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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

A tenant in common exclusively possessing real property requested that his siblings, the other tenants in common, execute a deed transferring to him their interests in the property. The Supreme Court, Kings County, held that by the Plaintiff requesting execution of the deed he acknowledged the others' ownership interests, thereby negating his claim of adverse possession. "The mere fact that he presented them with the deed was an acknowledgment by him of their ownership interest in the Premises." Burrano v. Campione, 2021 NY Slip Op 30093, decided January 11, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_30093.pdf.

Contracts of Sale/"Broom-Clean"

Under a post-closing occupancy agreement, the sellers remained in possession for 18 calendar days. On delivery of possession to the buyers, the property was required to be in "broom-clean" condition. $2,000 was held in escrow to ensure the sellers' performance under the agreement. The buyers claimed that that property was delivered to them in "filthy" condition, and they sought to be reimbursed from the escrow to cover the $400 they paid to have the home professionally cleaned. The sellers sought to recover the entire escrow. The Justice Court of the Town of Penfield in Monroe County ordered that the entire escrow be released to the sellers. "'[B]room-clean' does not impose the duty on the seller to have the property professionally cleaned…If the buyers desire to have the property professionally cleaned at delivery of possession to the buyers the buyers need to negotiate a 'professionally clean' condition, rather than a 'broom clean' condition." The Court ruled that the premises were delivered in broom-clean condition. Witter v. Nitschke, 2020 NY Slip Op 20323, decided November 12, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_20323.htm.

Contracts of Sale/Landmark Property

The purchaser sued the Sellers of real property for specific performance and to recover damages for breach of contract and fraud. The Appellate Division, Second Department, affirmed the ruling of the Supreme Court, Kings County, dismissing the cause of action for fraud. The contract provided that the property was being sold subject to landmark restrictions and afforded the Plaintiff the opportunity to obtain a "Landmark Search", on receipt of which the Plaintiff could cancel the contract. "…[T]he sellers had no duty to disclose the property's landmark status…and the amended complaint fails to allege that the sellers actively concealed the possibility that the property could attain landmark status, or how the sellers thwarted the plaintiff's efforts to discover such…" McDonald v. O'Connor, 2020 NY Slip Op 07558, decided December 16, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07558.htm.

Contracts of Sale/Specific Performance

The sellers' attorney advised the buyer's attorney of a new closing date and time, time being of the essence. The buyer did not appear at closing. The sellers' attorney then advised that the buyer was in default and that the contract deposit was forfeited; the buyer commenced an action for specific performance. The Supreme Court, Kings County, dismissed the complaint and canceled the notice of pendency, but the Court denied the sellers' motion for summary judgment on their counterclaim which sought a judgment that they were entitled to retain the down payment. The Appellate Division, Second Department, remitted the case for entry of a judgment that the sellers would retain the down payment. According to the Appellate Division, although the sellers were ready, willing and able to close on the new closing date the buyer, who admitted during a deposition that he did not have sufficient funds to close, was not. As to the down payment, "[a] buyer 'who defaults on a real estate contract without lawful excuse, cannot recover the down payment', at least where, as here, the down payment represents 10% or less of the contract price [citations omitted]." Ashkenazi v. Miller, 2021 NY Slip Op 00140, decided January 13, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_00140.htm.

Election of Remedies/One Action Rule

Real Property Actions and Proceedings Law ("RPAPL") Section 1301 ("Separate action for mortgage debt") states, in part, that "[w]hen final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff…and has been returned wholly or partly unsatisfied". Further, under Section 1301, "[w]hile the action is pending…no other action shall be commenced…to recover any part of the mortgage debt, without leave of court…"

The foreclosure of a mortgage was commenced before a prior action to foreclose the same mortgage was discontinued, requiring leave of court. According to the Appellate Division, Second Department, however, the prior "foreclosure action was discontinued before the defendants' motion…to dismiss the complaint was decided, and there is no indication in the record that the defendants were prejudiced by the plaintiff's failure to comply with RPAPL 1301(3)." The Appellate Division therefore affirmed the denial of the Defendants' motion to dismiss the complaint by the Supreme Court, Kings County. U.S. Bank National Association v. Karnaby, 2021 NY Slip Op 00451, decided January 27, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_00451.htm.

Homeowner's Association/Common Charge Lien/Priority

In a mortgage foreclosure, the Homeowners' Association asserted that its common charge lien had priority over the mortgage to the extent that the mortgage was modified. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Richmond County, granting the Plaintiff's motion for summary judgment and denying the Association's motion for a judgment that its lien for unpaid common charges had priority over the mortgage to the extent that the mortgage was modified. According to the Appellate Division, "the continuing lien for unpaid common charges created by its governing Declaration of Covenants, Restrictions, Easements, Charges and Liens…, which was recorded prior to the mortgage 'merely provided for a potential lien' for unpaid common charges…" Aspen Shackleton III, LLC v. Gordon, 2020 NY Slip Op 07340, decided December 9, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07340.htm.

Judgments/Tenants by the Entirety

Creditors holding money judgments against Alan Gestetner sought to compel the sale to satisfy their judgments of his interest in a house he owned as a tenant by the entirety with his wife. The Supreme Court, Rockland County, dismissed the proceeding for the failure to establish the value of the husband's interest in the home accounting for the homestead exemption available under Civil Practice Law and Rules Section 5206 ("Real property exempt from application to the satisfaction of money judgments"). The Appellate Division, Second Department, affirming the lower court's Order, noted that

> *"…the petitioners could, at most, request the Supreme Court to order the sale of Alan's interest in the marital home [citation omitted], and, had such relief been granted, the purchaser would have acquired only a tenancy in common subject to [the wife's] survivorship rights [citation omitted]."*

Matter of Sklar v. Gestetner, 2021 NY Slip Op 00179, decided January 13, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_00179.htm.

Judgments/Docketing – Incorrect Amount

Plaintiff, the property owner, and its mortgagee claimed that their interests should be subject to a prior docketed judgment only to the extent of $16,050, the amount set forth on the judgment docket, and not the actual amount of the judgment, $217,245, plus interest. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Kings County, holding that they acquired their interests subject to the judgment lien for the greater amount, plus accumulated interest. According to the Appellate Division,

> *"…any reasonable inquiry into the details of the judgment would have revealed that the $16,050 amount set forth in the judgment docket index is an incorrect amount…[T]he plaintiff and Investors Bank are charged with constructive notice of the amount of [the] judgment lien and were required to make further inquiry to determine whether the judgment had been satisfied or released…[T]he judgment docket index is merely notice of a lien and the lien is the judgment [citations omitted]."*

Myrtle 684, LLC v. Tauber, 2020 NY Slip Op 07901, decided December 23, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07901.htm.

Lien Law/Necessary Parties

The Supreme Court, New York County, dismissed the complaint against Defendants whose mortgage liens were recorded before the mechanic's lien being foreclosed was filed. The Court held that under Lien Law Section 44 ("Parties to an action in a court of record") "a prior mortgagee is not a proper party defendant in an action to foreclose a mechanic's lien [citations omitted]." Section 44 provides, in part, that necessary parties defendants include "all persons having subsequent liens…filed, docketed or recorded prior to the filing of the notice of lis pendens…" Midhattan Woodworking Corp. v. Unity Construction Group, LLC, 2021 NY Slip Op 30238, decided January 25, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_30238.pdf.

Mortgage Foreclosures/Lost Notes

The Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Dutchess County. In addition to finding that the Plaintiff did not establish that it was the holder of the note when the action was commenced, the Appellate Division also held that the lost note affidavit submitted did not meet the requirements of Uniform Commercial Code Section 3-804 ("Lost, destroyed or stolen instruments"). Under Section 3-804, "[t]he owner of an instrument which is lost…may maintain an action...upon due proof of his ownership, the facts which prevent the production of the instrument and its terms." According to the Appellate Division,

> *"…the lost note affidavit, which failed to establish when the note was acquired and failed to provide sufficient facts as to when the search for the note occurred, who conducted the search, or how or when the note was lost, failed to sufficiently establish the plaintiff's ownership of the note [citations omitted]."*

HSBC Bank USA, N.A. v. Gilbert, 2020 NY Slip Op 07874, decided December 23, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07874.htm.

Mortgage Foreclosures/Necessary Parties

Sonia Gaines, the Executrix of her the Estate of Marjorie Colwell, was bequeathed real property under Marjorie Colwell's Will. Gaines executed the note and mortgage being foreclosed in her individual capacity. Gaines not appearing or answering the foreclosure complaint, the Supreme Court, Kings County, entered a judgment of foreclosure and sale. Gaines moved to vacate the order of reference and the judgment of foreclosure and sale, asserting that the Plaintiff had fraudulently represented that she owned the property and that the Estate of Marjorie Colwell was a non-joined necessary party. The Supreme Court granted Gaines' motion and dismissed the complaint for the failure to join a necessary party. The Appellate Division, Second Department, reversed the lower court's ruling, denying the Defendant's motion. "'Generally, title to real property devised under the will of a decedent vests in the beneficiary at the moment of the testator's death and not at the time of probate' [citation omitted]." Therefore, the Estate was not a necessary party. US Bank Trust, N.A. v. Gaines, 2020 NY Slip Op 07623, decided December 16, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07623.htm.

In another case raising the issue of whether an Estate was a necessary party to a mortgage foreclosure, Gregory Kalinin executed a note and a mortgage on his property in Brooklyn and then conveyed the property to Defendant Svetlana Kalinin. An action was commenced to foreclose the mortgage in 2015. Gregory Kalinin, now deceased, was named a defendant. The Administrator of his Estate moved to be substituted for the decedent. The Supreme Court, Kings County, denied the motion and granted a judgment of foreclosure and sale. The Appellate Division, Second Department, reversed entry of the judgment, granting the motion to substitute the Administrator. According to the Appellate Division, "…[T]he judgment of foreclosure and sale contains language providing for a potential deficiency judgment against the decedent if the sale of the property does not cover the amount due to the plaintiff. Consequently, the decedent's estate was a necessary party to the action [citations omitted]." Specialized Loan Servicing, LLC v. Kalinin, 2020 NY Slip Op 07417, decided December 9, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07417.htm.

Mortgage Foreclosures/Notices – RPAPL Section 1303

In a mortgage foreclosure involving an owner-occupied one-to-four family dwelling, RPAPL Section 1303 ("Foreclosures; required notices") requires the foreclosing party to deliver to the mortgagor, with the summons and complaint, a notice captioned "Help for Homeowners in Foreclosure."

The Appellate Division, Second Department, agreed with the Supreme Court, Kings County's denial of the foreclosing Plaintiff's motion for summary judgment because the Plaintiff failed to submit a copy of the RPAPL Section 1303 notice purportedly served on the Defendant and the affidavit of service did not indicate compliance with the requirements of Section 1303. The Appellate Division, however, reversed the lower court's grant of the Defendant's motion for summary judgment dismissing the complaint. According to the Appellate Division,

> *"…the defendant failed to establish, prima facie, that the plaintiff did not property serve him with notice pursuant to RPAPL 1303. The defendant merely pointed to gaps in the plaintiff's proof and his bare denial of the receipt of the notice pursuant to RPAPL 1303. That was insufficient [citations omitted]."*

US Bank N.A. v. Bamba, 2020 NY Slip Op 07422, decided December 9, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07422.htm.

Mortgage Foreclosures/Notice of Sale

The Appellate Division, Second Department, upheld the denial of the Defendant's motion by the Supreme Court, Queens County, to set aside a foreclosure sale because the notice of sale was not sent to the defaulting Defendant-mortgagor. According to the Appellate Division, "…a party who defaults in appearing in a foreclosure action is not entitled to notice of a judicial sale…" Deutsche Bank National Trust Company v. Khan, 2020 NY Slip Op 08036, decided December 30, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_08036.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.

In Ridgewood Savings Bank v. Van Amerongen, the Appellate Division, Second Department, held that the Plaintiff had not established, prima facie, compliance with the requirements of RPAPL Section 1304. The Court, however, did not grant the Defendant-homeowner's motion for summary judgment dismissing the complaint as to him because "he failed to affirmatively demonstrate, as a matter of law, that the plaintiff failed to comply with RPAPL 1304…" This decision, reported at 2020 NY Slip Op 08095, dated December 30, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_08095.htm.

In US Bank, N.A. v. Panzer, the Appellate Division, Second Department, affirming entry of a judgment of foreclosure and sale by the Supreme Court, Westchester County, held that the Plaintiff had established compliance with RPAPL Section 1304 "by submitting the affidavit…[stating] that the [loan] servicer had standard office procedures for mailing RPAPL 1304 notices…[The affiant] described those procedures, and she stated that those procedures were adhered to in this case [citation omitted]." This case, reported at 2020 NY Slip Op 07418 decided December 9, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07418.htm.

In US Bank N.A. v. Mendelovitz, 2020 NY Slip Op 07621 and US Bank N.A. v. Pierre, 2020 NY Slip Op 07622, however, both decided December 16, 2020, the Second Department found that the Plaintiff had not established that it had complied with the notice requirements of RPAPL Section 1304. According to the Court in Pierre, "the plaintiff failed to provide evidence of the actual mailing, or 'proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure..'[citation omitted]." These cases are posted at:
http://www.nycourts.gov/reporter/3dseries/2020/2020_07621.htm and
http://www.nycourts.gov/reporter/3dseries/2020/2020_07622.htm.

Mortgage Foreclosures/Standing

New York's Court of Appeals ruled that "there is no per se rule requiring the [trial] court to grant a request for inspection of the original note prior to awarding summary judgment to a plaintiff in a mortgage foreclosure action…" The Plaintiff had demonstrated that it had standing to foreclose by including with its complaint a copy of the original note endorsed in blank and supporting material which included an affidavit of possession based on an employee's review of the Plaintiff's business records. JP Morgan Chase Bank, N.A. v. Caliguri, 2020 NY Slip Op 07660, decided December 17, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07660.htm.

The Appellate Division, Second Department, held that the foreclosing Plaintiff "was not required to submit additional evidence to demonstrate how or when physical possession of the note occurred." "'…[W]here the note is affixed to the complaint, it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date' [citation omitted]." Bank of New York Mellon v. Barkan, 2021 NY Slip Op 00143, decided January 13, 2021, is posted at
http://www.nycourts.gov/reporter/3dseries/2021/2021_00143.htm.

The Appellate Division, Second Department, affirmed the grant by the Supreme Court, Queens County, of the foreclosing Plaintiff's motion for summary judgment dismissing the Defendant's affirmative defense of lack of standing. According to the Appellate Division, "[s]ince standing was established by annexation of the note [endorsed in blank] to the complaint, the admissibility and sufficiency of the affidavit of the loan servicer's employee is irrelevant [citation omitted]. Further, inasmuch as the mortgage 'passes with the debt as an inseparable incident' [citations omitted], the validity and timing of various assignments of the mortgage are irrelevant to the issue of standing [citations omitted]." Wilmington Savings Fund Society, FSB v. Hershkowitz, 2020 NY Slip Op 07427, decided December 9, 2020, is posted at
http://www.nycourts.gov/reporter/3dseries/2020/2020_07427.htm.

The Appellate Division, Second Department, reversed entry of an Order of the Supreme Court, Nassau County, which granted the foreclosing Plaintiff's motion for summary judgment. The Appellate Division held that the Plaintiff had not established, prima facie, that it had standing. The affidavit on behalf of the loan servicer, affirming that the Plaintiff assignee had possession of the note when the action was commenced, stated that he relied on the loan servicing records. The records themselves, however, were not submitted. Deutsche Bank National Trust Company v. Schmelzinger, 2020 NY Slip Op 07543, decided December 16, 2020, is posted at
http://www.nycourts.gov/reporter/3dseries/2020/2020_07543.htm.

In SMS Financial XXXI, LLC v. Hutson, 2021 NY Slip Op 00449, decided January 27, 2021, the Appellate Division, Second Department, affirming the denial of the foreclosing Plaintiff's motion for summary judgment by the Supreme Court, Queens County, found that the mortgagee's affiant "did not attest that he was personally familiar with the record-keeping practices and procedures of the plaintiff's predecessors in interest, or that the records generated by those entities were actually incorporated into the plaintiff's own records or routinely relied upon in its business [citations omitted]." This case is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_00449.htm.

The Court of Appeals held, in US Bank National Association v. Nelson, 2020 NY Slip Op 07661, decided December 17, 2020, that the defense of standing, not raised by the Defendants in their answers or in any pre-answer motions, was waived. The Court did not reach the effect of RPAPL Section 1302-a ("Defense of lack of standing; not waived") because that Section was enacted effective December 23, 2019, while the appeal in this case was pending. Section 1302-a states, in part, that

> *"…any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in paragraph (a) of subdivision six of section thirteen hundred four of this article, shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss…"*

This decision is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07661.htm.

Mortgage Foreclosures/Statute of Limitations

New York State's Court of Appeals held in Freedom Mortgage Corporation v. Engel, 2021 NY Slip Op 01090, decided February 18, 2021, that "where the maturity of the debt has been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary…A voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked." Further, according to the Court, "[g]iven the advantages of a clear default ruling reinstating the pre-accelerated terms of the loan, the onus is on noteholders to inform the borrower at the time of the discontinuance if acceleration has not been revoked and it will not accept installment payments." This ruling is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_01090.htm.

In Bank of New York v. Hutchinson, the Appellate Division, Second Department, found that "the plaintiff's submission of the loan modification agreement, which 'clearly and unambiguously demanded a resumption of monthly installment payments on the note' [citations omitted], and the consent to cancel lis pendens [in the prior foreclosure of the mortgage] [citation omitted], was sufficient to raise a triable issue of fact as to whether the plaintiff had revoked its election to accelerate the full balance of the mortgage debt…[citations omitted] thereby warranting denial of summary judgment to the defendant dismissing the complaint [in the current foreclosure action] in its entirety." This case, 2021 NY Slip Op 00284, decided January 20, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_00284.htm.

Mortgage Recording Tax/"Mezzanine" Loans

Current Developments dated November 10, 2020 reported that legislation was being considered in Albany (Senate Bill 07231A/Assembly Bill 09041A) which would impose mortgage recording tax on "mezzanine debt" and on "preferred equity investments". Other legislation (Senate Bill 03074/Assembly Bill 03139) which would similarly impose the tax was introduced on January 22, 2021 and can be found at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03139&term=2021&Text=Y.

New York City/Development Rights

15 W. 17th St., LLC executed a Historic Preservation Deed of Easement conveying a façade easement and development rights to the Defendant Trust for Architectural Easements, formerly known as the National Architectural Trust, Inc. The Plaintiff, a member of the entity which had granted the easements and development rights, claimed that the Deed did not transfer development rights. The deed, however, stated the following:

> *"Grantor further desires to grant to Grantee any and all Developmental Rights associated with the Premises…The Parties acknowledge such grant shall forever remove the Developmental Rights from the Premises, prohibit Grantor from transferring or otherwise using the Development Rights, and that Grantee hereby extinguishes such Development Rights."*

The Supreme Court, New York County, granted the Defendant's motion for summary judgment dismissing the complaint, which Order was affirmed by the Appellate Division, First Department. According to the Appellate Division,

> *"[w]hile paragraph 1(h) [of the Deed] refers to development rights that could arise as a result of future changes to the zoning laws, plaintiff does not identify any changes to the zoning laws that would have resulted in new development rights other than the ones extinguished in paragraph 3 of the deed of easement. Accordingly, we find that 15 W. 17th St. did not retain any development rights to transfer to subsequent owners, and therefore plaintiff could not have purchased the development rights from nonparty The Milan Associates, L.P."*

THTML LLC v. Trust for Architectural Easements, 2020 NY Slip Op 07518, decided December 15, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07518.htm.

New York City/Environmental Control Board ("ECB") Judgments

The City of New York commenced an action to enforce a penalty resulting from the failure to pay an ECB judgment. The Defendant moved to have the judgment vacated, alleging that he did not own the property in question when the judgment was issued. The violation was issued in February 2019, which was after the property was sold at a foreclosure auction in 2015. The deed transferring title to the successful bidder at the foreclosure was, however, recorded in July 2019. The City argued that when the violation was issued the Defendant was still the owner of record. The Supreme Court, New York County, denied the Defendant relief. According to the Court, the fine resulted from the Defendant operating the property with illegal SRO units after the auction sale.

> *"[h]ad defendant extinguished all connection to the property and moved away, the Court might have questioned how a defendant in [a] foreclosure case could be held responsible for a fine issued years after the foreclosure auction terminated his equity of redemption…But the defendant here apparently continued to hold himself out as the owner by operating SROs without proper authorization."*

City of New York v. Limtung, 2020 NY Slip Op 34276, decided December 22, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_34276.pdf.

Options to Purchase/Leases

A lease for property in The Bronx included a purchase option exercisable "at any time prior to the end of the term of the Lease." The lease expired in 2015 and the Plaintiffs-tenants remained in possession as month-to-month holdover tenants. The Plaintiffs exercised the option in 2019; they then commenced an action for specific performance. The Supreme Court, Bronx County, dismissed the complaint.

> *"There was no provision [in the lease] that the option to purchase could be extended beyond the expiration*

> *of the original lease term. The fact that the lease provisions impliedly continue in the holdover tenancy does not provide any right to exercise the option to purchase…absent any further agreement of the parties."*

McMillan v. Marengo, 2020 NY Slip Op 51456, decided December 4, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_51456.htm and reported at 69 Misc. 3d 1221.

Pandemic/Leases

A number of decisions were handed down on the impact of the Pandemic on commercial leases.

As noted in Current Developments dated January 5, 2021, New York City enacted Local Law No. 55-2020, adding Administrative Code Section 22-1005 ("Personal liability provisions in commercial leases"), also known as the "Guaranty Law." 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."*

In 40 X Owner LLC v. Masi, the Plaintiff-landlord sought to recover unpaid rent from the guarantor of a lease of office space. The Defendant argued that the Guaranty Law barred recovery. The Supreme Court, New York County, granted the Plaintiff's motion for a default judgment on the issue of liability and directed the Plaintiff to file a note of issue for an inquest to determine the amount due. According to the Court,

> *"…the above provision does not apply in this case because this lease involved office space. It did not relate to a 'non-essential retail establishment', a restaurant, or to a company that was required to close to members of the public (such as gyms). There is no basis to find that this Administrative Code provision applies to a tenant that leased office space and simply stopped paying rent, even if the downturn in business was due to Covid-19."*

This decision, at 2021 NY Slip Op 30041, dated January 7, 2021 is posted at http://nycourts.gov/reporter/pdfs/2021/2021_30041.pdf.

The following rulings were issued by Judge Arlene P. Bluth, of the Supreme Court, New York County.

In 1140 Broadway LLC v. Bold Food, LLC, the Plaintiff-landlord sued the tenant and its guarantor for unpaid rent. The Defendants asserted as defenses the doctrines of frustration of purpose and the impossibility of performance. The tenant's business was managing and consulting for restaurants. The Court held that the frustration of

purpose doctrine "does not apply here, where the tenant rented office space, the tenant's industry experienced a precipitous downfall and the tenant to [sic] no longer be able to pay the rent." The Court also declined to apply the doctrine of impossibility. According to the Court, granting the Plaintiff's motion for summary judgment on the issue of liability and ordering a trial to determine the amount of damages,

> *"'[i]mpossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible…'[citation omitted].… [A]lthough restaurants were required to scale back certain operations (such as indoor dining) because of the pandemic, they were not fully shut down. Many food establishments decided to shut down because of the financial consequences from both the pandemic and the public health orders, but that does not mean there was a 'destruction of the subject matter' contemplated in the contract at issue here, which was for office space [to provide consulting services] on the twelfth floor of an office building. The Court is unable to find that the doctrine of impossibility has any application here."*

This decision, at 2020 NY Slip Op 34017, dated December 3, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_34017.pdf.

In ITS Soho LLC v. 598 Broadway Realty Associates Inc., a seven-year lease, of space in which the tenant was to build out and operate a gym, commenced March 15, 2020. On March 17 gyms were ordered to shut down until September 2020. The Tenant sought an Order rescinding and terminating the lease. The Court dismissed the case and directed the Clerk to enter a judgment including costs and disbursements. According to the Court,

> *"[a] temporary shut down of a gym does not constitute substantial frustration of a lease stretching for nearly a decade…That plaintiff's preferred use of the premises might not be profitable for a few months is not a basis for this Court to intervene and rip up the contract… Plaintiff claims that defendant breached this covenant [of good faith and fair dealing] by refusing to negotiate to allow plaintiff out of the lease and continuing to charge rent while the plaintiff is unable to build out on the premises. The Court is unable to find that defendant's refusal to accommodate plaintiff's desire to rescind a contract constitutes a valid cause of action. Defendant was under no obligation to renegotiate the lease so that plaintiff could walk away and it would be left with a vacant space."*

This decision, at 2020 NY Slip Op 34300, dated December 22, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_34300.pdf.

Similarly, the Court granted summary judgment as to liability in an action brought by a landlord against its lessee which had been operating a gym, and against the guarantor of the lease, for the non-payment of rent. Due to the Pandemic, the Defendants had raised defenses of frustration of purpose, impossibility of performance and the failure of consideration. According to the Court,

> *"[t]o permit the doctrines of impossibility or frustration of purpose to apply to commercial tenants who stopped paying due to the pandemic would raise countless questions. Would it apply to every commercial tenant and, if not, what is the criteria to quality for such relief? What about commercial tenants that were permitted to operate during the pandemic but still lost business? And because this is a widespread issue, there is a risk that considering tenants' claims on a case-by-case basis would yield wildly inconsistent and unfair results. In other words, this is clearly the role of the other branches of government…"*

As to the defense of the failure of consideration, "[t]his is not a case where they are forbidden from running a gym ever again at the premises." Cab Bedford LLC v. Equinox Bedford Ave, Inc., 2020 NY Slip Op 34296, decided December 22, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_34296.pdf.

Powers of Attorney

Current Developments dated December 16, 2020 reported on Chapter 323 of the Laws of 2020 which amended New York's General Obligations Law concerning powers of attorney. Among the changes made was the adding of a provision allowing a power to be signed by a person other than the principal of the power in the principal's presence and at the principal's direction. Chapter 323 is effective on the 180th date following its enactment, which is June 13, 2021.

Under consideration in the New York State Legislature is Senate Bill S00888/Assembly Bill A02353 which would, if enacted, further amend General Obligations Law Section 5-1501B ("Creation of a valid power of attorney…") to require that the signature of the principal of a power of attorney or of a person signing on behalf of the principal be "witnessed by two persons who are named in the instrument as agents or as permissible recipients of gifts… The person who takes [this] acknowledgment [of the principal or of the person signing on behalf of the principal] may also serve as one of the witnesses." As of the date of the writing of this Bulletin, this legislation has passed the State Senate and is under review in the State Assembly. Chapter 323. Chapters 323 and Senate Bill 00888 can be found at https://www.nyassembly.gov/leg/?default_fld=&leg_video=&bn=A05630&term=2019&Text=Y and https://www.nyassembly.gov/leg/?default_fld=&leg_video=&bn=S00888&term=2021&Text=Y.

Recording Act/Bona Fide Encumbrancers

Current Developments dated January 5, 2021 reported on the case of JP Morgan Chase Bank, National Association v. Aspilaire, 2020 NY Slip Op 06510, decided November 12, 2020, in which the Appellate Division, Second Department, held that a mortgage was subject to a prior mortgage which had been fraudulently satisfied of record. The satisfaction of mortgage being void, the later mortgagee 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"). This ruling is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_06510.htm.

A ruling to the contrary, on different facts, has since been issued by the Appellate Division, First Department, in Bank of New York v. Terrapin Industries, LLC, 2020 NY Slip Op 07705, decided December 22, 2020. In that case, the foreclosure of a mortgage on a condominium unit held by The Bank of New York ("BNY"), as Trustee, was marked "disposed" and the related notice of pendency had expired. Further, an action commenced by the mortgagor resulted in a default judgment against BNY which discharged the BNY mortgage. That Order discharging the mortgage was recorded in the public records in 2014. In 2015, a mortgage on the same unit was executed to KBS Sheapshead Bay, LLC ("KBS"). The default judgment against BNY was vacated in 2016. The Supreme Court, New York County, held that the KBS mortgage lien was superior to any mortgage lien held by BNY. The Appellate Division, First Department, affirmed the lower court's ruling.

According to the Appellate Division, the KBS mortgage had priority. The Supreme Court had properly applied the equitable doctrine of laches because BNY had unreasonably delayed in vacating the default judgment and restoring its foreclosure action, and KBS would be prejudiced if BNY was deemed to have the senior lien. The Court had also "properly concluded that KBS is a bona fide encumbrancer, as nothing in the public record created any issues affecting title when KBS entered into its mortgage…" This decision is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_07705.htm.

Recording Charges/Tax Map Verification Fee

The Plaintiffs challenged the validity of tax map verification fees required to be paid by Suffolk County's Real Property Tax Service Agency to record or file any real property related document in the office of the Suffolk County Clerk. The fees, authorized by Suffolk County Administrative Code Section A18-3 ("Verified identification numbers required on all instruments filed pertaining to title of land"), are $200 for the first parcel of land affected by a document and $200 for each additional parcel, not to exceed in the aggregate $5,000. A separate

and additional fee of $200 is charged to verify the tax lots to record or file a mortgage or a mortgage-related instrument, such as a building loan agreement, the assignment of or an agreement modifying a mortgage, or a consolidation agreement. The Plaintiffs contended that because the fees have no relationship to the costs incurred to record or file real property related instruments they are a tax which cannot be imposed without the enactment of enabling legislation by the State. The Supreme Court, Suffolk County, denied the Plaintiff's' motion for summary judgment and for provisional class certification and granted the Defendant's motion to dismiss the complaint. According to the Court,

> *"…even without regard to the factually complex question of whether the fees charged for tax map verifications are so disproportionate to the costs of providing them or to the benefits conferred upon those who obtain the verifications as to transform them into a tax…the want of State legislative authorization for the county's imposition of the tax map verification fees…was addressed…by the State Legislature's enactment of Laws of 2019, Chapter 55, Part SS, Section 1, which became effective on April 12, 2019, amending CPLR Sections 8019 and 8021 [which authorized the charging of tax map number verification fees]."*

Cella v. Suffolk County, 2020 NY Slip Op 51564, decided December 31, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_51564.htm.

However, tax map verification fees charged by Nassau County were held unconstitutional. According to the Supreme Court, Nassau County, in Falk v. Nassau County, Index No. 600868/2017, "...the County's current fee associated with providing a TMCL [tax map certification letter] are [sic] excessive and not tied [to] the County's responsibility to maintain the property registry. The TMCL fees were not assessed or estimated on the basis of reliable factual studies or statistics and are far in excess of the costs necessary to provide the service of generating the TMCL. As the fees associated with TCMLs are used to generate revenue, they are an unlawful and unconstitutional tax." This case, decided March 6, 2020, is reported at 2020 N.Y. Misc. LEXIS 10945.

Tenants by the Entirety/"Divisible Divorce" Doctrine

The Plaintiff-wife and her husband, the Defendant, were married in New York in 1982 and purchased real property in Queens County as tenants by the entirety. The Plaintiff moved to Virginia and, in 2010, obtained an ex parte final decree of divorce. The statute of limitations to commence an action for the equitable distribution of their assets in New York having expired, the Plaintiff commenced an action to partition their real property in New York. The Defendant contended that since the property was owned by the entireties the property was not subject to a partition. RPAPL Section 901 ("By whom maintainable") allows a partition action to be brought by a joint tenant or a tenant in common. The dismissal of the compliant by the Supreme Court, Queens County, was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"New York…follows the 'divisible divorce' doctrine, pursuant to which the ex parte Virginia divorce decree, obtained without personal jurisdiction over the defendant, terminated the parties' status as husband and wife, but had no effect on defendants' property rights [citation omitted]. In conformity with this doctrine, it is well established that an ex parte foreign divorce decree cannot divest the nonappearing spouse of his or her rights in a New York tenancy by the entirety [citations omitted]…Thus, the tenancy by the entirety in which the parties own their marital home has not been terminated."*

Bernhardt v. Schneider, 2021 NY Slip Op 00407, decided January 27, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_00407.htm.

Transfer Tax/New Paltz

The Town of New Paltz, in Ulster County, pursuant to authority granted in the State's Community Preservation

Law of 2007 (Chapter 599 Laws of 2007), adopted Local Law 5 of 2020 imposing a transfer tax of 1.5% on each conveyance of real property or an interest in real property in the Town, including the Village, of New Paltz effective February 1, 2021. Under that enabling legislation, the transfer tax is payable by the buyer. Exemptions include conveyances made pursuant to grandfathered contracts. According to a Notice issued by the Town Supervisor, conveyances occurring after February 1 are not taxable if made pursuant to a binding written contract "entered into prior to such date, provided that the date of execution of such [a] contract is confirmed by independent evidence such as the recording of the contract, payment of a deposit, or other facts and circumstances acceptable to the County Commissioner of Finance…" Further information, including the form required to be submitted to the Ulster County Clerk with payment of the tax, can be obtained at https://www.townofnewpaltz.org/town-clerktax-collector/pages/real-estate-transfer-tax#:~:text=The%20Town%20of%20New%20Paltz%20adopted%20Local%20Law,each%20conveyance%20of%20real%20property%20or%20interest%20therein.

Uniform Commercial Code/Mezzanine Loans

Current Developments dated July 23, 2019 reported on Atlas MF Mezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC, 2019 NY Slip Op 04495, decided June 6, 2019, in which the Appellate Division, First Department, dismissed causes of action seeking an Order overturning a mezzanine loan foreclosure sale, on grounds including claims that the lender breached the duty of good faith and fair dealing by not conducting a "commercially reasonable" UCC sale and that the transferee at the sale did not act in good faith. According to the Appellate Division, "…if UCC sales could be unwound, it would only serve to muddy the waters surrounding nonjudicial sales conducted pursuant to article 9 of the UCC, and to deter potential buyers from bidding in nonjudicial sales, which would, in turn, harm the debtor and the secured party attempting to collect after a default." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04495.htm.

The Permanent Editorial Board ("PEB") for the Uniform Commercial Code, acting under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws), issued a Commentary disagreeing with the decision in Atlas MF Mezzanine Borrower, LLC. According to the Editorial Board's "Commentary", "a transferee who has not acted in good faith does take subject to the debtor's right of redemption in addition to other rights of the debtor in the collateral."

> *"Although the debtor may indeed be entitled to seek monetary damages for a disposition that did not comply with [UCC] Section 9-610 [citations omitted], the debtor is also entitled to the debtor's right of redemption and other rights in the collateral when the transferee has not acted in good faith. A bad faith transferee may not rely on the 'take free' rule. Any policy based on commercial certainty is subordinate to the policy of not rewarding those that do not act in good faith."*

PEB Commentary No. 22, "Status of a Disposition Under Section 9-610 of the Uniform Commercial Code if the Transferee Does not Act in Good Faith", dated August 24, 2020, can be obtained at https://www.ali.org/about-ali/governance/committees/joint-committees/.

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