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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Adverse Possession

In a case involving the assertion of a claim of adverse possession, the Supreme Court, King County, held that Real Property Actions and Proceedings Law ("RPAPL") Article 5 ("Adverse Possession") prior to its amendment in 2008 applied to a claim of adverse possession because the claimed adverse use began in 1995. The Court dismissed the complaint and vacated a previously issued preliminary restraining order. The Plaintiffs had used a strip of land on the Defendant's adjoining property knowing that it was not the Plaintiff's property. "[U]nder the prior law, when a party sought to obtain title by adverse possession on a claim not based upon a written instrument…[t]hat party also had to establish, by clear and convincing evidence…the common-law requirements of hostile possession, under a claim of right, which was actual, open and notorious, and exclusive and continuous for the statutory period[citation omitted]." 1982 East 12th Street Holdings LLC v. Lati, 2020 NY Slip Op 33849, decided November 17, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33849.pdf.

Building Loan Agreements/Material Modifications

Defendant subcontractors asserted that the lien of the Plaintiff's mortgage being foreclosed should be subordinated to their mechanics' liens because the Plaintiff failed to file an amendment to the related building loan agreement ("BLA"). They contended that the filing of a modification to the BLA was required when the borrower was no longer had to adhere to the BLA's requirements for equity infusions. The Supreme Court, Monroe County, denied the subcontractors' motion for summary judgment seeking a determination of the priority of their mechanics' liens and granted the Plaintiff's motion for summary judgment. The Appellate Division, Fourth Department, affirmed. According to the Appellate Division,

> *"[a]lthough the BLA identified certain 'Required Equity Funds…the BLA did not require those payments to be made before plaintiff advanced loan proceeds to [the borrower]. Rather, the BLA established that, once those payments were made, plaintiff would be obligated to make certain advances. Plaintiff thus retained the discretion to make the loan advances…We therefore conclude that [the borrower's] failure to provide those funds at [a] rate equal with the percentage of completion of the project did not constitute a material modification [requiring the filing of an amendment to the BLA] inasmuch as that failure did not alter the rights or liabilities…under the BLA [citations omitted]."*

S&T Bank v. Top Capital of New York Brockport, LLC, 2020 NY Slip Op 06616, decided November 13, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06616.htm.

Collateral Estoppel/Statute of Limitations

The Supreme Court, Kings County, granted the Defendant's motion to dismiss the complaint in a mortgage foreclosure because the Court had ruled in a quiet title action that the limitations period had run. The Appellate Division, Second Department, affirmed the lower court's Order. According to the Appellate Division, "[t]he issue of whether the statute of limitations for commencing a foreclosure action had expired was clearly raised in the quiet title action and was decided against the bank." Deutsche Bank National Trust Company v. Daldan, Inc., 2020 NY Slip Op 06752, decided November 18, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06752.htm.

Condominiums/Business Judgment Rule

The Defendants constructed a balcony enclosure for their unit. The condominium's board of managers brought an action for the removal of the enclosure. The Defendants contended that approval for the improvement had been obtained from the managing agent. The Supreme Court, Queens County, ordered that it be removed. The Appellate Division, Second Department, affirmed. According to the Appellate Division,

> *"[r]egardless of whether the [Defendants] obtained written advance permission in 1979 to enclose the subject balcony as required under the condominium's by-laws…[the Plaintiff's] consent could be revoked at any time and that, in 2016, the plaintiff revoked its consent to all balcony enclosures…The business judgment rule prohibits judicial inquiry into the actions of a condominium board as long as the board acts for the purpose of the condominium, within its authority and in good faith [citation omitted]. The plaintiff met its burden on summary judgment by establishing that it acted in good faith, within its authority, and for the benefit of the condominium, when it mandated the removal of balcony enclosures in order to complete its facade renovation project."*

Board of Managers of Village Mall at Hillcrest Condominium v. Banerjee, 2020 NY Slip Op 06482, decided November 12, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06482.htm.

Condominiums/Common Charges

A Board of Managers commenced an action to foreclose a common charge lien and for a money judgment. The Defendant had withheld payment of common charges because of an ongoing issue with an exhaust vent in one of his unit's bathrooms. The Defendant sought reimbursement of common charges as "compensation" for the inconvenience he had endured. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment and ordered that a Judicial Hearing Officer or Special Referee ascertain the amount due. According to the Court, "[t]he obligation of a condominium unit owner to pay charges is for the most part absolute and cannot be avoided [citations omitted]…[D]efendant was not permitted to withhold payment of these fees by the governing documents for the condominium." Board of Managers of the 200 East 65th Street & 210 East 65th Street Condominium v. McCallum, 2020 NY Slip Op 33890, decided November 24, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33890.pdf.

Condominiums/Duty of Care to Tenants

The Plaintiff sought to recover damages for personal injuries alleged to have been caused by exposure to mold while he was a unit owner's tenant. The Plaintiff alleged the mold was caused by water intrusion in 2012 during Hurricane Sandy and by a sewer backup in 2014. The Condominium, also a defendant, moved for summary judgment dismissing the complaint as to it, arguing that it did not owe a duty of care to the Plaintiff and, in any event, it did not have actual or constructive knowledge of the condition. The Supreme Court, Queens County, denied the motion for summary judgment; the Appellate Division, Second Department, affirmed. The By-Laws of the condominium established various duties of care which extended to unit tenants as third-party beneficiaries. Further, the condominium "failed to eliminate all questions of fact as to whether the mold condition was a reasonably foreseeable consequence of the allegedly significant water incursions from outdoor sources [citation omitted]." Desernio v, Ardelean, 2020 NY Slip Op 06750, decided November 18, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06750.htm.

Contracts of Sale/Consequential Damages

The Plaintiff, constructing a home within its residential development, sued the purchasers of the home for breach of contract. The Supreme Court, Ontario County, dismissed the Plaintiff's claim for consequential damages. While the general rule is that consequential damages are not recoverable when a purchaser breaches a contract to purchase residential real estate, when the seller is a commercial developer, "the developer begins to incur costs that reduce profit margin…[T]he carrying costs are nothing but a financial loss…[The] defendants failed to establish as a matter of law that consequential damages were not foreseeable or contemplated by the parties at the time they executed" the contract of sale. Chrisanntha, Inc. v. deBaptiste, 2020 NY Slip Op 06607, decided November 13, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06607.htm.

Easements

The Supreme Court, Kings County, dismissed the complaint in an action seeking a declaration that the Plaintiff fee owner's property had the benefit of a driveway easement over the Defendant's adjoining property. The Court first ruled that those of the Plaintiffs who were tenants lacked standing. The Court then held that the Plaintiff fee owner was

> *"not entitled to an easement by necessity based on the 'fire exit' that she recently installed in the rear [of the Plaintiff's property] because the Property borders a public street and can be physically and legally accessed from that public street [citation omitted]…Furthermore, [the Plaintiff] is not entitled to a prescriptive easement since…[the Plaintiff's use of the Defendant's property] was always permissive…In addition, [the Plaintiff] is not entitled to an easement by implication because she has failed to demonstrate that the use of [the Defendant's property is necessary to the beneficial enjoyment of the [Plaintiff's] Property."*

Marte v. Boerum Johnson LLC, 2020 NY Slip Op 33701, decided October 29, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33701.pdf.

Equitable Mortgages

The Appellate Division, Second Department, affirmed the entry of summary judgment by the Supreme Court, Kings County, which had found that the Plaintiff held a first priority equitable lien for $486,000. A mortgage securing that sum, executed in 2006 and held by the Plaintiff, included an address for the property but not a property description. According to the Appellate Division, "the documentary evidence submitted by the plaintiff sufficiently established the existence of the loan, the intent that it be secured by the property, and the debtor's obligation to satisfy the debt by a certain date [citations omitted]." U.S. Bank National Association v. Alleyne, 2020 NY Slip Op 06166, decided October 28, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06166.htm.

Guaranty/Leaseholds

Under the guarantee of a lease extension, both of which were executed in 2004, the guarantor was to be liable "until the date that there shall be delivered to Owner a vacate instrument confirming the Premises are vacant, broom clean, free of occupants, and free of Tenant." When the lease, as extended, expired the tenant remained in occupancy. Litigation ensued between the landlord and the tenant. The stipulation settling the litigation provided for execution of a new lease, which was entered into in 2016. The guarantor was not a party to the action, the stipulation of settlement or the new lease.

In 2018, the landlord commenced an action to recover rent arrears under the 2016 lease and to enforce the guarantee. The Supreme Court, Westchester County, granted the guarantor's motion for summary judgment dismissing the cause of action as against him, which ruling was affirmed by the Appellate Division, Second Department. According to the Appellate Division, the guarantor

> *"established, prima facie, that his obligation under the guaranty did not extend to the 2016 lease, which was entered into after the 2004 lease extension had already expired, contained materially different terms from those of the 2004 lease extension…all of which would significantly increase his risk as guarantor if he was to be held liable with respect to the 2016 lease [citation omitted]. [The guarantor] did not consent to the terms of the 2016 lease, nor did [the guarantor's] guaranty of the 2004 lease extension, by its terms, apply to any modification, renewal, or extension of the lease, or the entirely new lease entered into after the 2004 lease extension had expired in accordance with its terms [citation omitted]."*

PRG Associates Limited Partnership v. Planet Organic Holding Corp., 2020 NY Slip Op 06304, decided November 4, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06304.htm.

Leases/Liquidated Damages

A lease between the Plaintiff, as landlord, and the Defendant, as tenant, was terminated. Under the Settlement Agreement the Defendant paid the Plaintiff $261,751.73. The Agreement also required the Defendant to make monthly "Surrender Payments" and further provided that if the Defendant defaulted under the Agreement "the aggregate amount of all Fixed Rent, additional rent or other sums and charges dues and payable during the term of the Lease shall immediately thereafter become due and payable…"

The Defendant failed to timely make four monthly surrender payments and, notwithstanding that the Plaintiff re-let the premises one month after it was surrendered, the Plaintiff sued to enforce the liquidated damages provision, moving for summary judgment to collect $1,020,125.15, plus interest and other costs provided for under the lease. Affirming the rulings of the trial court and the Appellate Division, First Department, New York's Court of Appeals held that the liquidated damages provision was an unenforceable penalty

> *"because it is plainly disproportionate to the damages for the only contractual breach at issue in this appeal, i.e., overdue payment of the monthly surrender installments…The damages provision effectively reinstated defendant's future rent liabilities under the terminated lease…even though those damages did not flow from a breach of the Surrender Agreement. Those damages were 7½ times what plaintiff would have received, if defendant had fully complied with the Surrender Agreement. Plaintiff cannot enforce a non-existent lease under the guise of damages for breach of a separate contract."*

The Trustees of Columbia University in the City of New York v. D'Agostino Supermarkets, Inc., 2020 NY Slip Op 06937, decided November 24, 2020, is posted at http://nycourts.gov/reporter/3dseries/2020/2020_06937.htm.

Leases/Option to Extend

Plaintiff's sublease contained five options each of which would, if exercised, extend the lease for a term of five years. The first option was exercisable by the subtenant giving written notice to the Defendant of its election to exercise the option "no later than nine (9) months prior to the termination date of the lease…time being of the essence." The notice for the first option was required by April 3, 2019; the Plaintiff exercised that option on September 20, 2019. The Defendant rejected the Plaintiff's notice. The Plaintiff asserted that a court in equity should relieve it from the consequences of its untimely notice to renew. The Supreme Court, Suffolk County, ruled that the untimely notice to renew was ineffective as a matter of law, granted the Defendant's motion for summary judgment, and dismissed the Plaintiff's claim for injunctive relief.

According to the Court, equity can intervene in such a case when the failure to send the notice was due to inadvertence, negligence or an honest mistake, the renewal would result in a forfeiture by the tenant (the "forfeiture rule"), and the landlord would not be prejudiced. "[T]he forfeiture rule was crafted [by the Court of Appeals] to protect tenants in possession who made improvements of a 'substantial character' with an eye toward renewing a lease…" Here, the Plaintiff was an out-of-possession tenant which "made no improvements to the property in anticipation of renewing the lease…" SVC West Babylon LLC v. 204 Great East Neck Road LLC, 2020 NY Slip Op 20289, decided October 27, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_20289.htm.

Mortgage Foreclosures/Abandonment

Under subsection (c) of Civil Practice Law and Rules ("CPLR") Section 3215 ("Default") "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."

An action to foreclose a mortgage was commenced on November 26, 2014. The Defendants-property owners did not interpose an answer. On February 3, 2015, the Plaintiff filed a request for judicial intervention and foreclosure settlement conferences were held. The matter was released from the foreclosure settlement conference part on April 22, 2015. On November 28, 2016, the Defendants moved to have the complaint dismissed as asserted against them, claiming the action was abandoned. The Supreme Court, Kings County, denied the Defendants' motion. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division,

> *"[w]here, as here, a settlement conference is a necessary prerequisite to obtaining a default judgment (see CPLR 3408[a], [m]), a formal judicial request for such a conference in connection with an ongoing demand for the ultimate relief sought in the complaint constitutes 'proceedings for entry of judgment' within the meaning of CPLR 3215(c) [citations omitted]. Since the plaintiff demonstrated that it initiated proceedings for the entry of a judgment of foreclosure and sale within one year after the defendants' default, it was not required to proffer a reasonable excuse or demonstrate a potentially meritorious cause of action [citations omitted]."*

CitiMortgage, Inc. v. Zaiback, 2020 NY Slip Op 06744, decided November 18, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06744.htm.

In Deutsche Bank National Trust Company v. Hasan, the Appellate Division, Second Department, reversed an Order of the Supreme Court, Kings County, dismissing the complaint in a mortgage foreclosure for having been abandoned under CPLR Section 3215(c). The Plaintiff had moved for an Order of Reference within one year of the Defendant's default. "In such cases the complaint should not be dismissed pursuant to CPLR 3215(c), even if, as here, the plaintiff's motion is later withdrawn [citations omitted]." This decision on November 4, 2020, at 2020 NY Slip Op 06243, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06243.htm.

Mortgage Foreclosures/Default/Equitable Relief

The Defendant, a Church, moved for summary judgment dismissing the complaint in an action to foreclose a mortgage on its property, contending that its failure to pay real estate taxes, an act of default under the mortgage, was merely "technical" and that on learning of the default the Defendant paid the taxes. The Supreme Court, Nassau County, denied the Defendant's motion and granted the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, affirming the lower court's Order, noted that the Defendant did not promptly cure the default after the Plaintiff notified the Defendant of the default. According to the Appellate Division,

> *"[t]he Church did not cure the tax default until…approximately seven months after the plaintiff notified the Church of the tax default. Under these circumstances, it cannot be said that the plaintiff's conduct was unconscionable, or constituted overreaching [citation omitted]. Sympathy for the defendants [sic] cannot be permitted to undermine the stability of contractual obligations…"*

L & L Associates Holding Corp. v. Seventh Day Church of God of the Apostolic Faith, 2020 NY Slip Op 07047, decided November 25, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07047.htm.

Mortgage Foreclosures/Intervention

The Defendant property owner did not appear in the foreclosure and conveyed the premises, subject to the foreclosure action, to the Appellant. The Supreme Court, Kings County, substituted the Appellant for the Defendant but denied that branch of its motion for leave to intervene and submit an answer. The Appellant Division, Second Department, modified the lower court's Order. According to the Appellate Division

> *"[t]he appellant was entitled to intervene as of right pursuant to CPLR 1012(a) since it established that the representation of its interest by the parties would be inadequate, that the action involved the disposition of title to real property, and that it would be bound and adversely affected by a judgment of foreclosure and sale [citation omitted]. The fact that the appellant obtained its interest in the premises after the action was commenced and the notice of pendency was filed does not definitely bar intervention [citation omitted], nor does the fact that Charles defaulted in answering the complaint [citations omitted]."*

Consumer Solutions, LLC v. Charles, 2020 NY Slip Op 06097, decided October 28, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06097.htm.

Mortgage Foreclosures/Notices

RPAPL Section 1304 – RPAPL Section 1304 ("Required prior notices") requires that "a lender, an assignee or a mortgage loan servicer [commencing] legal action against the borrower, including [a] mortgage foreclosure" send a notice, in the form specified in Section 1304, to the borrower at least ninety days before litigation on a "home loan" is commenced. The notice is required to be sent by registered or certified mail and by first class mail to the last known address of the borrower.

The Appellate Division, Second Department, reversed the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Suffolk County, holding that Plaintiff failed to strictly comply with the requirements of RPAPL Section 1304. According to the Appellate Division,

> *"…the plaintiff failed to submit an affidavit from a witness who attested to having personal knowledge of either the actual mailing or 'a standard office mailing procedure designed to ensure that items are properly addressed and mailed' [citations omitted]. Moreover, the records submitted…did not establish as a matter of law that the requisite RPAPL 1304 mailings were completed. A copy of a letter and envelope addressed to the defendant, each bearing a 20-digit number, was insufficient to eliminate all triable issues of fact as to whether the certified mailing actually occurred [citations omitted]. Moreover, the plaintiff failed to submit any evidence substantiating the assertions that a second copy of the notice was mailed to the defendant by regular first-class mail, as required by the statute…"*

Deutsche Bank National Trust Company v. Feeney, 2020 NY Slip Op 06753, decided November 18, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06753.htm.

The Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Westchester County, because the Plaintiff did not establish it had complied with RPAPL Section 1304. "The copies of letters addressed to the defendant, bearing 20-digit bar codes, were insufficient to demonstrate, prima facie, that the certified mailing or first class mailing actually occurred [citations omitted]. The 'Proof of Filing Statement' from the New York State, pursuant to RPAPL 1306, reflecting a tracking number, a 'Mailing Date Step 1' of May 16, 2020, an a "Filing Date Step 1' of May 17, 2020, also was insufficient to demonstrate, prima facie, the plaintiff's compliance with all of the requirements of RPAPL 1304 [citations omitted]." JPMorgan Chase Bank, National Association v. Gershfeld, 2020 NY Slip Op 05895, decided October 21, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05895.htm.

Mortgage Foreclosures/Real Estate Taxes & Insurance/ Voluntary Payment Doctrine

The foreclosure of a mortgage had been dismissed for lack of personal jurisdiction and for the failure to prosecute. In an action to quiet title brought under RPAPL Article 15 ("Action to compel the determination of a claim to real property"), the Supreme Court, Kings County, directed that the mortgage, again being foreclosed, be cancelled of record for being time barred. The Appellate Division, Second Department, affirmed the lower court's ruling.

Asserting the voluntary payment doctrine, the bank asserted a counterclaim for unjust enrichment to recover amounts paid by the loan servicer for real estate taxes and insurance on the mortgage property. The Appellate Division, in holding that the voluntary payment doctrine does not allow a recovery for unjust enrichment, stated the following:

> *"The voluntary payment doctrine 'bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law' [citations omitted]. Here, the Bank concedes that its servicer paid real estate taxes and insurance on the property, but it has not alleged that it did so accidentally or mistakenly, or that it was induced to do so by fraud."*

Daldan, Inc. v. Deutsche Bank National Trust Company, 2020 NY Slip Op 06749, decided November 18, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06749.htm.

Mortgage Foreclosures/Referee's Report

The Supreme Court, Delaware County, confirmed the report of the referee who computed the amount due to the Plaintiff. The Defendant, on appeal, contended that the Court erred in confirming the report in the absence of a hearing. The Appellate Division, Third Department, affirmed the lower court's ruling. The notice of computation provided that written objections were to be submitted to the referee who would determine whether there should be a hearing. The Defendant's objections to the referee did not allege that the referee made an error in any computation. Even if there was an error, the Defendant did not contest the referee's computations when the Supreme Court considered the Plaintiff's motion to confirm the referee's report. MTGLQ Investors, L.P. v. Thompson, 2020 NY Slip Op 06989, decided November 25, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06989.htm.

Mortgage Foreclosure/Standing

The Defendant in a mortgage foreclosure asserted that the foreclosing Plaintiff lacked standing. The had Plaintiff produced the note secured by the mortgage and a copy of the assignment of the mortgage to the Plaintiff, which assignment stated that the original mortgagee "hereby assigns onto the assignee [the mortgage]…TOGETHER with the bond or note or obligation described in said mortgage." According to the Appellate Division, Second Department, this recital in the assignment of the mortgage "established the Plaintiff's standing." Cenlar FSB v. Glauber, 2020 NY Slip Op 07028, decided November 25, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07028.htm.

The Supreme Court, Suffolk County, dismissed an action to foreclose a mortgage, finding that the Plaintiff lacked standing. The Plaintiff did not establish that the allonge was firmly attached to the note when the action was commenced, as required by Uniform Commercial Code Section 3-202 ("Negotiation…"). Under Section 3-202, "[a] n endorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." Deutsche Bank National Trust Company v. Burke, 2020 NY Slip Op 51255, decided October 15, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_51255.htm.

Mortgage Foreclosures/Statute of Limitations

The Appellate Division, Third Department, held that the Supreme Court, Columbia County, erred when it dismissed a mortgage foreclosure commenced in 2018 on the grounds that the statute of limitations, running from the commencement of the prior foreclosure in 2008, had expired. In the 2008 action, only the deceased borrower was named a party defendant. The executor of the decedent's estate not being substituted as a party in the 2008 action, "the court lacked jurisdiction over the 2008 action, and that action was a nullity from its inception [citations omitted]. It follows that the 2008 action, a legal nullity, did not trigger the statute of limitations." U.S. Bank National Association v. Stewart, 2020 NY Slip Op 05982, decided October 22, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_05982.htm.

Mortgage Modifications/Priority

Plaintiff, the holder of a junior mortgagee, alleged that its mortgage had priority over the terms of the modification agreement entered into between the first mortgagee and the borrower. The Appellate Division, Second Department, affirmed the holding of the Supreme Court, Nassau County, that the Plaintiff's second mortgage did not have priority over the modification. "Deutsche Bank established that the lien modification agreement, which did not extend new funds and resulted in a reduced interest rate, did not prejudice the rights of the plaintiff or impair its security interest [citations omitted]." Commodore Factors Corp. v. Deutsche Bank National Trust Company, 2020 NY Slip Op 07160, decided December 2, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07160.htm.

New Legislation/Mortgage Foreclosures

Chapter 269 of the Laws of 2020, enacted and effective November 11, 2020, amended CPLR Section 6511 ("Filing, content and indexing of notice of pendency"), RPAPL Section 1321 ("Default or admission"), and RPAPL Section 1351 ("Judgment of sale") which authorizes a court to direct a referee to compute amounts due to the Plaintiff and to any prior encumbrancers. Chapter 269 requires that each order of reference, judgment of foreclosure and sale, and notice of pendency for the foreclosure of a mortgage on one-to-four family residential property include "the name and telephone number of the mortgage servicer." Senate Bill 4190/Assembly Bill 06976 is posted at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S04190&term=2019&Text=Y.

Mortgage Recording Tax

The Supreme Court, New York County, declined to dismiss an action to foreclose an unrecorded mortgage for the failure to state a cause of action on the grounds that mortgage recording tax was not paid. According to the Court, the Defendant's argument was "premature" because "the tax can be paid subsequent to the commencement of the action but prior to entry of the judgment of foreclosure and sale." The Fellowship for Advanced Comprehensive Talmudics, Inc. v. East 16th St. Realty, LLC, 2020 NY Slip Op 33619, decided November 2, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33619.pdf.

Pandemic/NYC Local Laws

In a decision dated November 25, 2020, the United States District Court for the Southern District of New York upheld the validity of three local laws enacted in response to the COVID-19 pandemic. The Local Laws are the "Residential harassment law" (Local Law 56-2020, amending Admin. Code Section 27-2004(a)(48)); the "Commercial harassment law" (Local Law No. 53-2020, amending Admin. Code Section 22-902(a)(11)); and the so-called "Guaranty Law", (Local Law No. 55-2020, adding Admin. Code Section 22-1005 ("Personal liability provisions in commercial leases") and amending Admin. Code Section 22-902). The "Harassment Laws" prohibit harassment of residential and commercial tenants because they were impacted by COVID-19. The Guaranty Law provides, in part, the following:

> *"A provision in a commercial lease…or [in another document] relating to such a lease…that provided for one or more natural persons…to become, upon the occurrence of a default or other event, wholly or partially liable for [amounts] owed by the tenant under such agreement…shall not be enforceable against such natural persons if the conditions of paragraph 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."*

The Court held that the Harassment Laws do not implicate the Plaintiffs', who are landlords, free speech rights and do not violate their due process rights; they "do not prevent landlords from making routine rent demands" and "the Laws are sufficiently clear on what constitutes harassment." The Court also held that the Guaranty Law does not violate the Contract Clause "…because this Circuit's jurisprudence affords broad deference to the good-faith efforts of policymakers to regulate in the interest of the public good…" and "[i]t is not the role of the Court…to opine on the wisdom…of the decision to shift the economic impact of the pandemic from commercial tenants and their guarantors to landlords." Lastly, the Court ruled that these Local Laws were not preempted as they did not conflict with State laws. The Plaintiff's claims were dismissed. Melendez v. City of New York, 20-CV-5301, can be obtained at 2020 U.S. Dist. LEXIS 222774.

Similarly, in a decision dated November 20, 2020, Judge Arlene P. Bluth of the Supreme Court, New York County, held that the "Guaranty Law" (Admin. Code Section 22-1005) does not violate the contracts clause of the United States Constitution, that it applies to stand-alone personal guarantees for commercial leases, and that it applies, not merely to cases commenced after its enactment, but to defaults from the beginning of the pandemic. The Court dismissed an action commenced against the natural person guarantor of a commercial lease. 204 East 38th LLC v. Sons of Thunder LLC, 2020 NY Slip Op 33862, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33862.pdf.

Judge Bluth also, in a ruling dated November 20, 2020, relying on Admin. Code Section 22-1005, dismissed claims against the natural person guarantor of a commercial lease. The Court also dismissed the guarantor's counterclaim for damages against the Plaintiff stemming from the Plaintiff's refusal to withdraw its claims in light of Section 22-1005. "The instant action did not constitute harassment as a matter of law." 27 Morton, L.P. v. MDS Fashions, LTD, 2020 NY Slip Op 33861, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33861.pdf.

However, in another case, also decided November 20, 2020, Judge Bluth granted the Plaintiff-lessor's cross-motion for an Order directing a commercial tenant and its guarantor to pay back rent, and to pay additional rent during the pendency of the action. The Plaintiff alleged that, except for two months, rent had not been paid since October 2019. Since the Plaintiff did not seek to have the tenant evicted "the instant case does not violate any executive orders [and, therefore, the] [p]laintiff is permitted to…seek damages arising out of the tenant's failure to pay rent." As to the Defendant-guarantor, Admin. Code Section 22-1005 did not apply. "The default here occurred long before the time period provided for" in that Section. CP Associates LLC v. Concourse Family Dental, 2020 NY Slip Op 33875, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33875.pdf.

Partition

Dorothy Baucom died intestate, leaving her three daughters, the Plaintiff and the Defendants, Deborah and Charlene, as her heirs. Deborah was appointed Administratrix of her mother's estate. In 2014, the Defendants executed and recorded an Administrator's Deed conveying their mother's property to themselves. The Plaintiff commenced an action seeking a judgment that she was a one-third owner of the property and seeking the property's partition and sale. The Supreme Court, Kings County, ruled that title vested in the parties as tenants in common on the decedent's death; therefore, the Plaintiff was a one-third owner of the property. The Court vacated the 1994 deed which it ruled was null and void.

The Court also granted the Plaintiff's motion for the partition and sale of the property and appointed a Referee to conduct an accounting. The Referee was authorized to order an appraisal of the property to ascertain whether there was any creditor with a lien on the interest of any party, and to determine "whether the property is encumbered by a mortgage and, if so, to compute the amount due for principal, interest and other disbursements under the terms of said mortgage; the expenditures made by the parties for property taxes, mortgage payments, common charges, insurance costs, repair, maintenance and improvements costs; and to income earned, if any, as well as to report whether the property is so circumscribed that a partition of said property cannot be made with great prejudice to the owners."

Baucom v. Young, 2020 NY Slip Op 33826, decided November 9, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33826.pdf.

Recording Act/Fraudulent Satisfaction of Mortgage

A satisfaction of a mortgage purportedly executed by JP Morgan Chase Bank was recorded. The property was sold; at closing the purchaser executed a money mortgage to Flagstar Bank. The title commitment reported that there were no outstanding mortgages.

Flagstar Bank foreclosed and took title by a referee's deed. JP Morgan then commenced an action to vacate the satisfaction and to foreclose its mortgage. The Supreme Court, Kings County, found that the satisfaction of the mortgage was forged but dismissed the complaint as against Flagstar, holding that it was a bona fide encumbrancer. The Appellate Division, Second Department, reversed to the extent that the lower court had granted Flagstar's motion for summary judgment dismissing the complaint as to it. According to the Appellate Division, the satisfaction of mortgage was void and, therefore, Flagstar was not entitled to protection as a bona fide encumbrancer under Real Property Law Section 266 ("Rights of purchaser or incumbrancer for valuable consideration protected")

> *"A discharge or satisfaction of a mortgage is void at its inception when it is executed and recorded by one who has no interest in the mortgage [citations omitted]. Accordingly, the forged satisfaction of mortgage in this case is not entitled to any legal effect, and Flagstar's encumbrance based on it is not protected [citations omitted]."*

JP Morgan Chase Bank, National Association v. Aspilarie, 2020 NY Slip Op 06510, decided November 12, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06510.htm.

Statute of Frauds

Partners in various real estate ventures entered into a written settlement agreement providing for the sale of certain real property to one of them to settle a dispute. The Defendants were alleged to have reneged on the agreement; the Plaintiff filed an action seeking a judgment that the Defendants willfully breached the contract, for specific performance, for damages for breach of contract, and for the imposition of a vendee's lien. The Supreme Court, Kings County, denied the Defendant's motion to dismiss the compliant and to cancel the notice of pendency. The Appellate Division, Second Department, reversed the lower court's Order, granting the motion to dismiss and cancelling the lis pendens. The Appellate Division ruled that the causes of action were barred by the statute of frauds (General Obligations Law Section 5-703(2) ("Conveyances and contracts concerning real property to be in writing"). According to the Appellate Division, the settlement agreement

> *"…did not contain the essential terms typically included in a contract for the sale of real property, including the purchase price, the time and terms of payment, the required financing, the closing date, the risk of loss during the sale period, and adjustments for taxes and utilities [citation omitted]. Additionally, the alleged contract was not signed by [one of the defendants], and it indicated that several of the properties were co-owned by other individuals who also were not signatories to the document [citation omitted]. Further, the emails relied upon by the plaintiff to demonstrate that the parties reached a complete agreement were between the parties' attorneys, and there was neither an allegation in the complaint nor any evidence in the record that the attorneys were authorized in writing to bind the parties to a contract of sale [citations omitted]. "*

Ehrenreich v. Israel, 2020 NY Slip Op 06499, decided November 12, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06499.htm.

Tax Sales

After the City of Newburgh took title through the foreclosure of a tax lien, the City and the property's owner, the Plaintiff, entered into a contract under which the Plaintiff would repurchase the property after it paid on payment of all past due tax liens, including all accrued interest and penalties. When the Plaintiff did not appear at the closing the City cancelled the contract. The City denied the Plaintiff's request to reinstate the contract and reschedule the closing. The Plaintiff commenced an action seeking, among other relief, a ruling granting specific performance of the contract, damages under 42 U.S.C. Section 1983 ("Civil action for deprivation of rights") and damages under the Americans With Disabilities Act. The Appellate Division, Second Department, affirmed the ruling of the Supreme Court, Orange County, dismissing those causes of action.

According to the Appellate Division, "[t]he plaintiff waived any challenge to the underlying default judgment of foreclosure by entering into the contract of sale, which acknowledged that the City had acquired title to the premises and all known rights of redemption had been extinguished, and by making payments thereon [citations omitted]." The claim that charging interest and penalties was unlawful as to those in military service was waived for the same reasons. The claim that the Plaintiff's disability prevented him from participate in tax reduction programs was insufficient to state a cause of action under the ADA. Lastly, the Plaintiff "failed to specify how the City's policies and procedures for tax reductions had discriminatory effect on members of the military or disabled persons, and therefore failed to state a cause of action that the City's procedures constituted an equal protection violation [citation omitted]." Sikorsky v. City of Newburgh, 2020 NY Slip Op 06822, decided November 18, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06822.htm.

Uniform Commercial Code/Cooperative Units

The terms of sale for the auction sale of the stock for a cooperative unit set forth that the sale would be subject to a provision of the proprietary lease under which a sale of shares is subject to the managing agent's approval. The managing agent did not approve the transfer to the Plaintiff, the successful bidder, who sued for specific performance, and, claiming tortious interference, for damages against the managing agent and the cooperative corporation. The Supreme Court, New York County, dismissed the complaint. The Appellate Division, First Department, affirmed the lower court's ruling. The Plaintiff asserted that UCC Section 9-407 ("Restrictions on creation or enforcement of security interest in leasehold interest…") prohibits a proprietary lease from restricting transfers. However, according to the Appellate Division, "[n]othing in [UCC Section 9-407] or the comments [to the Section] prohibits a provision in the terms of sale from requiring approval by the cooperative's managing agent before transferring the (proprietary) lease [citation omitted]."

Under UCC Section 9-407(a), "…a term in a lease agreement is ineffective to the extent that it (1) prohibits, restricts, or requires the consent of a party to a lease to the assignment or transfer of…or enforcement of a security interest in an interest of a party under the lease contract…" Plotch v. 435 East 85th Street Tenants Corp, 2020 NY Slip Op 06031, decided October 22, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06031.htm.

Uniform Commercial Code/Mezzanine Loans

The Defendant sought to enjoin the UCC sale of its membership interest in an entity owning real property, asserting that because the sale affects land UCC Section 9-604 ("Procedure if security agreement covers real property…") requires that the foreclosure must be conducted under RPAPL Article 13. Section 9-604 provides, in part, "[i]f a security agreement covers both personal and real property, a secured party may proceed…(2) as to both the personal property and the real property in accordance with the rights with respect to real property…" The Supreme Court, Kings County, denied the request for an injunction and allowed the Plaintiff to re-schedule the sale. According to the Court, "…foreclosing upon an interest in an entity that owns real property does not implicate the real property itself to the extent the U.C.C. does not allow the foreclosure." 893 4th Avenue Lofts LLC v. 5AIF Nutmeg, LLC, 2020 NY Slip Op 33902, decided November 25, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_33902.pdf.

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