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Current Developments

Adverse Possession

Article 5 ("Adverse Possession") of the Real Property Actions and Proceedings Law ("RPAPL") was amended by Chapter 269 of the Laws of 2008. The amendments to Article 5 made by Chapter 269 are to apply to all claims of adverse possession filed after its effective date of July 7, 2008. Prior to the enactment of Chapter 269, under New York common law, a person claiming title by adverse possession had to assert that he or she was acting under a "claim of right"; whether the person holding adversely had actual knowledge of the identity of the record owner was not controlling. Chapter 269 amended RPAPL Section 501 ("Adverse possession; defined") to define "claim of right" to mean "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be."

Plaintiff, the Administrator of the Estate of the record owner of certain property in Kings County, asserted that the new definition of "claim of right" applied to this case since the Action was commenced after July 7, 2008. Plaintiff also asserted that because the Defendants knew the decedent had an heir who had succeeded to title by operation of law, they could not successful assert a "claim of right." The Supreme Court, Kings County, ruled that the Defendants were the owners of the property by adverse possession. The Appellate Division, Second Department, affirmed but modified the lower court's Order. According to the Appellate Division, the applicable law was that in effect at the time the purported adverse possession ripened into title. If title vested in the Defendants prior to the enactment of Chapter 269, the new statutory definition of "claim of right" did not apply and the Defendants' "claim of right" would not be impaired by knowledge that the record owner's heir was otherwise the rightful owner of the property. There was, however, a triable issue of fact as to whether the Defendants' occupancy resulted in a "claim of right" under the law in effect prior to the enactment of Chapter 269. Hogan v. Kelly, decided July 19, 2011, is reported at 2011 WL 2899586.

Building Loans

Lehman Brothers Holdings, Inc. brought an Action to foreclose a senior consolidated mortgage, a building loan mortgage and a project loan mortgage on property at 25 Broad Street in Manhattan. It moved for summary judgment and for a ruling that mechanic's liens filed against the property after the mortgages were recorded were junior to the mortgage liens. The mechan-

ic's lienors moved for summary judgment, claiming priority over the liens of the mortgages. The Supreme Court, New York County, granted the motion for summary judgment declaring that the senior mortgage had priority, allowing the Plaintiff to foreclose, and appointed a referee to compute. The Court also held that the senior consolidated mortgage and the building loan mortgage had priority over the mechanic's liens.

The mechanic's lienors were, however, granted summary judgment as to their claims of priority over the project loan mortgage. Notwithstanding Plaintiff's assertion that the proceeds of the project loan mortgage were not to be used for the cost of an improvement under the Lien Law, the Court found that the project loan mortgage "is really a building loan contract." "Even if not labeled a building loan contract, the Project Mortgage can still be denominated as a building loan contract if it meets the Lien Law's requirements of a building loan...There can be no dispute that the Project Loan Agreement provides for loan payments, in consideration of making improvements to the property, as that term is used under the Lien Law. Accordingly, the Project Loan Agreement is a building loan contract, and, because it was not filed with the New York County Clerk, the Project Mortgage is subordinate to the mechanic's liens." Lehman Brothers Holdings, Inc. v. 25 Broad, LLC, decided June 13, 2011, is posted at http://www.courts.state.ny.us/reporter/pdfs/2011/2011_31931.pdf.

Contracts of Sale

The Supreme Court, New York County, held that a contract to purchase two commercial condominium units for $3,000,000 less than their fair market value, entered into by the former developers of the building who had been removed from control, was unenforceable since the contract vendee had a unilateral, unrestricted right to cancel the contract. According to the Court, "[u]nder New York law, agreements that are illusory and lack mutuality of obligation are unenforceable. 'There is no mutuality of obligation where one party can terminate his promise at will.'" (Citation omitted) Cari, LLC v. 415 Greenwich Fee Owner, LLC, Index No. 650690/10, was decided on June 14, 2011.

Corporations

Plaintiff-lessor's predecessor in interest and Defendant Easy Street, Inc. entered into three leases in 1994 for space in the Plaintiff's building. An Extension Agreement, signed by Defendant Jean-Marc Flack as President of Defendant Easy Street, Inc. was executed in 2003 and an Additional Space Agreement was executed by Defendant Karen Erickson as President of Easy Street, Inc. in 2005. Easy Street, Inc. was, however, dissolved by proclamation in 1999, and it was not reinstated. In an Action for rent alleged to be due and owing, the Plaintiff's motion for summary judgment was granted by the Supreme Court, New York County, as to Defendants Easy Street, Inc., Jean-Marc Flack and Karen Erickson. Although Flack and Erickson signed the Extension Agreement and the Additional Space Agreement in their representative capacities, they acted on behalf of a dissolved corporation and the agreements were not necessary to the winding up of the corporation's affairs. "Defendants purported lack of knowledge that the company was dissolved at the time they signed the leases does not diminish their liability." 498

Seventh Avenue, LLC v. Easy Street, Inc., decided August 5, 2011, is posted at http://www.courts.state.ny.us/reporter/pdfs/2011/2011_32252.pdf.

Electronic Recording/RP-5217

The Office of Real Property Tax Services, New York State Department of Taxation and Finance, has announced a pilot project for the online preparation of the Real Property Transfer Report submitted with each deed, commonly known as Form RP-5217. New online Form RP-5217-PDF is "a one part fill-in form containing a 2D barcode" which, when completed, "may be saved and shared electronically."

The counties in the pilot project are Cortland, Erie, Essex, Orange, Onondaga and Tompkins. According to RP-5217-N ("Pilot project introducing an online Real Property Transfer Report"), "[t]here will be a transition period during which participating counties will accept both the old four-part form and the new one-part form. Eventually [within three to six months of the startup of the pilot program], the counties will phase out the four-part form, and will only accept forms that are in the one-part 2D barcode format." See http://www.orps.state.ny.us/rp5217/rp5217n.pdf.

Estates

Under Estates, Powers and Trusts Law ("EPTL"), Section 5-3.2 ("Revocatory effect of birth of child after execution of will"), "[w]henever a testator has a child born after the execution of a last will, and dies leaving the after-born child unprovided for by any settlement, and neither provided for nor in any way mentioned in the will, every such child shall succeed to a portion of the testator's estate as herein provided." According to the Appellate Division, Second Department in Matter of Gilmore, under the ruling in Bourne v. Dorney (171 N.Y.S. 2d, aff'd 227 N.Y. 641) applying EPTL Section 5-3.2, children adopted in New York are considered born to a testator at the time of adoption.

Petitioners claimed that they were nonmarital, biological children of the deceased, whom he became aware of after he executed his will. They contended that Section 5-3.2 should be extended to protect so-called "after-known" children and they should be entitled to inherit as after-born children. According to the Appellate Division, affirming the ruling of the Supreme Court, Nassau County, which held that the Petitioners did not have any rights under Section 5-3.2, "there is no indication that the Legislature intended that nonmarital children, born prior to the execution of a will, are to be considered after-born children pursuant to EPTL Section 5-3.2 and, thus, are entitled to succeed to a portion of a testator's estate." Matter of Gilmore, decided June 14, 2011, is reported at 925 N.Y.S. 2d 567.

Fraudulent Conveyances

The United States District Court for the Eastern District of New York, confirming its ruling in a related but unreported decision, held that the United States Government can pursue restitution under state law, including state laws permitting the voiding of fraudulent transfers, without being subject to otherwise applicable state law statutes of limitation. The Plaintiff's husband, having

pleaded guilty to conspiracy to commit money laundering, was ordered by the Court to pay restitution; the United States was examining his 1990 no consideration transfer of real property to his wife. In an Action to quiet title to proceeds received from the wife's sale of the property, the Court granted the Government's motion to dismiss for the failure to state a claim without prejudice to the Plaintiff's right, within twenty days of the Order, to amend her complaint to assert an action to quiet title on grounds unrelated to statutes of limitations. Ceparano v. United States, decided July 21, 2011, is reported at 2011 WL 2909308.

Insurance Law, Section 6409

On June 21, 2011, the New York State Insurance Department's Office of General Counsel issued its Opinion (OGC Op. No. 11-06-05), "Real Estate Broker Marketing Arrangements with Title Insurance Agents." The Opinion responded to the following question: "May a real estate broker provide to a title insurance agent marketing services and be paid, at a market rate, a fee for actual services rendered?" "Yes", according to the Department, "[a]s long as the real estate broker and the title insurance agent are not affiliated entities, and there is no quid pro quo or any other arrangement that would violate N.Y. Ins. Law Section 6409 (d) or any other provisions of the Insurance Law, the real estate broker may provide to a title insurance agent the marketing services that are set forth in the facts [in this Opinion], and be paid, at a market rate, a fee for actual services rendered."

Under Insurance Law Section 6409(d) ("commissions and rebate prohibited"):

> No title insurance corporation or any other person acting for or on behalf of it, shall make any rebate of any portion of the fee, premium or charge made, or pay or give to any applicant for insurance, or to any person, firm, or corporation acting as agent, representative, attorney, or employee of the owner, lessee, mortgagee or the prospective owner, lessee, or mortgagee of the real property or any interest therein, either directly or indirectly, any commission, any part of its fees or charges, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business. Any person or entity who accepts or receives such a commission or rebate shall be subject to a penalty equal to the greater of one thousand dollars or five times the amount thereof."

The Opinion is posted at http://www.ins.state.ny.us/ogco2011/rg110605.htm.

Mechanic's Liens/Condominiums

Under Real Property Law Section 339-l ("Liens against common elements"), a mechanic's lien which, in addition to being filed against condominium units owned by the party alleged to be liable to the mechanic, is filed against condominium units owned by others is an invalid "blanket lien" for not properly identifying the property subject to the lien, as required by Lien Law Section 19 ("Contents of notice of lien"). Three notices of mechanic's liens were filed by a mechanic against tax lots for condominium units owned by the sponsor of a condominium, against tax lots for condominium units conveyed by the sponsor before the liens were filed, and against the

tax lot (the "base lot") for the property before the recording of the Declaration of Condominium. The Sponsor-Petitioner moved to discharge the mechanic's liens for being blanket liens; the mechanic's lienor cross-moved for amendment of the liens, nunc pro tunc, under Lien Law Section 12-a ("Amendment").

The Supreme Court, Kings County, granted the cross-motion. Although the lien was filed against the base lot and against units that had been previously conveyed by the Sponsor, the mechanic's liens sufficiently identified the property subject to the liens. Therefore, the Court directed the Respondent-mechanic's lienor to file, within ten days of the Court's Order, amended mechanic's liens without reference to the base lot or to the units conveyed by the Sponsor before the liens were filed, including units conveyed as to which the deeds were recorded after the liens were filed. The amendment of the liens did not prejudice any existing lienor or purchaser in good faith. Matter of Myrtle Owner LLC, decided July 22, 2011, is reported at 2011 WL 2991778.

Mortgage Foreclosures

In an action to foreclose a mortgage on property in Kings County Supreme Court, Justice Kramer held that the parties to a foreclosure are required during settlement conferences "to negotiate in good faith towards creation of a mutually satisfactory modification agreement." Finding that the Plaintiff did not act in good faith, the Court stayed the foreclosure "until such time as the plaintiff moves the Court to resume negotiations in good faith." In addition, due to delay which the Court found was attributable to the Plaintiff, the Court sanctioned the Plaintiff's attorney 50% of the interest due to the Plaintiff from April 23, 2009, the date of the first HAMP [Home Affordable Modification Program] conference, until June 3, 2011, the date on which the parties appeared before the Court. The Defendant was ordered to pay $3,000 per month to the County Clerk until the stay was lifted or the mortgage was repaid. Deutsche Bank Trust Company of America, as Trustee v. Davis, decided June 29, 2011, is reported at 2011 WL 2640795.

Mortgage Foreclosures

A limited liability company, a Defendant in a mortgage foreclosure, moved to enjoin the Plaintiff from causing the property to be sold at auction and to vacate the judgment of foreclosure and sale. It claimed improper service of process and that its default in appearing and answering was excusable. The Supreme Court, Queens County, denied the motion.

Under Civil Practice Law and Rules ("CPLR"), Section 5015 ("Relief from judgment or order"), the court which rendered a judgment may relieve a party from it on grounds of "excusable default" on a motion "made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party." Service upon the Defendant limited liability company was made by delivery of the summons and complaint to New York's Secretary of State as provided in Limited Liability Company Law Section 303 ("Service of process on limited liability companies"). The Court held that the failure of the Defendant to maintain a current address on file with the Secretary of State does not constitute a "reasonable excuse" under CPLR Section 5015.

Under CPLR Section 317 ["Defense by person to whom summons not personally served"], "[a] person served with a summons other than by personal delivery to him or his agent for service under Rule 318 ["Designation of agent for service"]...who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense." Although service on the limited liability company through delivery of process on the Secretary of State was not "personal delivery" under Rule 318, the Court held that the Defendant did not demonstrate it had a meritorious defense. 101-19 37th Avenue, LLC v. R&L Equity Holding LLC, decided June 21, 2011, is posted at http://www.courts.state.ny.us/reporter/pdfs/2011/2011_31663.pdf.

Mortgage Foreclosures

A note was executed to American Brokers Conduit and a mortgage to secure that note was made to MERS as its nominee. The complaint, in an Action to foreclose the mortgage brought by Deutsche Bank National Trust Company, as Trustee, alleged that the Plaintiff was assigned the note and mortgage and was "in possession of the original note with proper endorsement and/or allonge and is therefore, the holder of both the note and mortgage, which passes as incident to the note."

The defendant defaulted in answering and his time to answer or to appear expired. However, one year after entry of an Order appointing the Referee, the Defendant moved to vacate his default and for the dismissal of the Action due to a lack of jurisdiction over him. The Supreme Court, Suffolk County, denied the motion, finding that the Defendant's general denial of service was insufficient to rebut the process server's affidavit of service. Further, any claim that the Plaintiff lacked standing to sue was waived by the Defendant's failure to answer or to assert a pre-answer motion to dismiss.

Although the Court found that the note was endorsed by American Brokers Conduit to the Plaintiff, it also discussed the authority of MERS to assign a mortgage as nominee for the holder of the note. According to the Court, "[t]he concept of nominees appearing in the land records on behalf of the true owner has long been recognized...Therefore, while the use of a nominee as the equivalent of an agent for the lender is not unusual, what is unusual is the extent various courts will go to limit the contractual role of MERS as a nominee." Deutsche Bank National Trust Company, as Trustee v. Pietranico, decided July 27, 2011, is reported at 2011 WL 3198834.

Mortgage Foreclosures

Ann Zweig was the successful bidder at a foreclosure sale held on September 12, 2007. The closing was scheduled for October 12, 2007. Before the closing date, litigation ensued between the foreclosing mortgagee and the holder of another mortgage, which litigation concluded with a decision by the Appellate Division, First Department in November 2010. Ms. Zweig commenced an Action seeking to be removed from her obligation to complete the purchase or, alternatively,

for an Order to be issued directing the refund of her deposit. The Supreme Court, New York County, dismissed the complaint and granted the foreclosing mortgagee's motion for summary judgment. Under the terms of sale, the Plaintiff, as the successful bidder, was subject to any appeal of the judgment of foreclosure and sale and she assumed "all risk of loss or damage to the premises from the date of auction until the date of closing and thereafter." According to the Court, "[t]he intervening litigation and appeal that ensued were foreseeable events well within the risks Zweig undertook when she bought the property." Zweig v. Tolchin, decided May 16, 2011, is reported at 2011 WL 2534866.

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance has announced that the interest rate to be charged for the period October 1, 2011 – December 31, 2011 on late payments and assessments of mortgage recording tax and the State's Real Estate Transfer Tax will be 7.5% per annum, compounded daily. The interest rate to be paid on refunds of those taxes will be 2% per annum, compounded daily. The interest rates are published at http://www.tax.ny.gov/pay/all/int_curr.htm.

Restrictive Covenants

In 1956, a large parcel of land in Hamilton County was conveyed to Antlers of Raquette Lake ("Antlers"). The deed reserved to the grantor a parcel known as the Birch Cottage lot, restricting the use of the Birch Cottage lot to residential use and prohibiting any commercial use. The covenant restricting the use of the Birch Cottage lot was to "run with the land and be binding upon and ensure the benefit of the respective parties hereto, their successors and assigns." Antlers thereafter subdivided its parcel into approximately sixty individual lots which it conveyed by deeds also limiting those lots to residential use.

Owners of certain of those lots, and an association of owners of real property in the hamlet of Raquette Lake, brought an Action seeking to enjoin Antlers and other Defendants from developing the Birch Cottage lot and two contiguous lots for commercial use. The Supreme Court, Hamilton County, found that the lots in question were part of a common scheme of development prohibiting commercial use, and the Court granted the Plaintiffs' motion for summary judgment. The Appellate Division, Third Department, affirmed the ruling of the lower court.

According to the Appellate Division, the covenant restricting the use of the Birch Cottage lot was not a "personal" covenant enforceable only by Antlers; it was a "real" covenant enforceable by subsequent owners of the dominant estate. That deeds in the chain of title to the Birch Cottage lot did not contain the restriction did not establish that the covenant had been extinguished; subsequent grantees of that lot were on notice of the restrictions contained in the original deed. A 2007 agreement purportedly extinguishing the covenant was ineffective as it was not joined in by all of the property owners benefitted by the restriction. Lastly, Antlers' release of its option to purchase the Birch Cottage lot did not release the property from the restrictive covenant. Pepe v. Antlers of Raquette Lake, Inc., decided August 4, 2011, is reported at 2011 WL 3328714.

UCCs/New York City Register

According to a statement issued by the New York City Register, "[b]eginning September 6, 2011, any UCC documents submitted that are accepted and recorded will not be returned. Customers can go online to print a copy of the recorded document. As required, the [recording] offices will continue returning any UCC documents that are submitted and rejected due to errors, for corrections and resubmission." The Offices of the City Register are responsible for recording documents affecting real property in New York, Bronx, Kings, and Queens counties.

First American News

"Commercial Credit Line Mortgages," by Michael J. Berey, was published in the *New York Law Journal* on July 27, 2011.

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