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NATIONAL COMMERCIAL SERVICES

Current Developments

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Attachment

Under Civil Practice Laws and Rules ("CPLR") Section 6201 ("Grounds for attachment"), an order of attachment may be granted "where the plaintiff has demanded and would be entitled…to a money judgment against one or more defendants, when…3. 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…" Under CPLR Section 6211 ("Order of attachment without notice"), an order of attachment, directing the sheriff to levy upon property in which the defendant has an interest as will satisfy the amount specified in the order, may be granted without notice, provided that within five days after the date of the levy the plaintiff moves for an order confirming the attachment. Rule 64 ("Seizing a person or property") of the Federal Rules of Civil Procedure authorizes a federal court, applying remedies available under the law of the state in which the court is located, to seize property to secure satisfaction of a potential judgment.

In 2003, Nicholas and his wife Alexandra obtained a mortgage loan on their property in Brooklyn. In April 2008, they transferred title to themselves and their daughter, Olga. In May 2008, Nicholas and Alexandra conveyed their interests in the property to Olga, who obtained a loan secured by a mortgage made to MERS, as nominee for Bank United. Proceeds of the Bank United loan were applied to satisfy the 2003 mortgage. The May 2008 deed was never recorded and the Bank United mortgage was recorded on May 28, 2013.

In March 2013, Defendants Nicholas, Alexandra and Olga, executed a deed transferring title to the Brooklyn property to the Carters for $354,000. Title appeared to be free and clear of any mortgages, since the 2003 mortgage had been satisfied and the 2008 mortgage had not been recorded. Following the closing, withdrawals totaling more than $100,000 were made from a bank account held jointly by Alexandra and Olga. On March 31, 2014, Plaintiff, the assignee of the 2008 mortgage, commenced an action in federal court to recover on the Bank United note and seeking damages for fraud, unjust enrichment and breach of the warranty of title. On August 1, the federal district court for the Eastern District of New York granted Plaintiff's ex parte application for an Order of Attachment to secure what was claimed to be due on the Bank United loan. The Suffolk County Sheriff levied upon real property owned by Nicholas and Alexandra in Dix Hills, and on August 7, 2014 Plaintiff filed a motion to confirm the Order.

No. 161. November 10, 2014

The District Court confirmed its Order of Attachment, finding that Defendants took steps to "dispose of, transfer or hide" proceeds from their sale of the Brooklyn property and that Plaintiff had "established a probability of success on the merits of, at least, their unjust enrichment claims in the full amount secured by the order of attachment…" Green Tree Servicing LLC v. Christodoulakis, decided October 28, 2014, is reported at 2014 WL 5475514.

Brokers

A small claims action was commenced by the purchaser of property in Staten Island against the broker which listed the property, to recover the purchaser's cost to install a new sewer line. The property was listed by the broker as being serviced by city sewers when there was only a septic tank. The Defendant-broker alleged that she relied on information provided by the seller; the seller gave a credit to the claimant at closing in lieu of completing a Property Condition Disclosure Statement. A Disclosure Statement, if executed, would have required the seller to make an affirmative representation as to the type of sewer system.

Justice Straniere of the Civil Court, Richmond County, awarded the claimant judgment for the expense incurred to connect the property into the City's sewer line. According to the Court, "…along with receiving a license, brokers and salespersons are charged with knowledge and responsibility to check the public records to confirm any information the broker is conveying to the potential purchasers." In this case, the "[d]efendant did not accurately list the facts concerning the existence of the septic system rather than city sewers and this induced the defendant to enter into the contract to [sic] and to purchase the premises." McDermott v. Related Assets, LLC, decided September 16, 2014, is reported at 45 Misc.3d 1205(A).

Eminent Domain

The owner of real property in the Town of Brookhaven filed a claim for damages due to the State's taking of a temporary easement ranging in depth from eight to sixteen feet along the owned parcel's frontage with State Route 112. The easement reserved to the claimant "the right of access and the right of using said property and such use shall not be further limited or restricted under this easement beyond that which is necessary to effectuate its purpose." The Court of Claims awarded the claimant damages based on the rental value of the land encompassed within the temporary easement, plus an amount for actual damages resulting from injury to that part of its land. The Court found that the entire property was not affected; access to the balance of the claimant's land was not significantly disrupted by the easement. The claimant, seeking consequential damages based on the rental value of the entire parcel, appealed. The Appellate Division, Second Department, affirmed the holding of the Court of Claims. The record was "devoid of any concrete evidence that the claimant suffered a significant economic injury to the entire parcel as a result of the temporary taking." Ronmar Realty Inc. v. State of New York, decided October 29, 2014, is reported at 2014 WL 5461511.

Foreclosures/Common Charge Liens

Real Property Law Section 339-z ("Lien for common charges"), part of the State's Condominium Act, provides that "[t]he Board of Managers, on behalf of the unit owners, shall have a lien on each unit for unpaid common charges thereof, together with interest thereon, prior to all other liens except…(iii) all sums unpaid on a first mortgage of record…"

In 2000, the owner of a condominium unit gave a first mortgage to Defendant Citibank, N.A. In 2001, the unit owner gave a second mortgage to Citibank, N.A. The first mortgage and the second mortgage were consolidated into a single lien. Approximately seven years later, the Condominium filed a common charge lien against the unit and then foreclosed on its lien. The winning bidder at the foreclosure sale brought an Action for a judgment that the second mortgage was subordinate to the common charge lien and that the second mortgage was extinguished pursuant to the judgment of foreclosure and sale. The Supreme Court, Richmond County, denied Plaintiff's motion for summary judgment and granted Defendant's cross-motion for summary judgment, ruling that the consolidated mortgage was a first mortgage entitled to priority under Real Property Law Section 339-z. The Appellate Division, Second Department, affirmed; "…Citibank's second mortgage comes within the ambit of the statutory priority accorded

to all sums unpaid on a first mortgage of record over a lien for unpaid common charges." Plotch v. Citibank, N.A., decided September 10, 2014, is reported at 992 N.Y.S. 2d 114.

Mortgage Foreclosures

The foreclosing Plaintiff moved for an Order of Reference. It also sought leave of court to reform the mortgage being foreclosed, to amend the complaint and the notice of pendency to correct a scrivener's error in the tax lot of the subject property, and to amend the caption of the Action to remove "John Does" and "Jane Does" from the Defendants listed. The Supreme Court, Kings County, denied the motion and, sua sponte, directed the dismissal of the complaint on the grounds that the Plaintiff's attorney had not filed an affirmation confirming the accuracy of the Plaintiff's pleadings, as required for a residential mortgage foreclosure by an Administrative Order issued by the Chief Administrative Judge of New York State on October 20, 2010.

The Appellate Division, Second Department, reversed and granted Plaintiff's motion. In support of its motion for an order of reference, Plaintiff submitted the note and mortgage, the complaint setting forth the facts of the claim, and an affidavit attesting to the default. None of the Defendants had opposed the request to reform the mortgage and to amend the complaint and notice of pendency to correct the scrivener's error. Further, there were no "John Does" or "Jane Does" occupying the premises. Lastly, Plaintiff's motion and order of reference were filed before the Administrative Order took effect. Wells Fargo Bank, NA v Ambrosov, decided September 10, 2014, is reported at 2014 WL 4435631.

Mortgage Foreclosures

In 2011, MERS, as nominee of Delta Funding Corporation ("Delta"), assigned two mortgages consolidated in 2007. The consolidation agreement recited that it consolidated two notes secured by the mortgages, one executed in 2006 and the other in 2007. A purported allonge, made to the order of the assignee and signed by a Vice President of Delta, accompanied but was not attached to a copy of the 2006 note. The assignee commenced an Action to foreclose the mortgage; it asserted that it possessed the original notes when the foreclosure was commenced.

Defendant raised as affirmative defenses Plaintiff's lack of standing to foreclose and Plaintiff's failure to serve the Defendant with the ninety day notice required by Real Property Actions and Proceedings Law Section 1304 ("Required prior notices") to be mailed to the borrower when a "legal action" is commenced to enforce a "home loan." Plaintiff moved for summary judgment and to have the Court strike Defendant's answer. The Supreme Court, Kings County, denied Plaintiff's motion and ordered the parties to appear at a preliminary conference.

The Court held that the assignment of the mortgages did not assign the notes, there was no evidence offered in admissible form that the notes were physically delivered to Plaintiff before the foreclosure was commenced, there was no evidence that Delta authorized the assignment of mortgage, the allonge was not firmly affixed to the 2006 note (as required by UCC Section 3-202(2)), and there was no evidence that the 2007 note was endorsed to the Plaintiff. The Plaintiff could not therefore establish that it had standing. Further, proof in admissible form was not provided that the ninety day notice was, in fact, mailed. HSBC Bank USA, N.A. v. Thomas, decided October 10, 2014, is reported at 2014 WL 5333474.

Mortgage Foreclosures

Plaintiffs, who were the Defendants-mortgagors in a mortgage foreclosure commenced in a New York State court, brought an Action in the federal district court for the Eastern District of New York seeking damages for alleged violations of the Fair Debt Collections Practices Act, 15 USC Section 1692, et seq. (the "FDCPA") and New York General Business Law Section 349 ("Deceptive acts and practices unlawful") (the "GBL"). Plaintiffs claimed that the foreclosing Defendant lacked the authority to foreclose because Defendant had not been assigned the note secured by the mortgage and because the State Court was not informed of the change in the mortgage servicer.

The District Court granted the Defendant's motion to dismiss, with prejudice "because any amendment by plaintiff

would be futile." The Court held that the FDCPA claims were barred by its statute of limitations as they were not, as required by the FDCPA, filed "within one year from the date on which the violation occurred." As to the claim under the GBL, Section 349 applies to "'acts or practices [which] have a broader impact on consumers at large'", and "this is a dispute that is unique to the parties involved…" DeJesus v. BAC Home Loans Servicing, LP, decided September 26, 2014, is reported at 2014 WL 4804999.

Mortgage Foreclosures/Res Judicata

Plaintiff Dupps was in arrears on her mortgage payments. She conveyed her land to Defendant Betancourt, allegedly on the understanding that Dupps would be able to repurchase the property. Betancourt took out a mortgage which went into default; the mortgagee obtained a judgment of foreclosure and sale. Betancourt and Dupps were named and served in the foreclosure but both defaulted. Dupps and a tenant at the property commenced an Action to set aside the transfer of the property to Betancourt and to vacate the judgment of foreclosure. The Supreme Court, Nassau County, dismissed the complaint on the ground of res judicata under Rule 3211 ("Motion to dismiss") of the CPLR. The Appellate Division, Second Department, affirmed. According to the Appellate Division, "…once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or seeking a different remedy." Dupps v. Betancourt, decided October 8, 2014, is reported at 2014 WL 5011101.

Mortgages/Prepayment

A purchase money mortgage for $305,000 to the seller, a corporation, was executed for part of the consideration on the June 2007 sale of real property in Haverstraw, Rockland County. The note and mortgage were simultaneously assigned to Plaintiff, the seller's principal. The note provided for the making of 240 equal installments until the note was fully paid on July 30, 2017. An amended note reduced the monthly amount and extended the final payment date to December 31, 2017. Defendants timely made all payments.

Although the note and the amended note contained no provision allowing for the prepayment of principal, in addition to paying the regular monthly payments required under the note, Defendants made extra payments of principal, alleged to be 49 additional payments totaling $60,022.55. Plaintiff negotiated each of those additional checks without objection. Defendants, applying the extra payments, contended that the loan was paid in full in December 2013.

Plaintiff claimed that Defendants still owed $62,203.25 and Plaintiff commenced an action for a declaration that the note had not been paid in full. He asserted that under New York law a mortgagor has no right to prepay unless there is a right to prepayment in the loan documents, Defendants counterclaimed for a declaration that the note and mortgage were paid in full, for the discharge of the mortgage, and for the cancellation of the notice of pendency. The Supreme Court, Rockland County, denied Plaintiff's motion for summary judgment and granted Defendants' cross-motion. Although execution of its Order was stayed for thirty days, the Court directed the County Clerk to discharge the mortgage and any recorded modifications of the mortgage and to cancel the notice of pendency.

According to the Court, although the note did not provide for prepayment and contained a "non-waiver" clause requiring a writing to amend its terms, "…the plaintiff has through his conduct, waived his right to now object to the payments received being applied to principal. He could at any time after he started receiving payments, rejected them, and sent them back to the defendants. Instead, he retained them, and put the money to his own use." The non-waiver clause was not controlling; "there is ample authority that states that such a provision nullifies only executory oral modifications…When the oral agreement to modify has in fact been acted upon to completion, there is no need to protect the integrity of the written agreement from false claims of modification." Roland v. Vigliotti, Index No. 031407/2014, was decided on October 31, 2014.

Mortgage Recording Tax/New York State Transfer Tax

New York's Department of Taxation and Finance announced that the interest rate to be charged for the period January 1, 2015 – March 31, 2015 on late payments and assessments of Mortgage Recording Tax and the State's

Real Estate Transfer Tax will be 7.5% per annum, compounded daily. The interest rate to be paid on refunds will be 2% per annum, compounded daily. The notice issued by the Department is posted at http://www.tax.ny.gov/pay/all/int_curr.htm

Parkland

The Supreme Court, New York County, held that three parcels of land being transferred by New York City to New York University ("NYU"), for a development project being undertaken by NYU, were public parkland which could not be transferred without State Legislative approval. The Court enjoined NYU from beginning any construction which would impact these parcels of land. The Appellate Division, First Department, dismissed the cause of action which asserted that the City had alienated public parkland without legislative approval, and the Appellate Division vacated the relief awarded by the lower court. While there may be an implied dedication of land for public use when the acts and declarations of the municipality "manifest a present, fixed unequivocal intent to dedicate", according to the Appellate Division:

> "Here, petitioners have failed to meet their burden of showing that the City's acts and declarations manifested a present, fixed and unequivocal intent to dedicate any of the parcels at issue as public parkland. While the City has allowed for the long-term continuous use of parts of the parcels for park-like purposes, such use was not exclusive, as some of the parcels (like LaGuardia Park) have also been used as pedestrian thoroughfares [citation omitted]. Further, any management of the parcels by the Department of Parks and Recreation was understood to be temporary and provisional, pursuant to revocable permits or licenses. Moreover, the parcels have been mapped as streets since they were acquired by the City, and the City has refused various requests to have the streets de-mapped and re-dedicated as parkland."

The Appellate Division affirmed the Supreme Court's ruling that the project approval process complied with ULURP and SEQRA. Glick v. Harvey, decided October 14, 2014, is reported at 2014 WL 5125875.

Reversion of Title

Under Real Property Law Section 345 ("Recording of declaration of intention to preserve certain restrictions on the use of land"), except as provided in subdivision 9 of Section 345, a right of entry or a possibility of reverter created by an instrument imposing a condition subsequent or a special limitation restricting the use of land is unenforceable, and the possessory estate that would result from the reversion of title is extinguished, unless an initial Declaration of Intention to Preserve Restrictions on the Use of Land (a "Declaration") is recorded not less than twenty-seven years nor more than thirty years after the condition or special limitation was created. For the restriction to remain in effect, a renewal declaration is to be recorded after the expiration of nine years and before the expiration of ten years from the date the declaration or prior renewal declaration was recorded.

In 1976, Plaintiff, The Roman Catholic Diocese of Brooklyn, New York conveyed the property in question to Defendant, Christ the King Regional High School. The deed conveyed the land for "so long as the grantee continues the operation of a Roman Catholic High School upon the premises described herein, upon the cessation of which all right, title and interest herein conveyed shall revert to the grantor, or its successor." An agreement (the "Agreement") executed with the deed also stated that Defendant "shall maintain and operate a Catholic high school in and upon the entire premises herein described and shall use the same for no other purpose not customarily or usually associated with such use." The Agreement included the same language as was in the deed providing for a possibility of reverter. Defendant notified Plaintiff that Defendant considered the Agreement unenforceable; Plaintiff sought a judgment declaring that the obligation to re-convey the property to Plaintiff remained valid, enforceable and binding.

Plaintiff, according to the Court, "implicitly" admitted that the reverter in the deed had been extinguished because a Declaration had not been filed. Plaintiff argued, however, that Real Property Law Section 345 did not affect the reverter in the Agreement. The Supreme Court, Queens County, held that the condition subsequent in the Agreement was extinguished and Defendant's obligation under the Agreement to reconvey the property to Plaintiff

if it ceased to be used as a Catholic high school was unenforceable. According to the Court, "[t]here is nothing in the language of section 345 which limits its effect to reverters found in deeds…Subdivision 9 of section 345 does not except a possibility of reverter contained in an agreement between the parties from extinguishment."

Plaintiff also alleged that Defendant breached that part of the Agreement requiring that Defendant use the property only for the operation of a Catholic high school, by leasing a substantial portion of the property for use as a non-sectarian charter middle school, and sought a judgment declaring that such use was a breach of contract. The Court held that this cause of action was not barred by Real Property Law Section 345. "The provision in the 1976 agreement restricting defendant from using any portion of the premises for any purpose other than one customarily or usually associated with the operation of a Catholic high school creates a restriction on use without a reversionary right that is distinct from the condition subsequent and possibility of reverter obligating defendant to reconvey the property to plaintiff should defendant cease to operate a Catholic high school." The Roman Catholic Diocese of Brooklyn, N.Y. v. Christ the King Regional High School, decided on August 21, 2014, is reported at 2014 NY Slip Op 32389 and posted at http://www.courts.state.ny.us/reporter/pdfs/2014/2014_32389.pdf

Title Insurance/Access

The easterly boundary of a property in Manhattan runs along Wadsworth Terrace, a public street. However, along Wadsworth Terrace the land is located between four and thirty feet below street level and is separated from Wadsworth Terrace by a stone retaining wall on the sidewalk. The stone retaining wall is owned by New York City's Department of Transportation. Plans for the construction of a building on the property provided for the removal of the above-grade portion of the retaining wall.

A building permit was issued and a section of the above-grade retaining wall was removed. Then construction was halted because of the Department's concern that construction would impair the structural support provided by the retaining wall. An Action was commenced under the Owner's and Loan title insurance policies issued for the property; the insureds claimed that the title policies failed to disclose that the retaining wall blocked access to the property from Wadsworth Terrace. The Supreme Court, Nassau County, granted the title insurer's motion for summary judgment dismissing the complaint as to it, and the Appellate Division, Second Department affirmed.

The 1992 ALTA Owner's and Loan policies of title insurance issued to the insureds in 2005 insure against loss or damage sustained or incurred by reason of a "lack of a right of access to and from the land." According to the Appellate Division, "'[s]uch a provision refers to the absence of a legal right to access and does not cover claims concerning lack of an existing means of physical access. [citations omitted]'. On its motion for summary judgment, [the title insurer] established that [the insureds] have a legal right of access because the subject property abuts a public street." 43 Park Owners Group, LLC v. Commonwealth Land Title Insurance Company, decided October 22, 2014, is reported at 2014 WL 5350992.

Title Insurance/Water Changes

The insured under an Owner's Policy of title insurance sought indemnification and reimbursement for water charges first reflected in the records of the City's Department of Environmental Protection after the title policy was issued. The Supreme Court, New York County, granted the motion of the Defendant title insurer and its agent to dismiss the complaint, and the Appellate Division, First Department, affirmed. According to the Appellate Division, the policy excepted from coverage "water rates...which are not shown as existing liens by the public records". "That the water charges arose from use predating the closing is immaterial." Timac Realty v. G&E Tremont LLC, decided October 9, 2014, reported at 2014 NY Slip Op 06858 and posted at http://www.courts.state.ny.us/reporter/3dseries/2014/2014_06858.htm

Uniform Commercial Code

UCC Section 9-518 ("Claim concerning inaccurate or wrongfully filed record"), as amended by Chapter 490 of the

Laws of 2013, authorizes an employee of New York State or a political subdivision thereof who is identified as the Debtor in a falsely filed financing statement to bring a proceeding to invalidate the filing. Respondent, incarcerated as the result of a felony indictment presided over by Judge Nichols of the Columbia County Supreme Court, filed a financing statement in New York's Department of State naming Judge Nichols as the Debtor and the Respondent as the Secured Party. The Judge brought a special proceeding under UCC Section 9-518(d) seeking expungement of the financing statement, an injunction restraining Respondent from filing any further financing statements against Petitioner without leave of court, and an award of costs.

The Supreme Court, Columbia County, holding that the financing statement was filed to retaliate for the Petitioner's performance of his judicial duties, ordered the Department of State to expunge the filling from the public record. The Court awarded to the Petitioner full statutory damages of $500 plus the costs and disbursements he incurred for the special proceeding. It also granted the Attorney General's cross-motion for sanctions in the amount of $2,500 for "attorney time" expended in the proceeding to defend against the Respondent's "counter action" which sought monetary damages of $28,000,000, his release from jail and an order making him exempt from future arrest or imprisonment. The Court did not, however, issue an injunction barring the Respondent from filing or amending any future financing statements against the Petitioner without leave of court. There was no proof in the record, as required by UCC Section 9-518(d)(3), that "respondent has engaged in a repeated pattern of false [UCC] filings." Nichols v. Branton, decided September 24, 2014, is reported at 2014 WL 4816075.

Best wishes for the Holidays!

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