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Current Developments

Adverse Possession

Under Real Property Actions and Proceedings Law ("RPAPL"), Section 501 ("Adverse possession; defined"), as amended effective July 7, 2008, an adverse possessor may gain title to occupied real property if the occupancy has been "adverse, under claim of right, open and notorious, continuous, exclusive and actual". "Claim of right" is defined to mean "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be". In reversing the ruling of the Supreme Court, Kings County, which dismissed the complaint in which the Plaintiffs claimed title by adverse possession, the Appellate Division, Second Department, found that "the plaintiffs established a reasonable basis for their belief that they owned the disputed property by submitting an affidavit of [one of the Plaintiffs] stating that they were advised that the disputed parcel was a part of the property they purchased from [HUD] in 1974". Calder v. 731 Bergan, LLC, decided April 12, 2011, is reported at 920 N.Y.S. 2d 413.

Adverse Possession

Under RPAPL Section 543, as amended effective July 7, 2008, "the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse". The act of mowing a lawn across the boundary line of an adjoining landowner is also deemed by Section 543 to be permissive and non-adverse. In an action claiming title to certain real property by adverse possession, the Supreme Court, Westchester County, dismissed that part of the complaint alleging adverse possession based on the installation of driveway lights, the planting of foliage and shrubbery, landscaping and lawn maintenance. This ruling was affirmed by the Appellate Division, Second Department, in Hartman v. Goldman, decided May 3, 2011 and reported at 2011 WL 1733962.

Condemnation

The prior owners of property in the Town of Yorktown claimed that they were forced to sell at a loss because the actions of the Town over a period of years deprived them of the right to develop and use the property. The Plaintiffs alleged that the Town denied permits to build and wetlands permits, imposed onerous environmental regulations, and refused to allow the property to be included in the sewer district. They alleged that the Town's actions constituted a de facto taking for which damages are payable. The Appellate Division, Second Department, affirmed the Supreme Court, Westchester County's dismissal of the claim of de facto condemnation. According to the Court, "[a]lthough the plaintiffs argue that

$3,600,000 [the sale price] was a fraction of the value of the land, even assuming the value the plaintiffs' appraiser assigned to the land, $10,000,000, represented its true value, the difference between $10,000,000 and $3,600,000 does not constitute a diminution in value sufficient to demonstrate a de facto taking". Adrian v. Town of Yorktown, decided April 12, 2011, is reported at 920 N.Y.S. 2d 411.

Contracts of Sale

Closing under a contract for the sale of a residence in Valley Stream was subject to the Defendants-Purchasers obtaining a mortgage commitment. If they were unable to obtain a mortgage commitment after diligent effort within forty-five days of their receipt of a copy of a fully executed contract, the Defendants could cancel the contract and obtain a refund of their down payment. However, only one of the Defendants applied for a mortgage and, her income being insufficient to service the loan, her application was denied. The Plaintiffs-Sellers claimed that the Defendants breached the contract and the Plaintiffs' attorney continued to hold the down payment in escrow. The Plaintiffs moved for cancellation of the notice of pendency filed by the Defendants, to have the Court hold the Defendants in breach of the contract, and for the Court to direct the escrow agent to release the contract deposit to the Plaintiffs. The Defendants counterclaimed for specific performance.

The Supreme Court, Nassau County, granted the Plaintiffs' motion for summary judgment, canceled the notice of pendency, dismissed the Defendants' counterclaim, and directed the escrow agent to release the down payment to the Plaintiffs. According to the Court, the other Defendant not having joined in the loan application, "the defendants failed to promptly, and diligently, pursue a mortgage loan" in breach of the contract's mortgage contingency clause. Mancuso v. Silvey, decided April 20, 2011, was reported in the New York Law Journal on April 28, 2011.

Cooperative Units/Foreclosures

Under subsection "f" of Uniform Commercial Code Section 611 ("Notification before disposition of collateral"), a specific predisposition notice must be sent to the debtor by a secured party enforcing its securing interest in a residential cooperative interest used by the debtor no less than ninety days prior to the date of the disposition of the cooperative interest. The notice is required to be printed on a separate, colored page which is other than the color of the notice of disposition required by UCC Section 9-611(b). The text of the subsection "f" notice must be in bold, 14-point type. The title of the notice must be in bold, 20-point type. Subsection "f" was added to Section 611 by Chapter 507 of the Laws of 2009, effective on January 14, 2010.

The owners of a cooperative unit in Manhattan sought a stay of the secured party's foreclosure of their unit. They alleged that they were not properly notified of their default, that the notice of sale was defective, and that the sale was not commercially reasonable since the value of the cooperative greatly exceeded the amount necessary to cure the default. The Supreme Court, New York County, held that the Section 611(f) notice given by the secured party did not comply with the requirements for timing, type size or the information to be provided, and granted the motion to stay the sale of the apartment until new notices under Section 611 were issued. Further, the Court rejected the Debtor's argument that a sale of a cooperative unit is not, as a matter of law, commercially reasonable when the value of the collateral

exceeds the amount needed to cure the default. According to the Court, "[e]ven were this claim factually accurate, there is no legal basis to this argument". Stern-Obstfeld v. Bank of America, decided January 4, 2011, is reported at 915 N.Y.S 2d. 456.

Deeds in Lieu of Foreclosure/Home Equity Theft Prevention Act

The New York State Banking Department issued a General Industry Letter dated May 10, 2011 setting forth its opinion that Real Property Law Section 265-a ("Home Equity Theft Prevention") does not apply to deeds in lieu of foreclosure. Section 265-a was enacted as part of the "Home Equity Theft Prevention Act", Chapter 308 of the Laws of 2006, effective February 1, 2007. Section 265-a deals with sales of one-to-four family owner-occupied dwellings in foreclosure. It also applies to the sale of one-to-four family owner-occupied dwellings being foreclosed when the "equity seller" and the "equity purchaser" enter into an agreement to re-convey the property to the "equity seller". A transaction in "material violation" of the requirements of Section 265-a is voidable, and it may be rescinded by the seller within two years of the date of the recording of the conveyance to the purchaser.

According to the opinion of the Banking Department,

> "[Section] 265-a does not apply to the person who was the holder of the mortgage or was otherwise entitled to foreclose on the mortgage (or any agent of such person) at the time the deed in lieu of foreclosure was entered into, when such person agrees to accept a deed to the mortgaged property in full or partial satisfaction of the mortgage debt, as long as there is no agreement to reconvey the property to the borrower and the current market value of the home is less than the amount owed under the mortgage".
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> ……
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> "…Although a purchaser of a [deed in lieu] is not specifically excluded from the definition of 'equity purchaser'…we believe such omission does not indicate an intention to cover a purchaser of a [deed in lieu], but rather indicates that the drafters contemplated that [Section] 265-a applied only to the scammers and unscrupulous entities who stole a homeowner's equity and to bona fide purchasers who might buy the property from them".

The Letter is posted at http://www.banking.state.ny.us/il110510.htm.

Judgments

A money judgment was docketed in Dutchess County against a "Bob" Conway. When "Robert Conway", the judgment debtor, and his wife conveyed their property, the judgment was not reported by the title searcher. The Supreme Court, Dutchess County, denied the judgment creditor's petition for an Order directing the Sheriff to sell the property to satisfy the judgment, holding that the judgment, not having been docketed against the name "Robert Conway", did not create a lien against the property. The Appellate Division, Second Department, reversed and remanded the matter to the Supreme Court to enter a judgment directing the Sheriff to sell the property to enforce the judgment. Civil Practice Law and Rules Section 5018 ("Docketing of judgment") requires only that a judgment be docketed against the

judgment debtor's surname. In addition, "Bob" is a common derivative of the name "Robert". Matter of Accounts Retrievable System, LLC v. Conway, decided April 26, 2011, is reported at 2011 WL 1630677.

Similarly, the transferees of property in Albany County commenced a proceeding seeking a declaration that the property conveyed to them by "John" McCabe was not subject to a judgment lien against "Jack" McCabe. The Supreme Court, Albany County, found the judgment creditor had failed to show that the grantor and the judgment debtor were the same person and held that the property was therefore free and clear of the judgment. The Appellate Division, Third Department, reversed the lower court's Order and dismissed the petition. It held that the docketed judgment complied with the requirements of CPLR Section 5018 and it was the Petitioner's burden of proving the property was not subject to the lien. Soressi v. SWF, L.P., decided February 17, 2011, is reported at 916 NYS 2d 349.

Judiciary Law

Under Judiciary Law, Section 470 ("Attorneys having offices in this state may reside in an adjoining state"), an attorney admitted to practice in New York with his or her residence in another State may practice law in New York when the attorney has "an office for the transaction of [a] law business ... within this State". The Defendant in an action to foreclose a mortgage moved to dismiss the complaint, alleging that the Plaintiff's attorney was a non-resident of New York who did not maintain an office in the State. The Supreme Court, Nassau County, denied the motion and the Appellate Division, Second Department affirmed. The Plaintiff's counsel provided an affidavit that she maintained an office in the Plaintiff's office in Brooklyn, and, in any event, a violation of Judiciary Law Section 470 would "'not provide a basis for the defendant to have the complaint against him dismissed'" (citation omitted). Sovereign Bank v. Calderone, decided May 3, 2011, is reported at 2011 WL 1733873.

Lien Law

Defendants-mechanics lienors opposed a foreclosing Plaintiff's motion for summary judgment, alleging that their liens had priority over the mortgages being foreclosed. They asserted that since the mortgages recited that the advances were to be received as trust funds to pay the cost of improvements, the loans secured by the mortgages were building loan contracts for which Section 22 affidavits were required to be filed. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment. The Court held that there was no express promise by the mortgagor to apply the loan proceeds to the improvement of the mortgaged premises as required under the Lien Law for there to be a building loan contract. The Court further noted that "plaintiff has no obligation as to the advances made to the owner so long as the requisite [Section 13 Lien Law] covenant is included in the mortgages as occurred in this case". Bank of America, N.A. v. Oliver, LLC, decided April 27, 2011, 2011 NY Slip Op 31105, is posted at http://www.nycourts.gov/reporter/pdfs/2011/2011_31105.pdf.

Mortgage Foreclosures

According to RPAPL Section 1371 ("Deficiency judgment"), a deficiency judgment in an action to foreclose a mortgage is the sum of the amount owed the Plaintiff and the amount of any prior liens and encumbrances, with interest, plus costs and disbursements, less the greater of the market value or sale price of the property. The foreclosing Plaintiff moved for a deficiency judgment. The indebtedness was

$373,905.69 and the property sold at auction for $285,600, an amount greater than the $225,000 fair market value of the property at the date of the sale. Accordingly, the Plaintiff alleged that the deficiency judgment should be $88,305.69.

The Supreme Court, Suffolk County, denied the Plaintiff's motion for leave to enter a deficiency judgment because the Plaintiff's appraisal report stated that the property if improved with a home was worth between $412,000 and $1,000,000. The Appellate Division, Second Department, reversed the ruling of the lower court and remitted the matter to the Supreme Court for entry of a deficiency judgment in the amount of $88,305.69. According to the Appellate Division, it was undisputed that "on the date of the foreclosure sale, the subject property was unimproved, that the plaintiff's appraiser described the subject property as 'not buildable', and that the defendant did not submit her own appraisal report. Accordingly, there was no basis in the record for the Supreme Court to reject the conclusion of the Plaintiff's appraiser, who valued the subject unimproved property at $225,000". Sicuranza v. McDonald, decided April 26, 2011, is reported at 2011 WL 1601584.

Mortgage Foreclosures/MERS

Current Developments dated July 12, 2007 reported the decision MERS v. Coakley, at 838 N.Y.S. 2d 622, in which the Appellate Division, Second Department, held that MERS had standing to foreclose because the note secured by the mortgage being foreclosed had been transferred to MERS in blank. According to the Appellate Division, the mortgage "passed as an incident to the promissory note". More recently, in connection with a motion to substitute an assignee of the mortgage as the Plaintiff in the same action, the Defendant alleged that MERS lacked the authority to assign the mortgage. The Appellate Division, affirming the ruling of the Supreme Court, Suffolk County, held that MERS, the lawful holder of the note and mortgage, was free to assign the note and mortgage. The Court noted that neither the note nor the mortgage prohibited an assignment by MERS. Saxon Mortgage Services, Inc. v. Coakley, decided April 26, 2011, is reported at 2011 WL 1601592.

Similarly, in The Bank of New York v. Sachar, the Defendant alleged that the Plaintiff did not have standing to foreclose because the mortgage was assigned to the Plaintiff not by the original lender but by MERS. Judge Suarez of the Supreme Court, Bronx County, ruled on March 3, 2011 that the Plaintiff had standing. According to the Court, "the mortgage conferred broad powers upon MERS as nominee to act on the original lender's behalf". (Index No. 0380904/2009)

Mortgage Foreclosures/Surplus Money

Property in Kings County owned by Norman and Catherine Gaynes was sold at a foreclosure auction in 1987. The surplus monies, deposited by the Referee with the Kings County Clerk, were transferred to the State Comptroller in 1999 as abandoned property. In 2009, Mrs. Gaynes filed a Notice of Claim and received one-half of the surplus. The State Comptroller held the balance of the surplus for distribution to Mr. Gaynes' Estate. The Comptroller asserted that surplus money from a foreclosure sale is deemed held by a husband and wife as tenants in common. Mrs. Gaynes sought an Order directing the State Comptroller to disburse to her the remaining surplus.

The Supreme Court, Kings County, held that Mrs. Gaynes was entitled to the remaining surplus. In the Third Department, surplus money is personal property held by a husband and wife as tenants in common, but in the Second Department "'where realty owned by a husband and wife is sold in a mortgage foreclosure action, the proceeds which remain after the mortgage debt is satisfied are constructively real property held by the entirety by both spouses'". [citations omitted]. Salley v. Gaynes, decided May 4, 2011, is reported at 2011 NY Slip Op 31204.

Mortgage Recording Tax/New York State Transfer Tax

The New York State Department of Taxation and Finance has announced that the interest rate to be charged for the period July 1, 2011 – September 30, 2011 on late payments and assessments of mortgage recording tax and the State's Real Estate Transfer Tax will be 8% per annum, compounded daily. The interest rate to be paid on refunds of those taxes will be 3% per annum, compounded daily. The interest rates are published at http://www.tax.ny.gov/pay/all/int_curr.htm.

Notice of Pendency

A notice of pendency was filed in 2006 in an action seeking cancellation of a deed on the grounds of undue influence and fraud. The notice of pendency expired in 2009 and was not extended. About one month after the notice expired, the Plaintiff filed another notice in a new action against the same Defendant with virtually identical allegations. The Order of the Supreme Court, Queens County, granting the defendant's motion to dismiss the complaint and cancel the lis pendens for the 2009 action, was affirmed by the Appellate Division, Second Department. According to the Appellate Division, the Plaintiff and the Defendant were identical in both actions, and the filing of the 2009 notice of pendency was "an attempt to abuse the privilege of filing a notice of pendency" [citation omitted]. Tavitian v. Tavitian, decided April 26, 2011, is reported at 2011 WL 1601574.

Partition

A couple purchased a home as tenants in common prior to their marriage. After a proceeding for their divorce was discontinued by stipulation, the wife commenced an action seeking the sale of the property. The Defendant-husband moved to dismiss, arguing that the premises was a marital asset which had to be disposed on resolution of their legal relationship. He also asserted that their prenuptial agreement, dealing with the disposition of the proceeds of the sale of the house on the dissolution of their marriage, precluded the sale of the property before their marriage was dissolved. The Plaintiff sought sanctions, a partition sale, and the appointment of a receiver to ascertain the rights, shares and interests of each party. The Supreme Court, Westchester County, held that since the property was purchased as tenants in common prior to their marriage, the property remained owned in common and was not a marital asset. It also found that the prenuptial agreement did not waive the right to partition and, there being no divorce proceeding pending, no issue existed as to equitable distribution. The Court denied the motion to dismiss and granted the motion for the appointment of a receiver prior to the partition sale. Taylor v. Taylor, decided March 22, 2011, is reported at 2011 WL 1044586.

Partnerships

Kenneth Maynard, the general partner of a limited partnership owning a building and a tenant in common interest in the underlying land, offered to purchase the limited partners' interests for $842,427, which amount he represented to the limited partners was the highest value of the building based on its cash flow. A majority of the limited partners consented, and the property was conveyed to an entity controlled by Maynard, which took out a mortgage loan. He had not, however, disclosed to the limited partners that he had been negotiating for a mortgage loan based on an appraisal that valued the real property interests at $2,200,000. A former general partner who, under the amended Partnership Agreement, was to receive 20% of the net proceeds of a refinancing, commenced an action against Maynard for damages, and the limited partners-Defendants cross-claimed against Maynard for damages. The Appellate Division, First Department, which remanded the matter for further proceedings on damages, held that Maynard, as the general partner, had breached his fiduciary duty to the limited partners. While he had a fiduciary duty to inform the limited partners of material facts, "he repeatedly assured the limited partners that the price he was offering was generous while simultaneously negotiating for a mortgage that presupposed a far higher valuation for the Partnership property".

As to the measure of damages, the Appellate Division noted, although the general rule for the measure of damages when a fiduciary has sold property for an inadequate price is the difference between what was received and what should have been received, an "increased measure of damages is appropriate 'where the breach of trust consists of a serious conflict of interest-which is more than merely selling for too little'". (Citation omitted). Frame v. Maynard, decided April 28, 2011, is reported at 2011 WL 1585329.

Tenancy by the Entirety/Foreign Divorce

Defendant and her husband owned a residence in Queens as tenants by the entirety. Following the husband's death, the Defendant, as surviving tenant by the entirety, deeded the property to herself and her daughter. The Plaintiff commenced an action alleging that the Defendant and her husband were divorced in France by an ex parte judgment of divorce which converted ownership of the property to a tenancy in common. The Plaintiff married the Defendant's then former husband following the divorce and, as his sole heir under a Will executed in France, sought an order declaring the Defendant's conveyance void, directing that the property be sold, and directing that the proceeds of sale be equally divided between the Plaintiff and the Defendant. The Supreme Court, Queens County, granted the Defendant's motion to dismiss. Since the Defendant was not a resident of France and was not personally served and did not appear, in person or by an attorney, in the French divorce proceeding, the divorce terminated their marital status without affecting the non-resident Defendant's marital economic rights. That the Defendant, domiciled in New York and having obtained United States citizenship, was born in France does not confer personal jurisdiction in an action in France. Perrot v. Perrot, decided April 6, 2011, is reported at 31 Misc. 3d 1207(A) and 2011 WL 1303385.

Transfer Tax

The Petitioner sold a condominium unit used exclusively as the primary residence of its Ambassador to the United Nations. For this conveyance, the Petitioner was exempt from payment of the State's Real Estate Transfer Tax and the tax was payable by the grantee. However, the Petitioner assumed the obligation to pay the tax on behalf of the grantee, "volunteering to do so as part of its contractual agreements", on the assumption that the Petitioner would be entitled to a refund of the tax. New York State's Tax Appeals Tribunal affirmed the determination of an Administrative Law Judge denying the Petitioner's request for a refund of the transfer tax, because the transfer tax was paid pursuant to the Petitioner's contractual agreement with its purchaser. Payment of the tax on behalf of the grantee was not "erroneous", and the Petition was properly denied. In the Matter of the Petition of Government of the Republic of Madagascar/Permanent Mission of Madagascar to the United Nations (DTA Nos. 822357 and 822358), decided March 10, 2011, is posted at www.nysdta.org/Decisions/822357.dec.pdf.

Transfer Tax/Mansion Tax

Petitioner Michael Sacks purchased a condominium unit for $900,000. The immediately adjoining unit was purchased by Petitioner Frances L. Sacks, his wife, for $625,000. There is a passageway between the units, there is one shared kitchen, and the units have been and continued after closing to be used as a single unit. The Division of Taxation issued a Notice of Determination claiming that the Petitioners' owed the "Mansion Tax" imposed by Tax Law Section 1402-a ("Additional Tax"), computed on the aggregate amount of the purchase prices for the two units, together with interest thereon and a penalty, the penalty then being cancelled in a conciliation conference. An Administrative Law Judge held that the taxes were properly assessed, and the determination of the Judge was affirmed by the Tax Appeals Tribunal. Matter of the Petition of Michael and Frances Sacks (DTA No. 822322), decided March 10, 2011, is posted at www.nysdta.org/Decisions/822322.dec.pdf.

First American News

An Article by Michael Berey entitled "Electronic Recording for Real Estate in New York" was published in the New York Law Journal on April 26, 2011.

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