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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Condominiums/Common Charge Lien

Under Real Property Law ("RPL") Section 339-z ("Lien for common charges…"), a lien for unpaid common charges is "prior to all other liens except…(ii) all sums unpaid on a first mortgage of record." In the foreclosure of a first mortgage on a unit in a commercial condominium, the Board of Managers asserted, in a counterclaim, that its common charge lien against the unit was superior to the lien of the mortgage being foreclosed. It argued that RPL Section 339-z only applies to a traditional sale or conveyance of a unit and not to a lender's foreclosure sale.

The Supreme Court, New York County, noted that Section 339-z also states: "Notwithstanding the above, the declaration of an exclusive non-residential condominium may provide that the lien for common charges will be superior to any mortgage liens of record"; the condominium's By-Laws provide that "[t]o the extent permitted by applicable Law, [the condominium's common charge liens] shall be superior to any mortgage liens of record" on a unit. The mortgagee's motion to dismiss the counterclaim was therefore denied. Wilmington Trust, N.A. v. Elmwood NYT Owner, LLC, 2022 NY Slip Op 31188, decided April 6, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_31188.pdf.

Contracts of Sale

The Appellate Division, Second Department, modifying an Order of the Supreme Court, Kings County, granted the Defendant-property owners' cross-motion for summary judgment dismissing the complaint in an action seeking specific performance of a document the Plaintiff-purchaser contended was a contract of sale. The document did not specify a closing date and the parties had not agreed with respect to the mortgage terms. According to the Appellate Division,

> *"[t]The document…did not state whether the plaintiff was purchasing the property subject to the existing mortgage, obtaining a purchase money mortgage, or obtaining his own mortgage. The failure to include such terms makes the purported real estate contract unenforceable [citations omitted]."*

Cohen v. Holder, 2022 NY Slip Op 02778, decided April 27, 2022, is posted at https://www.nycourts.gov/reporter/3eseries/2022/2022_02778.htm.

Among a contract vendee's obligations to close was a requirement that the Defendant-seller deliver estoppel certificates from the commercial tenants dated no more than thirty days prior to the closing and in the form attached to the contract or otherwise reasonably acceptable to the purchaser. The seller did not deliver estoppels from all of the tenants; some of the estoppels were executed by the seller.

The Supreme Court, New York County, granted the Plaintiff-contract vendee's motion for summary judgment on its cause of action for a declaratory judgment holding that the Plaintiff was entitled to the immediate return of the contract deposit. The seller was required to pay part of the Plaintiff's legal fees and expenses to the extent provided in the contract. Angelo Gordon Real Estate Inc. v. Benlab Realty, LLC, 2022 NY Slip Op 31168, decided April 7, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_31168.pdf.

Eminent Domain/"Reasonable Probability Incremental Increase Rule"

Vacant property zoned for residential use but designated as wetlands was taken by eminent domain by New York City for use as part of a stormwater management project. The Supreme Court, Richmond County, finding that the property owner had established that there was a "reasonable probability" that the wetlands designation would be found to be an unconstitutional taking, awarded the claimant, as just compensation, an amount which included an increment above the regulated value of the property on the date of the taking to account for the probability that the wetlands regulations would be held to be confiscatory. According to the Appellate Division, Second Department, affirming the lower court's ruling,

> *"…pursuant to the "'reasonable probability-incremental increase rule', if the owner proves a reasonable probability that the regulations on the property could be invalidated in court as an unconstitutional taking, he or she is entitled to an increment above the value of the property as regulated, 'representing the premium a knowledgeable buyer would be willing to pay for a potential change to a more valuable use'" [citations omitted]…Here, given the 84% diminution in the value of the property, together with the effective prohibition on development of any part of the property effected by the wetlands regulations, the claimant established that there was a reasonable probability that the imposition of the wetlands regulations on the property would be found to constitute a regulatory taking [citations omitted]."*

Matter of New Creek Bluebelt, Phase 4, 2022 NY Slip Op 03118, decided May 11, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03118.htm.

Lien Law/Arbitration

An agreement between a property owner and the Plaintiff, a construction manager, provided that disputes over matters such as payments to the Plaintiff would be initially considered by an architect, then by a mediator, and, if not resolved in mediation, by an arbitrator. The manager's services were terminated; it filed a mechanic's lien, commenced an action to foreclose the lien, and filed a lis pendens and a demand for mediation. The owner moved by order to show cause seeking either the dismissal of the foreclosure of the mechanic's lien or to have it stayed pending completion of mediation and arbitration. The owner argued, however, that by commencing the foreclosure the Plaintiff had waived its right to arbitrate.

The Supreme Court, Suffolk County, stayed the action to enable the arbitrator to determine what amounts, if any, were due and owing to the Plaintiff, noting that under Lien Law Section 35 ("Waiver of arbitration; arbitrator's award conclusive"), "…in any arbitration proceeding had [pursuant to a contract to furnish labor or materials, the arbitrators'] award shall be conclusive…in any action to foreclose the lien." As to the Defendant's claim that the right to arbitrate was waived,

> *"[t]he commencement of an action to foreclose a mechanic's lien is in the nature of an effort to preserve the status quo pending arbitration [citation omitted] and does not constitute a waiver of the contractual right to resolve the dispute in arbitration [citation omitted]."*

West Rac Contracting Corp. v. Huntington Village Hotel Partners, LLC, 2022 NY Slip Op 22154, decided May 16, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_22154.htm.

Lien Law/Willful Exaggerated Mechanic's Lien

The Supreme Court, Richmond County, discharged a mechanic's lien filed against four properties under Lien Law Section 19 ("Discharge of lien for private improvement") on the ground that because the work done and materials furnished were not apportioned between the parcels the amount claimed by the lienor was willfully exaggerated. The Appellate Division, Second Department, reversed the lower court's Order. According to the Appellate Division,

> *"…the composite mechanic's lien was not invalid because of a failure to apportion the work and materials furnished between the four parcels of real property that were identified in the composite mechanic's lien. The requirement to do so 'applies where several transactions, involving the improvement of distinct parcels of real property, have been effected at the request of independent owners' [citation omitted]. Here, the petitioners failed to establish that the individual and independent lot owners…hired [the mechanic's lienor] in separate and distinct transactions. Furthermore, the composite mechanic's lien was not invalid on its face merely because it identified multiple lots by their respective tax block and lot designations [citation omitted]."*

Matter of Matrix Staten Island Development, LLC v. BKS-NY, LLC, 2022 NY Slip Op 02795, decided April 27, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02795.htm.

Mortgage Foreclosures/Neglect to Prosecute

In 2015, upon the Defendant's default in an action to foreclose a mortgage, an Order of Reference was issued by the Supreme Court, Kings County. The action was dismissed in 2017 but, in 2020, the Order dismissing the action was vacated and the action was restored by the Supreme Court, Kings County. The Defendant in the foreclosure commenced an action to cancel the mortgage, claiming that its enforcement was barred by the statute of limitations. The Supreme Court, Kings County, agreed with the lender that the statute of limitations did not bar the action because the foreclosure action had been restored.

Applying Civil Practice Law and Rules ("CPLR") Section 205 ("Termination of Action"), the Supreme Court granted the Defendant's motion for summary judgment in the action to cancel the mortgage. According to the Court,

> *"CPLR 205(a) permits a party to recommence an action within six months, where the action was dismissed other than by 'voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits.' A dismissal pursuant to CPLR 3215(c) ["Default judgment"], for failure to move for a default within a year, does not amount to a neglect to prosecute for purposes of CPLR 205(a) where the court does not include any findings of specific conduct showing a pattern of delay [citation omitted]."*

The Plaintiff also contended that the foreclosure should be dismissed under Rule 8 of Part F ("General Foreclosure Rules") of the Kings County Supreme Court's Uniform Civil Term Rules, which states that "[w]ithin one year after the signing and entry of an Order of Reference, an application for a judgment of foreclosure and sale must be made. Such period of time will be suspended by the filing [of] a Forbearance or Settlement Agreement with the clerk of this court. Failure to comply will result in an automatic dismissal of the action." The Court found that the foreclosure had not been dismissed under Rule 8.

Kelly v. U.S. Bank Trust National Association, as Trustee, 2022 NY Slip Op 30984, decided March 15, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30984.pdf.

Mortgage Foreclosures/Notices - RPAPL Section 1303

In the foreclosure of a mortgage on 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 notice is required to be in bold, 14-point type on colored paper other than the color of the summons and complaint and the title of the notice is required to be in bold, 20-point type.

In Bank of America, N.A. v. Keefer, 2022 NY Slip Op 02776, decided April 27, 2022, the Appellate Division, Second Department, reversed the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Suffolk County, because"[t]he plaintiff's submissions did not demonstrate that the notice served upon the defendant complied with the type-size requirements in RPAPL 1303 [citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_02776.htm.

Mortgage Foreclosures/Notices - RPAPL Section 1304

The Appellate Division, Second Department, reversed the grant of the foreclosing Plaintiff's motion for summary judgment by the Supreme Court, Nassau County, because the Plaintiff had failed to establish, prima facie, that it had complied with the "separate envelope" requirement of Real Property Actions and Proceedings Law ("RPAPL") Section 1304 ("Required prior notices"). Mailed with the Section 1304 notice was a "Consumer Notice Pursuant to 15 U.S.C. Section 1692(G)." The Appellate Division granted the Defendant-borrower's cross-motion for summary judgment dismissing the complaint as to him. US Bank National Association v. Drakakis, 2022 NY Slip Op 03022, decided May 4, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03022.htm.

Similar recent decisions of the Appellate Division, Second Department, in which the Court, applying the requirement that the Section 1304 notice be sent in a separate envelope, found that the Plaintiffs had failed to establish, prima facie, strict compliance with Section 1304, are HSBC Bank USA, N.A. v. DeBenedetti, 2022 NY Slip Op 02983, decided May 4, 2022, and Deutsche Bank National Trust Company v. Bonal, 2022 NY Slip Op 03230, decided May 18, 2022. Those rulings are posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_02983.htm and https://www.nycourts.gov/reporter/3dseries/2022/2022_03230.htm.

An additional similar decision was issued by the Supreme Court, Putnam County, in U.S. Bank, N.A. v. DeJesus, 2022 NY Slip Op 50461, decided June 1, 2022, posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_50461.htm.

In Wells Fargo Bank, N.A. v. Stephen, 2022 NY Slip Op 03414, decided May 25, 2022, the Appellate Division, Second Department, held that non-compliance with Section 1304 is a "'personal defense' which could not be raised by…strangers to the note and mortgage [citations omitted]," who, in this case, held only "an interest" in the mortgaged property. This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03414.htm.

In U.S. Bank Trust, N.A. v. Chiramannil, 2022 NY Slip Op 03270, decided May 18, 2022, the Appellate Division, Second Department, finding that the Plaintiff had complied with RPAPL Sections 1304 and 1306 ('Filing with Superintendent"), affirmed the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Suffolk County. According to the Appellate Division:

> *"Contrary to the plaintiff's contention, a defense based on noncompliance with RPAPL 1304 may be raised at any time prior to the entry of a judgment of foreclosure and sale [citation omitted]. Thus, the defendant properly raised failure to comply with RPAPL 1304 in opposition to the summary judgment motion, even though it was not asserted in her answer [citations omitted]. Nevertheless, where as here, a defendant raises failure to comply with RPAPL 1304 for the first time in opposition to a summary judgment motion, a plaintiff may establish that it complied with RPAPL 1304 by presenting evidence of compliance in its reply papers [citations omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03270.htm.

Mortgage Foreclosures/Referee's Report

The Supreme Court, Kings County, granted the Plaintiff's motion for an Order of Reference and appointed a Referee to Compute. The Order of Reference required the Plaintiff to serve a copy of the Order with Notice of Entry within 20 days of its entry and "no less than thirty (30) days prior to any hearing before the Referee." The Order also stated that the "Referee shall not proceed to take evidence…without proof of such service…" On December 16, 2016, the Referee issued his report; on March 6, 2017, a copy of the Order of Reference was served upon the Defendant and others.

The Defendant opposed the Plaintiff's motion to confirm the Referee's report and for issuance of a judgment of foreclosure and sale, contending that the Plaintiff had not complied with the dates in the Order of Reference. The Supreme Court's grant of the Plaintiff's motion was affirmed by the Appellate Division, Second Department. The Appellate Division, noting that the Defendant had not disputed her default on the mortgage, her default in appearing in the action, or the amount due, as computed by the Referee, stated the following:

> *"[A]s long as a defendant is not prejudiced by the inability to submit evidence directly to a referee, a referee's failure to notify a defendant and hold a hearing is not, by itself, a basis to reverse a judgment of foreclosure and sale and remit the matter for a hearing, and a new determination of amounts owed [citations omitted]. Where, as here, a defendant had an opportunity to raise questions and submit evidence directly to the Supreme Court, which evidence could be considered in determining whether to confirm the referee's report, the defendant is not prejudiced by any error in failing to hold a hearing [citations omitted]."*

Bank of America, N.A. v. Scher, 2022 NY Slip Op 03366, decided May 25, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03366.htm.

Mortgage Foreclosures/United States a Party

More than two years after property was sold at a tax lien sale the Plaintiff, which had been conveyed the property by the purchaser at the sale, commenced an action to quiet title under RPAPL Article 15. The Supreme Court, Nassau County, granted the Plaintiff's motion for summary judgment, holding that the Plaintiff was the owner of the property, free and clear of all liens and encumbrances.

A second mortgage on the property cut off by the tax lien sale was held by the Secretary of the United States Department of Housing and Urban Development. Champion Mortgage Company ('Champion"), the holder of the first mortgage, which was also cut off by the tax lien sale, asserted that the sale was void pursuant to 28 U.S.C. Section 2410 ("Actions affecting property on which United States has a lien") which states, in part, that

"an action to foreclose a mortgage or other lien, naming the United States as a party under this section, must seek judicial sale." In the Article 15 proceeding, HUD filed a notice of appearance, a waiver and a conditional assertion of a claim to any surplus monies; it did not interpose an answer.

The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division, "there is no evidence in the record that Champion is an agent or assignee of HUD [citations omitted]. As such, Champion may not assert HUD's rights with respect to any alleged noncompliance with 28 USC Section 2410 [citation omitted]." Carr Holdings, LLC v. Martinez, 2022 NY Slip Op 03094, decided May 11, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03094.htm.

Mortgage Foreclosures/Vacating Default

After entry of a judgment of foreclosure and sale by the Supreme Court, Suffolk County, the Defendant sought to vacate her default in opposing the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, affirming the lower court's Order, found that the Defendant had "failed to demonstrate a reasonable excuse for her default…[and] she did not demonstrate that the evidence on which she relied 'could not have been discovered earlier through the exercise of due diligence' [citation omitted]." Vacating a judgment or Order by reason of an "excusable default" or "newly discovered evidence" is allowed by Subsections (a)(1) and (2) of CPLR Section 5015 ("Relief from judgment or order'}. Wells Fargo Bank, N.A. v. Echeverria, 2022 NY Slip Op 02574, decided April 20, 2022, is reported at 204 AD3d 955 and posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02574.htm.

Mortgages/Statute of Limitations

In an action to cancel a consolidated mortgage on the grounds that more than six years had expired since the indebtedness had been accelerated, the Appellate Division, Second Department, affirmed the Supreme Court, Nassau County's grant of the Defendants' cross-motion for summary judgment dismissing the complaint. According to the Appellate Division,

> *…the 2012 notice [from the lender to the Plaintiffs] stated that if the plaintiffs were unable to pay the arrears there were 'various options that may be available…to prevent a foreclosure sale of [the] property' such as a repayment plan, loan modification, sale of the property, or deeding the property to the noteholder. Thus, the 2012 notice did not set forth the defendants' clear and unequivocal election to accelerate the debt, but instead, was a letter discussing acceleration as a possible future event [citation omitted]."*

Knox v. Countrywide Home Loans, Inc., 2022 NY Slip Op 03107, decided May 11, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03107.htm.

New York City/Building Department/Signage

The Department of Buildings issued summonses to the Petitioner for the installation of signs without a permit. Civil penalties were imposed by the Department's Office of Administrative Trials and Hearings for each violation. The Petitioner claimed that permits were not required under Local Law 28 of 2019 ("…waiving penalties for violations for signs that are accessory to a use on the same zoning lot") because there were similar signs in place before the Local Law's effective date of February 9, 2019 and, therefore, the new signs were grandfathered. Section 3 of Local Law 28 states that

> *"…no applicable violations shall be issued on or after the effective date of this section for an accessory sign in existence on or before the effective date of this section for a period of two years commencing on the effective date of this section, unless such accessory sign creates an imminent threat to public health or safety or the commissioner of buildings determines that such sign is otherwise not eligible for the temporary waiver created under this section."*

The Supreme Court, New York County, finding that the new signs were installed after February 9, 2019, ruled that "[t]here is absolutely no support for the proposition that Petitioners were not required to obtain a permit to hang the subject signs" under Building Code Section 105.7.2 ["Changing copy or structural change of sign or sign structure"]." Further, according to the Court, Local Law 28

> *"…merely serves to assist those who have hung signs without a permit in violation of the Administrative Code to resolve those violations without the burden of also paying substantial fines in addition to correcting the violation."*

West 81st Garage, LLC v. New York City Department of Buildings, 2022 NY Slip Op 31336, decided April 25, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_31336.pdf.

Pandemic/Lease Guarantees

Section 22-1005, ("Personal liability provisions in commercial leases"), also known as the "Guaranty Law", was added to New York City's Administrative Code by Local Law No. 55-2020. The Guaranty Law provides, in part, the following:

> *"A provision in a commercial lease…that provides for one or more natural persons…to become, upon the occurrence of a default or other event, wholly or partially personally liable for [amounts] owed by the tenant under such agreement…shall not be enforceable against such natural persons if the conditions of paragraphs 1 and 2 are satisfied:*
>
> *1. The tenant satisfies the conditions of subparagraphs (a), (b) or (c):*
>
> *(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020;*
>
> *(b) the tenant was a non-essential retail establishment subject to in-person limitations under guidance issued by the New York state department of economic development pursuant to executive order number 202.6 issued by the governor on March 18, 2020; or*
>
> *(c) the tenant was required to close to members of the public under executive order number 202.7 issued by the governor on March 19, 2020.*
>
> *2. The default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and March 31, 2021, inclusive."*

In 721 Borrower LLC v. Moha, 2022 NY Slip Op 02504, decided April 19, 2022, a landlord sued to collect unpaid rent from the guarantors of obligations under a lease. The Appellate Division, First Department, reversed the dismissal of the complaint by the Supreme Court, New York County, because there was unpaid rent and other arrears that arose from the tenant's obligations between May 2018 and February 2020, outside the period under Section 22-1005. Further, the amounts owed during the statutory period

> *"…may not be recoverable if Administrative Code Section 22-1005 is unconstitutional. The record on this motion to dismiss is insufficiently developed to determine the constitutionality issue as a matter of law. Consequently, the complaint should be reinstated so that the parties can further develop the record in the trial court [citation omitted]."*

This decision, which can also be found at 2022 N.Y. App. Div. LEXIS 2407 and 2022 WL 1144058, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02504.htm.

Powers-of-Attorney/Ratification

As reported in Current Developments dated March 20, 2019, mortgages executed on October 8, 2007 and October 15, 2007 and a consolidation agreement were signed on behalf of Defendant OKI-DO Ltd. ("OKI") by Edward Stein ("Stein") pursuant to a power of attorney, purportedly signed on October 4, 2007 by Dr. Kazuko Hillyer, the sole shareholder, officer and director of OKI. The Supreme Court, Suffolk County, noted that this power of attorney "revoked all previous authorizations from OKI to any purported agents".

In the foreclosure of those mortgages, OKI argued that the October power of attorney was a forgery. Dr. Hillyer had, however, given Stein a durable power of attorney in July 2007 which authorized Stein to "take such other actions relating to said real property and the sale thereof as my attorney-in-fact may deem advisable and "Execute all Corporate transactions of OKI-DO LTD., a New York Corporation, with, on my behalf, as President".

The Supreme Court held that although the Plaintiffs had failed to prove that Stein had apparent authority under the October 2007 power of attorney, Stein had actual authority to act on behalf of OKI under the July 2007 power of attorney. The Supreme Court further found that Dr. Hillyer was aware of the mortgages by no later than February 2008 and, failing to take any action, "OKI ratified Mr. Stein's ac-tions and became bound by it". The Court entered a judgment of foreclosure and sale. The Supreme Court's ruling, 2018 NY Slip Op 50920, on June 18, 2018, is post-ed at http://nycourts.gov/reporter/3dseries/2018/2018_50920.htm.

On May 18, 2022, the Appellate Division, Second Department, affirmed the lower court's ruling, holding that Stein had authority under the July 2007 power of attorney. Suffolk County. Sklavos v. Oki-Do, Ltd., 2022 NY Slip Op 03268, decided May 18, 2022, is posted at 2022 N.Y. App. Div. LEXIS 3173 and https://www.nycourts.gov/reporter/3dseries/2022/2022_03268.htm.

Real Estate Taxes/Assessments

A Petitioner commenced a CPLR Article 78 ["Proceeding against body or officer'] proceeding contesting the undervaluation of its property, which, it claimed, resulted in lower tax abatements under New York City's Industrial and Commercial Abatement Program. The Appellate Division, First Department, approved the Order of the Supreme Court, New York County, dismissing the proceeding. "The law is well settled that questions of property valuation, whether they be of overvaluation or undervaluation, are under the exclusive province of article 7 ["Judicial review") of the RPTL [citations omitted]." Matter of 9 Orchard Partners, LLC v. New York City Department of Finance, 2022 NY Slip Op 02614, decided April 21, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02614.htm.

The Supreme Court, Richmond County, took a contrary position in Matter of Richmond SI Owner LLC v. Soliman, 2022 NY Slip Op 50462, decided May 27, 2022. The Court, in granting the Petitioner's application for the tax reassessment and reclassification for its properties in an Article 78 proceeding, stated that it "rejects the [NYC Department of Finance's arguments that an RPTL Article 7 proceeding is an exclusive remedy…" The Petitioner, claiming that its properties were improperly classified as Building Class VI (a Tax Class 4 commercial property) instead of Building Class V0 (Tax Class I for residential property), sought relief under Administrative Code Section 11-206 ("Power of commissioner of finance to correct errors") and 19 RCNY Section 53-02(b)(10) ("Clerical errors and errors in description'). Under Section 11-206, "[t]he commissioner of finance may correct any assessment or tax which is erroneous due to a clerical error or an error in description contained in the several books of annual record of assessed valuations, or in the assessment rolls." Under Section 53-02(b)(10), "[t]he Commissioner of Finance may correct any assessment or tax due to an error in description which will include…(10) inaccurate building class that affected assessed value." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_50462.htm.

Recording Act/Notice of Pendency

In 2013, the Supreme Court, Kings County, dismissed the complaint in an action to foreclose a mortgage. In 2015, the property was sold to 153 Berriman St. Estate, Inc. ("Berriman"). In 2017, the Plaintiff's complaint was reinstated and the notice of pendency was refiled. Berriman sought to have the complaint dismissed because the 2013 action had been dismissed and the related notice of pendency vacated when the deed to it was recorded. The Appellate Division affirmed the ruling of the Supreme Court denying Berriman's motion to dismiss. According to the Appellate Division, "Berriman did not establish that it lacked knowledge, either actual or constructive, of the plaintiff's mortgage when it purchased the property." Deutsche Bank National Trust Company v. Hamilton, 2022 NY Slip Op 03372, decided May 25, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03372.htm.

Statute of Limitations

In Batavia Townhouses, Ltd. v. Council of Churches Housing Development Fund Company, Inc., 2022 NY Slip Op 03361, decided May 24, 2022, New York State's Court of Appeals held that Section 17-105 of "General Obligations Law ["GOL"], not GOL Section 17-101, governs whether the statute of limitations has been tolled of revived in a RPAPL Section 1501 ("Who may maintain an action") action to cancel a mortgage.

Section 1501 states, in part, that "[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage…has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action…to secure the cancellation and discharge of record of such encumbrance…"

Under GOL Section 17-101 ("Acknowledgment or new promise must be in writing"), "[a]n acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of the statute of limitations…other than an action for the recovery of real property."

Under GOL Section 17-105 ("Promises and waivers affecting the time limited for actions to foreclose a mortgage"), "…a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made…by the express terms of a writing signed by the party to be charged is effective…to make the time limited for commencement of the action run from the date of the waiver or promise…"

In a derivative action commenced by the limited partners of the borrower's managing general partner, seeking a declaration that a mortgage was unenforceable because the statute of limitations had expired without the commencement of a foreclosure, the lender asserted that the statute of limitations was tolled when the borrower delivered, before the limitations period had run, financial statements and tax returns listing the mortgage as an outstanding liability.

Affirming the October 2, 2020 ruling of the Appellate Division, Fourth Department, reported at 189 A.D. 3d 20, which held that the statute of limitations for commencing an action to foreclose the mortgage had expired and had not been revived by GOL Section 17-105 (which it determined was the applicable section of the GOL), the Court of Appeals stated the following:

> *"…General Obligations Law Section 17-105, by its express terms, is the sole statute governing the tolling or revival of the statute of limitations for an action to foreclose a mortgage….[S]ection 17-101 excludes itself – and by implication its allowance for a mere acknowledgment to toll or revive the statute of limitations - because it indicates that it does not apply to 'actions for the recovery of real property'….*
>
> *"Under General Obligations Law Section 17-105(1), the [borrower's] actions in the case could only toll or revive a statute of limitations for [the mortgagee] to bring a foreclosure action if the [borrower] made an 'express' 'promise to pay the mortgage debt'. Accordingly, the Appellate Division, correctly concluded that the [borrower's] delivery of its financial statements and tax returns to [the mortgagee] did not meet the requirements of section 17-105(1) because they were not express promises to pay the mortgage debt…"*

The Court of Appeals decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03361.htm.

Tax Lien Sales

In September 2013, Fulton Capital SI, LLC ("Fulton") purchased property at a tax lien sale. In 2014, the Supreme Court, Richmond County, vacated the prior owner's default and the judgment of foreclosure. The Appellate Division, Second Department, reinstated the judgment of foreclosure and sale and the prior owner attempted to redeem the tax lien. The Referee declined to convey the property to Fulton without further direction from the Supreme Court, and Fulton moved to compel the transfer of the property to it. The Supreme Court, finding that the exercise of the right of redemption was effective, denied Fulton's motion and granted the prior owner's motion to dismiss the complaint. The Appellate Division, Second Department, reversed the lower court's Order, granting Fulton's motion. According to the Appellate Division,

> *"[s]ince the sale of a property in a foreclosure sale extinguishes a defendant's right of redemption whether or not a deed has been delivered to the purchaser of the property [citations omitted], the defendant's 'belated post-sale tender of the moneys due cannot affect the rights of the purchaser' [citation omitted."*

NYCTL 1998-2 Trust v. Ocean Gate Estates Homeowners Association, Inc., 2022 NY Slip Op 02557, decided April 20, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02557.htm.

Transferrable Development Rights/Reversion

The case of 862 Second Avenue LLC v. 2 Dag Hammarskjold Plaza Condominium was noted in Current Developments dated August 2, 2021. A condominium building was constructed in Manhattan by the Defendant-lessee whose lease included the right to use development rights from an expanded zoning lot. The lease was terminated and the Plaintiff-lessor sued to recover for past due rent and, until the action was concluded, for the Defendant's continuing use and occupancy, including amounts for the use of the development rights purportedly payable as additional rent under the lease.

In 2018, the Supreme Court, New York County, awarded the Plaintiff an amount for past use and occupancy and ordered the Defendant to pay for use and occupancy pendente lite. Although the tenant claimed that the development rights were transferred to the condominium, the Supreme Court, New York County, ruled that the Plaintiff "never transferred the development rights" to the Defendant and that the additional rent payable under the lease included payments for the Defendant's use of those rights. In 2020, the Appellate Division, First Department, affirmed the lower court's ruling, stating that the Defendant's claim that it had obtained ownership of the development rights was "unsupported." The Supreme Court's decision is posted at 2018 NY Slip Op 31339 and the Appellate Division's decision is reported at 124 N.Y.S. 3d 783.

In a decision dated June 17, 2021, reported at 146 N.Y.S. 3d 921, the Supreme Court, New York County, held that the unused development rights reverted to the Plaintiff when the lease terminated and directed the Defendant to "effect a reversion" of the used development rights "when an event triggers reversion and makes transfer feasible, such as when [the Defendant] redevelops its building." This decision of the Supreme Court was affirmed by the Appellate Division, First Department on May 5, 2022. According to the Appellate Division,

> *"…the defendant's interest in the development rights was extinguished when the lease terminated… As for the used development rights, plaintiff acknowledges that they will continue to be occupied by defendant's building until there is a change of circumstances, such as casualty or redevelopment, at which point, due to the termination of the lease, defendant will no longer have the unfettered right to access plaintiff's development rights."*

The Appellate Division's decision, 2022 NY Slip Op 03047, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03047.htm.

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