction of clauses and covenants in mortgages…") "[a] covenant 'that the holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver,' must be construed as meaning that the mortgagee…in any action to foreclose the mortgage, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage…"

A mortgage being foreclosed provided that in the event of a default the mortgagee had the right to "apply for the appointment of a…receiver…without notice and without request for the adequacy of the security for the Debt and without regard for the solvency of the Mortgagor, or of any person, party or entity liable for payment of the Debt…"

The Supreme Court, New York County, granted the foreclosing Plaintiff's motion for the appointment of a temporary receiver. According to the Court,

> *"…Appellate Division cases are clear that where, as here, the mortgage contains a provision that a lender may 'without notice and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower', under RPL Section 254[10], that provision denotes that a mortgagee may apply for a receiver 'regardless of proving the necessity for the appointment' [citations omitted]."*

The Court noted that cases regarding the circumstances necessary for a receiver to be appointed deal with instances in which there is no express agreement that a receiver can be appointed. In 50 West 91st Street Funding, LLC v. 50W91 LLC, 2023 NY Slip Op 31084, decided April 4, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31084.pdf.

Mortgage Foreclosures/CPLR Sections 205(a) and 205-a

Under subsection (a) ("New action by plaintiff") of Civil Practice Law and Rules {"CPLR") Section 205 ("Termination of action"), "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff…may commence a new action upon the same transaction or occurrence…within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period…"

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 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. Coleman, 2023 NY Slip Op 01914, decided April 12, 2023, the first action to foreclose a mortgage was commenced in 2009 and dismissed in 2011. A second action was commenced in 2013 and dismissed on April 3, 2017. On March 30, 2018, the Supreme Court, Westchester County, granted the Plaintiff's motion to clarify an Order which had denied the Plaintiff's motion for leave to reargue the 2017 Order.

In the third, current action to foreclose the mortgage, the Defendant's motion for summary judgment to dismiss this foreclosure as time-barred was granted by the Supreme Court, which found that the six-month limitations period began to run on March 30, 2018; the third foreclosure, commenced October 11, 2018, was brought more than six months from the date of the March 30, 2018 Order. The Appellate Division, Second Department, reversed the lower court's Order, and granted the Plaintiff's motion for summary judgment and for an order of reference. According to the Appellate Division,

> *"…the six-month limitations period did not begin to run on March 30, 2018. For purposes of CPLR 205-a or CPLR 205(a), the March 30, 2018 order was ministerial in nature because, among other reasons, the complaint in the 2013 action had already been dismissed pursuant to the April 3, 2017 order and had never been reinstated [citations omitted]. Accordingly, the 2013 action was terminated for CPLR 205-a or for CPLR 205(a) purposes on November 11, 2018, six months after the plaintiff's appeal as of right from the April 3, 2017 order was exhausted [citation omitted]. As the plaintiff commenced this action on October 11, 2018, and service was completed on October 22, 2018, this instant action is timely."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01914.htm.

Mortgage Foreclosures/Judgment of Sale

RPAPL Section 1351 ("Judgment of sale") states that a foreclosure sale shall take place "within ninety days of the date of the judgment" of foreclosure and sale. In Bank of America, N.A. v. Cord, 2023 NY Slip Op 01655, decided March 29, 2023, the Appellate Division, Second Department, affirmed the Supreme Court, Dutchess County's denial of the Defendant's motion to vacate the notice of sale because the notice of sale was issued two years after entry of the foreclosure judgment. The lower court also granted the Plaintiff's cross-motion for an extension of time in which to hold the foreclosure sale. According to the Appellate Division,

> *"[t]he Supreme Court determined that the delay, due to the defendant's prior appeal from the judgment of foreclosure and sale and a motion by the referee for supplemental fees, was reasonable and that the plaintiff demonstrated good cause for an extension of time in which to hold the foreclosure sale of the property. The court also found that the defendant failed to establish that the delay caused any prejudice to him. The court's findings are supported by the record…"*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01655.htm.

Mortgage Foreclosures/Lost Note

In Wells Fargo Bank, N.A. v. Chrysostom, 2023 NY Slip Op 50248, decided March 30, 2023, the Supreme Court, Queens County, denied the Plaintiff's motion for an Order substituting a purported assignee as Plaintiff, granting the Plaintiff summary judgment and an Order of Reference. The Court found that the Plaintiff had not established, prima facie, that it possessed the note when the foreclosure was commenced. The lost note affidavit, submitted by an authorized representative of the Plaintiff's assignee, was, under Uniform Commercial Code Section 3-804 ("Lost, destroyed or stolen instruments"), not sufficient. UCC Section 3-804 states, in part, that "[t]he owner of an instrument which is lost…may maintain an action…upon due proof of his ownership, the facts which prevent his production of the instrument and its terms."

The affidavit stated that the note had been lost or misplaced. However, according to the Court, "…plaintiff failed to present due proof of its ownership of the note, the facts which prevent production of the note and its terms [citation omitted]. [The] lost note affidavit…did not identify who conducted the search, the date the note was lost, or explain the circumstances under which the note was lost [citation omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_50248.htm.

Mortgage Foreclosures/RPAPL Section 1304 Notice

The Supreme Court, Suffolk County's grant of a judgment of foreclosure and sale was reversed by the Appellate Division for the failure to provide the RPAPL Section 1304 notice to a mortgagor who had not executed the note secured by the mortgage. According to the Appellate Division, the Defendant who had executed the mortgage but not the note

> *"…was entitled to such notice as a 'borrower' within the meaning of [RPAPL Section 1304]. Although [he] did not sign the note, the plaintiff conceded that both of the defendants were title owners of the subject property and both executed the mortgage as a 'borrower'. 'Where, as here, a homeowner defendant is referred to as a 'borrower' in the mortgage instrument and, in that capacity, agrees to pay amounts due under the note, that defendant is a 'borrower' for the purposes of RPAPL 1304, notwithstanding…any ambiguity created by a provision in the mortgage instrument to the effect that parties who did not sign the underlying note are not personally obligated to pay the sums secured' [citations omitted]."*

HSBC Bank USA, N.A. v. Kalenborn, 2023 NY Slip Op 02109, decided April 26, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02109.htm.

Mortgage Foreclosures/Surplus Monies/Judgment Creditor

A referee's deed was delivered to the successful bidder at a foreclosure sale on or about January 29, 2020. A judgment creditor, whose judgment was docketed on June 29, 2022 against the Defendant who had owned the property, filed a claim against the surplus funds resulting from the foreclosure sale. The Supreme Court, Kings County, held that the prior owner had made a showing prima facie that he was entitled to the surplus. According to the Court,

> *"…it is well-settled that a judgment will not constitute a lien enforceable against the surplus funds derived from a foreclosure sale unless it was docketed prior to the delivery of the Referee's deed to the purchaser [citations omitted]. The judgment…was not issued until more than two years after the Referee's deed was delivered and, thus, is not directly enforceable as a lien against the surplus funds."*

Wells Fargo Bank, N.A. v. Gooding. 2023 NY Slip Op 31064, decided March 27, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31064.pdf.

Mortgage Foreclosures/Standing/Statute of Limitations

An action commenced in 2009 to foreclose a mortgage held by IndyMac Bank, F.S.B. was dismissed in 2012 because IndyMac, having ceased to exist before the foreclosure was commenced, lacked standing. The FDIC, as receiver, then assigned the mortgage to Defendant Deutsche Bank National Trust Company. The Plaintiffs, who had obtained title to the property in 2018, commenced an action under Section 1501 ("Who may maintain an action") of RPAPL Article 15 ("Action to compel the determination of a claim to real property"), seeking to have the mortgage cancelled and discharged of record. The Plaintiffs argued that since the indebtedness was accelerated in the foreclosure, the statute of limitations to foreclose the mortgage had expired. Deutsche Bank moved to dismiss the complaint. The Supreme Court, Kings County's grant of the Defendant's motion to dismiss was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"…the debt was not accelerated by the commencement of the 2009 foreclosure action, as the plaintiffs herein alleged. Although the complaint in the 2009 foreclosure action expressly 'elect[ed] to call due the entire amount secured by the mortgage,' IndyMac Fed was found to lack standing in that action, and thus, did not have the authority to accelerate the debt at that time [citations omitted]."*

Reinman v. Deutsche Bank National Trust Company, 2023 NY Slip Op 01813, decided April 5, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01813.htm.

Mortgages/Expunging Satisfaction

Mortgages were consolidated into a single lien by an agreement entered into on October 10, 2000 by the Defendant property owners and Superior Bank FSB. On October 24, 2000, the consolidated mortgage were transferred to U.S. Bank, N.A. On October 17, 2001, Alliance Funding Company, a division of Superior Bank which had originally held the first mortgage before consolidation and the note it secured executed a satisfaction of that mortgage. U.S. Bank commenced an action to expunge the satisfaction. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Queens County, which had expunged the satisfaction of mortgage. According to the Appellate Division,

> *"[t]he satisfaction of mortgage executed and recorded by Alliance was void at its inception since Alliance had no interest in the mortgage it purported to discharge [citations omitted]. [Further,] '[s]ince a statute of limitations cannot validate what is void at its inception,' the statute of limitations cannot act as a bar to an action to expunge a void satisfaction of mortgage [citations omitted]."*

U.S. Bank National Association v Sallie, 2023 NY Slip Op 01817, decided April 5, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01817.htm.

Nassau County/Recording Fees

Affirming a ruling of the Supreme Court, Nassau County granting the Plaintiff's motion for summary judgment on the cause of action seeking declaratory relief, the Appellate Division, Second Department, held that the fees charged by the Nassau County Clerk pursuant to Nassau County Administrative Code Section 6-33.0 ("Verification of section, block and lot information") to verify the tax lots of property being conveyed to record "deeds, mortgages or satisfactions, or any modifications or consolidations of the foregoing" were "excessive and improper." The Plaintiff was charged $450 to obtain two tax map certification letters to record a deed conveying property to him and a mortgage. According to the Appellate Division, referencing a 2017 decision of the Second Department holding that "'[f]ees cannot be charged to generate revenue or to offset the cost of other governmental functions [citations omitted]'",

> *"…the plaintiff established, prima facie, that the fees imposed…were excessive and improper, as they were enacted for general revenue purposes and not tied to the County's obligation to maintain its property registry [citations omitted]."*

Falk v. Nassau County, 2023 NY Slip Op 01983, decided April 19, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_01983.htm.

Right of First Refusal/Tax Sales

A right of first refusal ("ROFR"), enabling the Plaintiffs to purchase 145 acres of land if there was an offer to purchase the property, was recorded in the County Clerk's office in 2016. In 2019 the land was sold at a county tax foreclosure sale to Defendant Thomas Kirik. The Plaintiffs did not receive notice of the tax foreclosure sale.

The Plaintiffs claimed (i) that the foreclosure sale triggered the ROFR and thus they could purchase the property from Kirik for the amount of his successful bid; (2) that Kirik could not sell the property without honoring the ROFR; and (3) that the tax sale should be invalidated because the "notice by request" provision of the Monroe County Tax Foreclosure Act, requiring the holder of an interest in property to file a notice with the County Director of Finance to receive notice of any foreclosure proceedings violated due process.

The Supreme Court, Monroe County, held that the tax foreclosure sale did not trigger the Plaintiffs' rights under the ROFR and that Kirik was not bound to later offer the property to the Plaintiffs if it was to be re-sold; the ROFR did not "touch and concern" the land since it did not affect Kirik's use of the land or substantially affect its value, which is required, according to the Court, to find that a covenant runs with the land.

However, the Court ruled that the Plaintiffs, beneficiaries of the recorded ROFR, "were entitled to advance written notice of the foreclosure sale." Under Real Property Tax Law Section 1125 ("Personal notice of commencement of foreclosure proceeding"), personal notice of a tax foreclosure proceeding is to be afforded "each owner and any other person whose right, title, or interest was a matter of public record..." Further, under Chapter 635-1 Section 15 of the Monroe County Code, even when a person does not file notice of an interest in real property with the County Director of Finance, notice is to be given to a person having a claim to the real property at that person's last known address as it "appears upon the current tax rolls or the records in the office of the director of finance…" The addresses of the Plaintiffs, the owners of property adjacent to the land subject to the ROFR, "were in the tax rolls, as well as on the ROFR…"

As the Plaintiffs had not been afforded due process, the Court vacated the sale, set aside the referee's deed and ordered the County to hold a new sale. Wilmot v. Kirik, 2021 NY Slip Op 51313, decided October 22, 2021, was posted on April 14, 2023 by the New York State Slip Opinion Service at https://www.nycourts.gov/reporter/3dseries/2021/2021_51313.htm.

Tax Lien Foreclosure/Notices

In the foreclosure of a tax lien, one of the owners of a property being foreclosed sought to have the judgment of foreclosure vacated, claiming that she did not receive notice of the proceeding. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Westchester County, denying her motion to vacate. The Appellate Division noted that the notice sent by certified mail was returned bearing the notation "Return to Sender-Refused" and the notice sent by first class mail was not returned. "Under the circumstances, the means of notice employed by the City [of New Rochelle] were 'reasonably calculated…to apprise interested parties of the pendency of the [proceeding] and afford them an opportunity to present their objections' [citation omitted]."

Further, according to the Appellate Division, "an approval letter for a loan to cover the tax delinquency was issued on March 6, 2019, and listed [both owners of the property] as the borrowers." Some action having been taken to redeem the property, "she cannot now complain that she did not have notice of the foreclosure proceeding [citation omitted]." Matter of Foreclosure of Tax Liens, 2023 NY Slip Op 02310, decided May 3, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02310.htm.

Title Insurance/Common Law Indemnification

A policy of title insurance was issued to Wells Fargo, the holder of a second mortgage that was named as a defendant in an action to foreclose the first mortgage. The title insurer assumed Wells Fargo's defense in the foreclosure and paid $131,500 for an assignment of the first mortgage and the note secured by the first mortgage. Allegedly, the Defendant, the mortgagor as to both mortgages, defaulted in making payments due under the second mortgage.

The title insurer sought to recover the amount it paid to settle the foreclosure on behalf of its insured on the theory of common law indemnification. The Supreme Court, New York County, held that the mortgagor did not have a common law indemnity obligation. According to the Court,

> *"[t]he 'key element of a common-law cause of action for indemnification…is a separate duty owned the indemnitee by the indemnitor' [citation omitted]. [The plaintiff] does not explain why a mortgagor on Senior Mortgage 1 would owe a duty arising from that mortgage to the title insurer of the mortgagee on Junior Mortgage 2, such that the mortgagor's failure to make payments on Senior Mortgage 1 would be a breach of duty requiring the mortgagor to indemnify the title insurer on Junior Mortgage 2."*

In addition, for a claim based on common law indemnification it must be established that the party seeking indemnity was not negligent. The Plaintiff did not attempt to show that it was free of negligence. Chicago Title Insurance Company v. Valembrun, 2023 NY Slip Op 50326, decided April 11, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_50326.htm.

Uniform Commercial Code/Reverse Mortgages –

In Bank of New York Mellon Trust Company, N.A. v. Hendrickson, 2023 NY Slip Op 23093, decided March 31, 2023, the Supreme Court, Rockland County, dismissed an action to foreclose a Home Equity Conversion Mortgage securing a Home Equity Conversion Adjustable Rate Note, holding that the foreclosing Plaintiff, not having complied with the requirements of subsection (b) ("Enforceability") of Uniform Commercial Code Section 9-203 ("Attachment and enforceability of security interest…"), lacked standing. Although the Plaintiff argued that since it possessed the note endorsed in blank it had standing, the Court noted that the parties had agreed that the reverse mortgage agreement in question could be categorized as a "cash account". According to the Court,

> *"…a cash account agreement does not constitute a negotiable instrument within the meaning of UCC Section 3-104 ("Negotiable instrument"). Therefore, Plaintiff must do more than prove it possessed the Note at the time of commencement to establish standing...UCC Section 9-203(b) provides the applicable standard to establish standing to enforce a non-negotiable instrument such as the Note. Defendant has established that Plaintiff is unable to satisfy that standard. Indeed, Plaintiff admitted as much by admitting that it has no security agreement or assignment of the note."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_23093.htm.

Michael J. Berey
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