First American Title™
NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

By Michael J. Berey
Senior Underwriter

Adverse Possession

A portion of an ingress and egress easement over adjoining property owned by a Defendant has been enclosed by a fence and purportedly used for outdoor seating and dining since 1997. Plaintiff, the owner of adjoining property benefitted by the easement, sought an Order directing the Defendant-owner and its lessee to remove all structures and encroachments on the easement area and declaring that the Defendants were obligated to maintain the easement free of obstructions. The Supreme Court, Saratoga County, granted the Plaintiff's cross-motion for summary judgment, but the Appellate Division, Third Department, reversed the lower court's ruling. Although the Defendants "made a prima facie showing that [their] and their predecessors' use of the disputed portion of the easement was actual, open, notorious, exclusive and continuous for the prescriptive period [citations omitted]…a question of fact remains as to whether defendants' predecessors in interest had implied permission to use a portion of the easement for enclosed outdoor seating and dining [citation omitted]." CJA Realty Holdings, LP v. 14 Phila Street LLC, 2022 NY Slip Op 04208, decided June 30, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04208.htm.

Continuing Legal Education/New York State

New York State's CLE Board has announced that experienced attorneys who re-register on and after July 1, 2023 and attorneys admitted to the New York State Bar on and after that date must complete at least one credit hour of Cybersecurity, Privacy and Data Protection, a new category of CLE credit. See CLE News | NYCOURTS.GOV and https://www.nycourts.gov/LegacyPDFS/attorneys/cle/17a-Rules-1500-2h-Cybersecurity-Definition.pdf.

Contracts of Sale/Anticipatory Breach

A contract of sale prohibited its assignment without the sellers' written consent. The day before the closing, the buyer sought to acquire title in the name of a newly formed entity. When the sellers did not consent to the change, the buyer's attorney advised that the buyer would not cooperate with the sellers at the closing, which was part of an Internal Revenue Code Section 1031 exchange. The sellers canceled the contract and the buyer sued for specific performance and for the return of its down payment. The Supreme Court, Kings County, granted the sellers' motion for summary judgment dismissing the complaint and allowed the sellers to retain the down payment as damages for the Plaintiff's anticipatory breach of contract. That ruling was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"{t]he buyer's attorney's statements were a positive and unequivocal expression of intent not to perform, constituting repudiation of a contractual duty before the time for its performance had arrived [citation omitted]. The sellers were thus relieved of their obligation of future performance and entitled to recover damages for breach of the total contract [citations omitted]."*

The Appellate Division noted that the contract's terms entitled the sellers to retain the down payment if the contract was terminated due to the fault of the buyer. Hegeman Plaza, LLC v. Burgan, 2022 NY Slip Op 03711, decided June 8, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03711.htm.

Contracts of Sale/Bona Fide Purchaser/Recording a Lease

The Plaintiff- purchaser and the Defendant-seller entered into a contract of sale in June of 2016. There being encumbrances on the property, the seller cancelled the contract and in 2022 sold the property to a school. The Plaintiff sought to enjoin the conveyance. The Supreme Court, Kings County, held that the Defendant's unilateral cancellation of the contract without notice to afford the buyer the option to waive the title defects and close was a nullity. Further, "[even if the Defendant had the right to cancel the contract…,there is no evidence…the plaintiff was ever made aware of such cancellation." As to the school, there were allegations that it sought to have the Plaintiff give up its rights under the contract, giving rise to a litigable question as to whether the school was a bona fide purchaser. The Court issued a preliminary injunction, directing that the property be padlocked and prohibiting the school from accessing it without the written consent of all parties delivered to the sheriff or a further Order of the Court.

In August 2016 the seller and the Plaintiff entered into a ninety-nine year lease for the same property. The Plaintiff asserted that it was the lawful tenant of the property even it was not entitled to close under the contract. Interestingly, the Court held that the lease, being for a term in excess of forty-nine years, was unenforceable because it was not recorded and transfer taxes were not paid. Lifshitz v. Wilhelm, 2022 NY Slip Op 32141, decided July 5, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_32141.pdf.

Contracts of Sale/Environmental Conditions

The Plaintiff and the Defendant-seller entered into a contract to sell to the Plaintiff a commercial building with a laundromat on the ground floor. The contract provided that closing was "[s]ubject to the return of the lender's Environmental Phase I and Environmental Phase II reports with no environmentally hazardous conditions and/or issues affecting the premises." Environmental reports, however, found "unsound levels of various hazardous substances." As a result of these reports, the Plaintiff's lender would not commit to fund a mortgage loan and, therefore, the Plaintiff cancelled the contract. The Defendant refused to return the Plaintiff's down payment. The Supreme Court, Bronx County, granted the Plaintiff's motion for summary judgment and ordered the Defendant to return the down payment with any interest accrued. Kim v. 2349 Creston Realty Corp., 2022 NY Slip Op 32209, decided January 20, 2022, was posted on July 14, 2022 at https://www.nycourts.gov/reporter/pdfs/2022/2022_32209.pdf.

Contracts of Sale/Merger

The Plaintiff-purchasers and the Defendant-sellers contracted for the sale of a subdivided parcel of land on which the Plaintiffs intended to construct a home. The contract listed the approximate size of the parcel. After closing, the purchasers realized that the property conveyed was only a portion of the subdivided lot and did not include another parcel which was necessary to construct a home. The Defendants refused to execute a correction deed, offering to sell the additional parcel to the Plaintiffs. The purchasers commenced an action asserting, among other causes of action, breach of contract and quiet title. The Appellate Division, Fourth Department, reversed the ruling of the Supreme Court, Erie County, which had denied the Defendants' motion to dismiss the complaint, holding that the breach of contract and quiet title causes of action were barred by the doctrine of merger. While there are exceptions to the application of the merger doctrine, here, according to the Appellate Division,

> *"[t]he deed contained an unambiguous description of the property… [There was only] "an approximate indication of size [in the contract] and [the contract] did not indicate the additional parcel was part of the intended conveyance. Further, the contract contained no expression of intent that the contract's description would survive the closing [citations omitted]. Thus, we conclude that 'there was no clear intent…that a particular provision would survive delivery of the deed,' and therefore the provisions of the contract 'merged in the deed' [citations omitted]."*

The Appellate Division further held that promissory estoppel, unjust enrichment, fraudulent representation/misrepresentation and fraud causes of action could not be maintained, since they were indistinguishable from the cause of action for breach of contract. It also held that the purchasers' builder, also a plaintiff, did not have a valid cause of action because it was not a party to the contract, it had no privity with the Defendants, and there were no representations by the Defendants to it. Pickard v. Campbell, 2022 NY Slip Op 04442, decided July 8, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_04442.htm.

Contracts of Sale/Notice of Pendency

Plaintiff limited liability company conveyed real property in 2018 to Defendant Shlomo Noble. In 2020, the LLC and its sole member commenced an action to impose a constructive trust on the property and to recover damages for unjust enrichment; they claimed that Noble held title to the property only as nominee for the LLC and that he had failed to reconvey the property to the LLC. The Supreme Court, Kings County, issued a preliminary injunction enjoining Noble from transferring or encumbering the property. The Appellate Division, Second Department, modified the lower court's order by deleting the provision granting the preliminary injunction, finding that

> *"[a]lthough the plaintiffs alleged that Noble promised to reconvey the subject property to the LLC after obtaining a mortgage, that alleged promise was not contained in the contract of sale, which included a merger and integration clause whereby the LLC agreed that the contract fully expressed the parties' agreement [citation omitted]."*

The Appellate Division held, however, that the Supreme Court had properly denied that part of Noble's motion seeking cancellation of the notice of pendency filed in the action. An action to impose a constructive trust supports the filing of a lis pendens. Minzer v. Rauch, 2022 NY Slip Op 03720, decided June 8, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03720.htm.

Cooperatives/Noise

Plaintiff, the owner of a cooperative unit, sued the owners of the adjoining unit above and the apartment corporation's board of directors, alleging that noise and stomping by the children of the Defendant unit's owners adversely affected the Plaintiff's health and created structural cracks in his unit's walls and ceilings. The Appellate Division, First Department, modifying the ruling of the Supreme Court, New York County, held that there were sufficient allegations to state causes of action for nuisance and physical damage against the Defendant unit owners, but that the cause of action for breach of contract against the unit owners had been properly dismissed.

As to the board of directors, the Appellate Division held that the complaint stated causes of action for breach of the provision of the proprietary lease requiring the cooperative to maintain the structural parts of the building and for the alleged violation of the requirement of New York City's Administrative Code Section 27-2005 ("Duties of owner") that "[t]he owner of a multiple dwelling shall keep its premises in good repair."

Further, the allegations that the cooperative refused to repair the structural cracks (not the allegations of excessive noise) stated a cause of action for breach of the warranty of habitability. However, the Appellate Division held that the complaint failed to state a cause of action for the board of directors' breach of fiduciary duty. O'Hara v. Board of Directors of the Park Avenue and Seventy-Seventh Street Corporation, 2022 NY Slip Op 03872, decided June 14, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03872.htm.

Election of Remedies

Under Real Property Actions and Proceedings Law ("RPAPL") Section 1301 ("Separate action for mortgage debt"), "[w]here final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, no action shall be commenced…to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment…"

A money judgment was obtained in Kentucky against the guarantor of a mortgage loan. Although no execution was issued on the judgment, the Plaintiff proceeded to foreclose the related mortgage on property in Brooklyn. The Supreme Court, Kings County, granted the Defendants' motion to dismiss the complaint. According to the Court,

> *"[t]he election of remedies rule applies to actions on the guarantee of a note [citations omitted]…As no execution was issued under the Kentucky judgment, which remains unsatisfied, a foreclosure action on the mortgage securing the same debt is a remedy which is not currently available to plaintiff under RPAPL 1301(1)."*

Golden Resources, LLC v. Seddio, 2022 NY Slip Op 31846, decided June 10, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_31846.pdf.

Electronic Notarization

On December 22, 2021, Chapter 767 of the Laws of 2021, effective in 90 days, was enacted allowing licensed notaries to perform notarial acts using Remote Online Notarization ("RON"). New York's Secretary of State was charged by Chapter 767 with issuing regulations establishing "standards, practices, forms, and records relating to" electronic notarizations. Proposed regulations, adding sections 182.2-182.11 to Title 19 of the NYCRR, were published in the New York State Register on July 27, 2022. The July 27, 2022 New York State Register states that the regulations' purpose is "[t]o set standards relating to the performance of notarial acts, including electronic notarial acts." The proposed regulations can be found at proposed-rule-making-notaries-public-electronic-notaries.pdf (ny.gov).

Estates/Specific Devisee/ Bona Fide Purchaser

Under New York law, the interest of a specific devisee vests immediately on the death of a decedent. In this case, a Will specifically devised real property to the Plaintiff. Notwithstanding, without leave of the Surrogate's Court required by Estates, Powers and Trusts Law Section 13-1.3 ("Assets chargeable with payment of estate obligations…"), the Executor sold the property to persons whom the Supreme Court, Erie County, found were bona fide purchasers. The specific devisee commenced an action seeking to have that deed declared void ab initio and to be declared the owner of the property.

The Appellate Division, Fourth Department, affirmed the judgment of the Supreme Court dismissing the complaint and declaring that the purchasers owned the property "free and clear of any claim by" the Plaintiff. It was established at trial that the Plaintiff and her attorneys, by exchanges of emails and texts with the Executor and his attorneys, had consented to the sale and also that the purchasers were bona purchasers for value without notice of an adverse interest. Further, notwithstanding the requirement that leave of court be obtained for an Executor to sell specifically devised property,

> *"[e]ven if we assume, arguendo, that plaintiff is correct on the issue of the brother's authority, 'sales of property by executors falling within certain prohibitions of a long public policy are voidable and not void' [citation omitted]. As a result, defendants, as bona fide purchasers, are protected against rescission under the circumstances of this case [citation omitted]."*

Ehlenfield v. Kingsbury, 2022 NY Slip Op 03817, decided June 10, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_03817.htm.

Landmarks/Title Insurance

The United States District Court for the Southern District of New York held that the unrecorded designation of a title insured property as a landmark was not a Covered Risk. According to the Court, "…the Property's landmark designation was not recorded in the Public Records, as contemplated by the Policy…The Policy did not impose upon Defendant [title insurer] an obligation to search the entire universe of publicly available information to find the landmark designation." Further, "local regulations that restrict the use or development of real property do not give rise to a defect in or encumbrance on title" and even if the unrecorded landmark designation was deemed a defect or encumbrance, Policy Exclusion 1(a), excluding coverage for the losses claims, states, in relevant part, the following:

> *"The following matters are expressly excluded from the coverage of this policy…1.(a) any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to (i) the occupancy, use, or enjoyment of the Land, (ii) the character, dimensions, or location of any improvement erected on the Land…or the effect of any violation or these laws, ordinances, or governmental regulations…"*

As for the Plaintiff's claim for negligence based on the Certificate of Title, "the Certificate of Title merged with the Policy when the latter was issued, thus foreclosing any action for damages arising out of the previously conducted title search." The Court granted the Defendant's motion to dismiss. Fawn Second Avenue LLC v. First American Title Insurance Company, Index No. 21 Civ. 3715, decided July 11, 2022, can be obtained at 2022 U.S. Dist. LEXIS 122021.

Lien Law

A subcontractor engaged by another subcontractor to supply cranes to a construction site filed a mechanic's lien, claiming that it had not been paid. Addressing the issue of "whether the plaintiff, a supplier to a subcontractor, can recover from the general contractor", the Supreme Court, Kings County, held that the Plaintiff, "a mere supplier of materials to the job site, has no lien law claims against the general contractor." The Court also held that because there was no privity between the general contractor and the Plaintiff, the Plaintiff could not establish the elements required to support a cause of action for quantum meruit. Gotham Equipment & Rigging LLC. v. Mhany Cortelyou LLC, 2022 NY Slip Op 31679, decided May 23, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_31679.pdf.

Marketable Title/Mortgage Foreclosures

After a foreclosure sale, the mortgagor sued, alleging, inter alia, that there had been fraud in the foreclosure. The purchaser at the sale moved, inter alia, for leave to intervene in the foreclosure, to have the foreclosure sale set aside, and to have its down payment returned. The Supreme Court, Kings County, denied the intervenor's motion to set aside the sale and granted the Plaintiff's cross-motion to compel the intervenor to close. The Court further directed the intervenor to pay at closing per diem interest, and outstanding real estate taxes. The Appellate Division, Second Department, modified the lower court's order. While the Appellate Division, finding that "the mortgagor's action did not render title unmarketable", held that the Supreme Court properly denied the motion to set aside the sale, it also held that the lower court "erred in requiring the purchaser to pay the accrued taxes to the date of closing. Those payments must be made out of the proceeds of the foreclosure sale." DiTech Financial, LLC v. Steplight, 2022 NY Slip Op 03710, decided June 8, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03710.htm.

Mechanic's Lien/Duration

A mechanic's lien was filed on June 28, 2018 by a subcontractor which commenced an action to foreclose the lien on March 29, 2019. The lien not being extended, the Defendant property owner asserted that the lien had expired on June 28, 2019. The Plaintiff was, however, named a party defendant in a separate action brought by a different mechanic's lienor and, under Lien law Section 17 ("Duration of lien"), "[i]f a lienor is made a party defendant in an action to enforce another lien, and [there has been filed] a notice of pendency of the action… the lien of such defendant is hereby continued." Notwithstanding Section 17, the Supreme Court, New York County, dismissed the Plaintiff's cause of action to foreclose its lien. According to the Court,

> *"[m]echanic's liens filed by subcontractors who have failed to appear or answer should be discharged [citations omitted]…[and] plaintiff waived its lien by failing to appear or answer in the [other action]…"*

The Court allowed the Plaintiff's complaint to be amended to add a cause of action for unjust enrichment/quantum meruit. Everest Scaffolding, Inc. v. 310 Group, LLC, 2022 NY Slip Op 31740, decided May 31, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_31740.pdf.

Mortgage Foreclosures/Americans With Disabilities Act ("ADA"; 42 USC Section 12101 et seq.)

Following grant of the Plaintiff's motion for summary judgment, the Defendant moved to have the matter restored to a settlement conference, alleging that as a disabled person he was entitled to renewed loan modification negotiations pursuant to the ADA. The Appellate Division, Second Department, affirmed the denial of the Defendant's motion by the Supreme Court, Nassau County. According to the Appellate Division,

> *"[t]he defendant failed to submit sufficient evidence in support of his claim that he was disabled, and there was no proof that the defendant, in the course of prior settlement negotiations, alerted either the plaintiff or the court to his alleged disability [citations omitted]. Even assuming that the alleged disability was generally known, there is no allegation by the defendant, let alone proof, that the defendant requested, or was denied, reasonable accommodations during the prior settlement negotiations [citations omitted], or that prior negotiations had failed 'by reason of [his] disability' [citation omitted]."*

U.S. Bank N.A. v. Seepersaud, 2022 NY Slip Op 04321, decided July 6, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04321.htm.

Mortgage Foreclosures/Default

In U.S. Bank, N.A. v. Kahn Property Owner, LLC, 2022 NY Slip Op 03921, decided June 15, 2002, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Suffolk County. The Plaintiff had not established, prima facie, the mortgagors' default in payment. The affidavit of an employee of the Plaintiff's loan servicer was "conclusory" and the affiant did not submit business records substantiating that the Plaintiffs had defaulted. "{T]he affiant's assertions regarding the defendants' default, without the business records upon which he relied in making those assertions, constituted inadmissible hearsay [citations omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03921.htm.

Mortgage Foreclosures/Original Note

A Defendant moved to dismiss the complaint on grounds that the Plaintiff had not produced for inspection the original notes and the original consolidated note. The Supreme Court, Kings County, denied the motion, holding that the "production of an attorney-certified copy of the consolidated note [which superseded all of the prior notes] obviated the need for the Plaintiff to produce the original consolidated note for inspection." This ruling was affirmed by the Appellate Division, Second Department. U.S. Bank N.A. v. DeSalvo, 2022 NY Slip Op 04320, decided July 6, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_04320.htm.

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 New York Mellon v. McCaffrey, 2022 NY Slip Op 04619, decided July 20, 2022, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Nassau 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_04619.htm.

Mortgage Foreclosures/Notices - RPAPL Section 1304

A RPAPL Section 1304 ("Required prior notices") notice is required to "contain a list of at least five housing counseling agencies serving the county where the property is located…" In Hudson Valley Federal Credit Union v. Tavares, 2022 NY Slip Op 04013, decided June 22, 2022, the Appellate Division, Second Department, affirmed the denial of the Plaintiff's motion for summary judgment by the Supreme Court, Putnam County; the Plaintiff "failed to demonstrate that at least five housing counseling agencies on the list [provided in the notice] served Putnam County". However, the Appellate Division further ruled that the lower court should not, for this reason, have granted the Defendants' motion for summary judgment dismissing the complaint. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_04013.htm.

In US Bank N.A. v. Lanzetta, 2022 NY Slip Op 04322, decided July 6, 2022, the Appellate Division, Second Department, reversed the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Suffolk County, and granted summary judgment dismissing the complaint for the Plaintiff's failure to establish, prima facie, that it had complied with the "separate envelope" requirement of Section 1304. The envelope containing the Section 1304 notice included notices pertaining to the Federal Fair Debt Collection Practices Act (15 USC et seq.) and bankruptcy. This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04322.htm.

In HSBC Bank USA, N.A. v. Bedinotti, 2022 NY Slip Op 04599, decided July 14, 2022, the Supreme Court, Saratoga County, held that the Defendant-mortgagor had not proved the property being foreclosed was his principal dwelling, which, if established, would have required compliance with the notice requirements of Section 1304. The Appellate Division, Third Department, noting that the mortgagor had conveyed his interest in the property to a third party prior to entry of the judgment of foreclosure and sale and that the Plaintiff had waived its rights to a deficiency judgment against him, held that the judgment "does not impact defendant's existing rights" and dismissed the appeal. This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04599.htm.

In Deutsche Bank National Trust Company v. Weininger, 2022 NY Slip Op 04008, decided June 22, 2022, the Appellate Division, Second Department, reversed the grant of the Plaintiff's motion for summary judgment and dismissed the complaint because one of the mortgagors, who was not an obligor under the note, did not receive a Section 1304 notice. According to the Appellate Division, "[w]here, as here, a homeowner defendant is referred to as a 'borrower' in the mortgage instrument and, in that capacity, agrees to pay amounts due under the note, that defendant is a 'borrower' for the purposes of RPAPL 1304." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04008.htm.

Mortgage Foreclosures/Referee's Report

Defendants sought to have vacated entry of a judgment of foreclosure and sale by the Supreme Court, Warren County, claiming, inter alia, that their due process rights were violated by the lower court's confirmation of the order of reference ex parte. The Appellate Division, Third Department, held that the Supreme Court property permitted the order of reference to proceed ex parte because of the Defendants' failure to answer or timely appear. Further, although the referee had not afforded the Defendants notice and a hearing to contest the referee's report,

> *"'the referee's findings and recommendations are advisory…[citations omitted]'…[The] defendants were provided with 'an opportunity to challenge the referee's report by submitting evidence directly to the Supreme Court' upon plaintiff's motion to confirm the referee's report – an opportunity of which they did not avail themselves [citations omitted]."*

Carrington Mortgage Services, LLC v. Fiore, 2022 NY Slip Op 03951, decided June 16, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03951.htm.

Mortgage Foreclosures/Standing

The Appellate Division, Second Department, affirming denial of the Plaintiff's motion for summary judgment by the Supreme Court, Queens County, held that the Plaintiff had failed to eliminate all triable facts as to whether it had standing to maintain the foreclosure. Although a copy of the note was annexed to the complaint, it could not be ascertained whether a separate page endorsing the note to the Plaintiff was stamped on the back of the note or on an allonge. "If the endorsement was on an allonge, the plaintiff was required to prove that the allonge was 'so firmly affixed [to the note] as to become a part thereof,' as required by UCC 3-202(2)." Deutsche Bank National Trust Company v. Motzen, 2022 NY Slip Op 04289, decided July 6, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04289.htm.

Mortgage Foreclosures/Statute of Limitations

The Plaintiff commenced an action under RPAPL Section 1501 ("Who may maintain an action") seeking to have a mortgage on his property discharged on the basis that the statute of limitations to foreclose the mortgage had expired. The Supreme Court, Putnam County, granted the motion of the assignee of the mortgage for summary judgment dismissing the complaint, which ruling was affirmed by the Appellate Division, Second Department. The commencement of an action in 2010 to foreclose the mortgage, which action was dismissed, "did not serve to validly accelerate the debt, as the prior action was dismissed upon the Supreme Court's determination that the plaintiff in that action lacked standing [citations omitted]." Further, a loan servicer's default notice was "'merely an expression of future intent that fell short of an actual acceleration' [citations omitted]." Hawthorne v. New Century Mortgage Corp., 2022 NY Slip Op 04539, decided July 13, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04539.htm.

In Wells Fargo Bank, N.A. v. Rutty, 2022 NY Slip Op 03926, decided June 15, 2022, an action to foreclose a mortgage commenced in June 2011 was dismissed in 2013 on a determination by the Supreme Court, Queens County, that the Plaintiff in that action lacked standing. In 2017, when the plaintiff again sued to foreclose the mortgage, the Defendants moved to dismiss the complaint, claiming that because the debt was accelerated in the prior action the action was time-barred. The Supreme Court's denial of the motion was affirmed by the Appellate Division, Second Department. According to the Appellate Division, "[s]ince the prior action was dismissed for lack of standing, [the Defendant/Appellant] failed to establish that the plaintiff had the authority to accelerate the debt through the complaint filed in the prior action [citations omitted]." Wells Fargo Bank, N.A. v. Rutty, 2022 NY Slip Op 03926, decided June 15, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03926.htm.

Mortgages/Deeds as Mortgages

To avoid a mortgage foreclosure, the mortgagors delivered a quitclaim deed to the mortgagee's entity in 2011 in exchange for their release from the obligation. Petitioner, the holder of a 2018 money judgment, asserted that the deed was given as further security for the mortgage note and therefore it was not an absolute conveyance of title. Under Real Property Law ("RPL") Section 320 ("Certain deeds deemed mortgages"), "[a] deed conveying real property which…appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage…" The Appellate Division, Second Department, affirming dismissal of the action against the moving Defendants by the Supreme Court, Kings County, held that "[t]he record does not support a finding of a clear intent that the property was to be held, given, or transferred to [the lender's entity] as security for the [mortgagors'] loan obligation under the note and mortgage [citation omitted]." Matter of Saadia Safdi Realty, LLC v. Press, 2022 NY Slip Op 04631, decided July 20, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_04631.htm.

Pandemic/Leases

Retail tenants sought a ruling that the New York State Executive Order No. 202.8 ("Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency") effective March 22, 2020, and subsequent Executive Orders dealing with health measures required for reopening of businesses after June 20, 2020, terminated their leases as a matter of law. The Appellate Division, First Department, affirmed the Order of the Supreme Court, New York County, granting the Defendant-lessor's motion for summary judgment on counterclaims asserting that the leases were breached.

The Appellate Division held that the doctrines of frustration of purpose and impossibility of performance did not apply. As to frustration of purpose, the Plaintiffs "were not 'completely deprived' from using the premises as intended under their lease agreements [citations omitted]." As regards impossibility of performance, "the pandemic did not render their performance impossible, as 'the leased premises were not destroyed' [citations omitted]." The Appellate Division noted that there was "no basis in the leases for a temporary abatement of rent." Gap, Inc. v. 44-45 Broadway Leasing Co. LLC, 20222 NY Slip Op 03980, decided June 16, 2022, posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_03980.htm, is also located at 2022 NY. App. Div. LEXIS 3873.

In 1140 LLC v. Zerocater, Inc., 2022 NY Slip Op 31819, decided June 6, 2022, the Supreme Court, New York County, granted the Plaintiff-lessor's motion for summary judgment for past due rent plus late fees and interest, future rent and reasonable attorneys' fees and costs, the amount of the judgment to be determined at a trial. Beginning in April 2020, the Defendant-tenant stopped paying rent, claiming that it was unable to use its office space at the premises due to the Governor's Executive Orders prohibiting for a few months the operation of non-essential businesses. According to the Court,

> *"[d]efendant's defense of frustration of purpose and failure of consideration fail…The stay-at-home orders issued by the governor's office were temporary, and defendant's apparently unilateral decision not to operate in the building thereafter because of the potential presence of COVID-19 is insufficient to show that the purpose of the lease was frustrated. To the extent that the defendant relies on the "Inability to Perform" provision [in the lease], that provision specifically provides that in the event of governmental regulation or emergency conditions that interferes with plaintiff's ability to fulfill its obligations under the lease, defendant's obligation to pay rent will continue…"*

The Defendant also argued that it was entitled to terminate the lease under RPL Section 227 ("When tenant may surrender premises"), which states the following:

> *"Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenantable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender. Any rent paid in advance or which may have accrued by the terms of a lease or any other hiring shall be adjusted to the date of such surrender."*

The Court found that the Defendant had not cited authority for the proposition that the "any other cause" provision of Section 227 encompasses an airborne pandemic. Further, "the premises have not been destroyed or so injured by the elements as to be untenatable and unfit for occupancy." This decision is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_31819.pdf.

In Peet's Coffee & Tea Holdco Inc. v. North American Elite Insurance Company, 2022 NY Slip Op 31518, decided May 2, 2022, a tenant, having lost business as the result of government shut-down orders during the pandemic, sued its insurance company, which had declined to pay a claim under a policy of business interruption insurance. The Defendant argued that the Plaintiff had not suffered any "'direct physical loss or damage'", which would be a basis for coverage. The Supreme Court, Kings County, dismissed the complaint. According to the Court, "the mere loss of use is not physical loss." This decision is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_31518.pdf.

Relocating an Easement

A private roadway was established by a subdivision map filed in 1945. The original conveyances of properties within the subdivision now owned by the Plaintiff and the Defendants referenced the subdivision map, which afforded their lands an implied easement over the private road to a public street. The location of the roadway was fixed by a metes and bounds description set forth on the map. The Plaintiff proposed to relocate a portion of the road bisecting his property, at his sole cost and expense. The Defendants not agreeing to the proposal, the Plaintiff commenced an action for a declaratory judgment holding that he had the right to relocate the road, at his sole expense, and that the Defendants, and their successors and assigns, were required to use the road as relocated. The Supreme Court, Washington County, granted the Defendant's motion to dismiss the complaint. According to the Court,

> *"'unilateral relocation [of an easement] is not permitted where there is an indication that the parties intended to permanently fix the easement's location…'[citations omitted]. Here, there is clearly an indication that the original grantors intended to permanently fix the easement's location – notwithstanding that the location of the easement has migrated over the years."*

Marlow v. Greene, 2022 NY Slip Op 50653, decided July 19, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_50653.htm.

Renewal Judgments

Plaintiff, the holder of a 2006 money judgment, sought an Order renewing its judgment under Civil Practice Law and Rules Section 5014 ("Action upon judgment"). Under Section 5014, "[a]n action may be commenced… during the year prior to the expiration of ten years since the first docketing of the judgment. The judgment… shall be designated a renewal judgment." As noted by the Supreme Court, Queens County, in Sterling Recoveries, Inc. v. Erazo, 2022 NY Slip Op 50662, decided July 15, 2022, an action for a renewal judgment may be commenced where ten years from the docketing of the original judgment has passed, but the judgment creditor will have a "lien gap."

The judgment debtor contended that since he conveyed his home in Queens to his daughter in 2019 and he owns no other property, the request for a renewal judgement was moot. The Supreme Court, Queens County, granted the renewal judgment effective as of its date of docketing in the County Clerk's office. As to the Defendant's argument, "[w]hether or not Defendant presently owns an interest in real property is not a factor in deciding whether to issue a renewal judgment." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_50662.htm.

Tax Lien Foreclosures/Surplus Monies

The Supreme Court, Bronx County, held that the prior owner was not entitled to the surplus funds after the sale in a tax lien foreclosure commenced in 2019 because the owner, a New York corporation, was dissolved by the Department of State in 1994 for its failure to pay franchise taxes. According to the Court,

> *"[a]fter dissolution, a dissolved corporation has no existence, either de jure or de facto, except for a limited de jure existence for the sole purpose of winding up its affairs [citation omitted]…There are no guidelines that the court could find as to how long is 'limited' and what constitutes 'winding up'. However, claiming surplus funds in a court proceeding almost 18 years after dissolution does not sound like a limited winding up of affairs."*

The Court transferred the matter to the Surrogate's Court for a determination of who, on behalf of the Estate of the corporation's purported sole shareholder, was entitled to receive the surplus monies. NYCTL 2018-A Trust v. Keshia Realty Corp., 2022 NY Slip Op 50539, decided June 27, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_50539.htm.

Zoning/Variance

A pool constructed six feet from the property line was required by the Town of Islip Zoning Code to be set back not less than fourteen feet. The Town's Zoning Board of Appeals ("ZBA") denied the Petitioner's request for a variance; the Supreme Court, Suffolk County, granted the petition and directed issuance of the variance. The Appellate Division, Second Department, reversed the lower court's ruling, denied the petition and dismissed the proceeding. The Appellate Division held that the Petitioner had not established that a variance was warranted under Town Law Section 267-b ("Permitted action by board of appeals") under which a use variance may be granted only on "a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship."

The Appellate Division further found that the ZBA had considered, as required by Section 267-b, "'(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method…other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood…; and (5) whether the alleged difficulty was self-created'[citation omitted]." In addition, the Appellate Division found that

> *"[t]aking into account the rationale for the required setback, which was to protect the privacy and quiet enjoyment of adjacent residential properties, as well as the fact that the location of the pool was inconsistent with the nature and character of the surrounding area, and that the approval of the requested variance would establish an unwarranted precedent for future development of the area, the ZBA determined that granting the requested variance would have an adverse effect on the physical or environmental conditions in the neighborhood."*

Matter of Dutt v. Bowers, 2022 NY Slip Op 04546, decided July 13, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_04546.htm.

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