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Current Developments

By Michael J. Berey
Senior Vice President, Chief Underwriting Counsel – New York
First American National Commercial Services

Easements/Recording Act

Plaintiffs sought a judgment declaring that they have a pedestrian right-of-way over land owned by the Defendants between Dune Road and the Atlantic Ocean in the Village of West Hampton Dunes. The Supreme Court, Suffolk County, held in favor of the Plaintiffs and granted their motion for summary judgment. The Appellate Division, Second Department, affirmed. A deed from the common owner of the adjoining lands to the Plaintiffs' predecessor in title granted a right of way over that grantor's remaining land. "The recording of a deed creating a right of way over a grantor's remaining land constitutes constructive notice to a purchaser who later takes title to the servient parcel from the same grantor." *Djoganopoulous v. Polkes*, decided May 8, 2012, is reported at 2012 WL 1606071.

Equitable Subrogation

The Bank of Smithtown (the "Bank") made a mortgage loan for the purchase of a parcel in Orange County. Proceeds of the loan were applied, in part, to satisfy three existing mortgages. The Bank's title report did not, however, report the existence of another recorded mortgage held by Arbor Commercial Mortgage, LLC ("Arbor") on part of the Orange County property and on land in Rockland County. In an Action by Arbor to foreclose its mortgage, the Supreme Court, Rockland County, granted Arbor's motion for summary judgment and denied the Bank's motion for leave to serve an amended answer with a counterclaim seeking either (i) an Order upholding the priority of its lien based on the doctrine of equitable subrogation or (ii) directing the marshaling of assets so that Arbor's lien might be first satisfied by proceeding against the property in Rockland County. The Supreme Court held that equitable subrogation did not apply because the Bank was charged with constructive knowledge of Arbor's recorded mortgage. The Appellate Division, Second Department, reversed, holding that Arbor's motion for summary judgment should have been denied and the cross-motion granted to the extent of allowing the Bank to assert a counterclaim based on the doctrine of equitable subrogation.

"The doctrine of equitable subrogation applies in New York 'where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee,

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another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance *(King v. Pelkofski, 20 N.Y.2d 326, 333-334).*'" In *King v. Pelkofski,* the Court of Appeals held that equitable subrogation is barred when a mortgagee has actual notice of a prior recorded mortgage, but not when the mortgagee is only chargeable with constructive notice of the senior lien.

"Accordingly, the Bank's constructive knowledge of the plaintiff's mortgage is not an absolute bar to application of the doctrine of equitable subrogation." *Arbor Commercial Mortgage, LLC v. Associates at the Palm, LLC,* decided May 23, 2012, is reported at 2012 WL 1860734.

Mortgage Foreclosures

On January 7, 2011 Justice Schack of the Supreme Court, Kings County, issued an Order dismissing, sua sponte and with prejudice, the complaint in an Action to foreclose a mortgage and cancelling the notice of pendency. The dismissal resulted from the failure of the Plaintiff's counsel to submit the attorney's affirmation required in foreclosure involving property improved by one-to-four family residences under an Order issued by the Chief Administrative Judge of New York's courts in October 2010. The Order did not mention that the Plaintiff had a motion pending to extend the time to file the affirmation. The Appellate Division, Second Department, reversed the Order of the lower court. According to the Appellate Division, "there were no extraordinary circumstances warranting dismissal of the complaint and the concomitant cancellation of the notice of pendency. Contrary to the Supreme Court's determination, the plaintiff's counsel did not engage in 'delinquent conduct'. Rather, the plaintiff's counsel timely moved for an enlargement of time to file the required attorney's affirmation, and there is no evidence of a pattern of willful noncompliance with court-ordered deadlines." *Bank of America, National Association v. Bah,* decided May 23, 2012, is reported at 2012 WL 1860732.

Mortgage Foreclosures/MERS

Current Developments dated May 24, 2011, reported the March 3, 2011, decision of the Supreme Court, Bronx County, in *Bank of New York Mellon Trust Company NA v. Sachar* (Index No. 0380904/2009). In that case, the Defendant alleged that the Plaintiff did not have standing to foreclose because the mortgage was assigned to the Plaintiff by MERS, as nominee for the original lender, not by the lender itself, but the Court held that the Plaintiff had standing since "the mortgage conferred broad powers upon MERS as nominee to act on the original lender's behalf." The Appellate Division, First Department, has affirmed the ruling of the lower court, stating that MERS validly assigned the mortgage to the Plaintiff and, although MERS did not have an interest in the note secured by the mortgage, "an assignment of the note had been effectuated by physical delivery of the note before this action was commenced." The Appellate Division's opinion, dated May 22, 2012, is reported at 2012 WL 1837577.

Mortgage Foreclosure/Standing

The Defendants in an Action to foreclose a mortgage on property asserted, as an affirmative defense, that the Plaintiff lacked standing to foreclose. The Supreme Court, Suffolk County, rejected that defense and granted the Plaintiff's motion for summary judgment. According to the Court, standing is an affirmative defense that may be waived and "a waiver of defenses may be set forth in commercial mortgage loan documents." In this case, the terms of the mortgage waived asserting the defense of lack of standing. The mortgage stated that "the Note, this Mortgage and the other Loan Documents are not subject to any right

of recession [sic], set-off, counterclaim or defense…" The Defendants assumed the obligations of the original borrower by execution of an assumption agreement. *US Bank National Association v. Major Holdings, LLC*, decided May 8, 2012, is reported at 2012 WL 1676887.

Mortgage Recording Tax

New York State's Department of Taxation and Finance has issued an Advisory Opinion holding that a mortgage recorded on or on behalf of the United Nations Development Corporation is exempt from mortgage recording tax. The Corporation, formed under New York's Unconsolidated Laws, Section 9602, is an instrumentality of the State of New York, exempt from mortgage recording tax under 20 NYCRR Section 644.1. TSB-A-12(3)R, dated May 3, 2012, is posted at http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a12_3r.pdf.

Mortgage Recording Tax/Breakage Costs

New York State's Department of Taxation and Finance has issued Tax Bulletin TB-MR-30, "Application of the Mortgage Recording Tax to Breakage Costs Secured Under Interest Rate SWAP Agreements." This Bulletin confirms that the securing of breakage costs under a SWAP Agreement will not be treated as mortgage taxable indebtedness if (a) the breakage costs are included in the mortgage as part of the secured obligation and are defined as "additional interest", (b) the swap agreement relates to the same loan the mortgage secures and not, for example, another unsecured loan, and (c) the notional amount of principal under the swap agreement is the same as the principal amount secured by the mortgage. The Bulletin, dated June 5, 2012, is posted under "Mortgage Recording Tax Bulletins" at http://www.tax.ny.gov/pubs_and_bulls/publications/pubs_tax_types.htm.

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance has announced that the interest rates to be charged for the period July 1, 2012 – September 30, 2012 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.

Not-For-Profit Corporations

Current Developments dated March 8, 2012, reported on Matter of *51-53 W. 129th St. HDFC v. Attorney General of the State of New York*, decided November 29, 2011. In that case, the Supreme Court, New York County, Court denied the petition of a Not-For-Profit corporation seeking an Order to authorize it to sell its real property improved by low-income housing to a private purchaser. New York City's Departments of Housing Preservation and Development and Finance objected to the sale, and the Court found that the sale would contravene the purpose for which Petitioner was formed, to use the property for low-income housing. The Appellate Division, First Department, in a decision dated May 22, 2012, has unanimously affirmed the ruling of the lower court. According to the Appellate Division, "the purposes of the corporations are clearly served better by disapproval."

The decisions of the Supreme Court and Appellate Division are posted at:
http://www.courts.state.ny.us/reporter/pdfs/2011/2011_33096.pdf and
http://www.nycourts.gov/reporter/3dseries/2012/2012_03943.htm

Partition

The Debtor in a Chapter 7 Bankruptcy court petition moved for an Order avoiding certain recorded liens against her interest in a parcel of real property that she owned with her brother, on the basis that the liens, together with unavoidable encumbrances, impaired her homestead exemption. The Bankruptcy Court for the Eastern District of New York denied the motion, holding that as a result of the entry of a pre-petition judgment for the partition of the property the Debtor had no proprietary interest in the property, and therefore the liens could not be avoided on the basis of the homestead exemption. The United States District Court for the Eastern District affirmed the ruling of the Bankruptcy Court. New York law governs claims for exemptions relating to property of a Debtor's estate and, according to the District Court:

> "'In order to be entitled to a homestead exemption. N.Y. C.P.L.R. Section 5206 [Real property exempt from application of money judgments] requires evidence of two things: an ownership interest in real property and residency by the Debtor in the real property. [citation omitted]'"
> …
> "Under New York state law, appellant's ownership interest in the subject property was effectively extinguished by the interlocutory judgment of partition and sale insofar as, inter alia, she no longer had any right to control the conveyance or disposition of the property."
> …
> "Since appellant's ownership interest in the real property was terminated upon the pre-petition entry of the interlocutory judgment of partition and sale…the subject real property was no longer property of the estate subject to the homestead exemption, notwithstanding appellant's retention of a limited right of possession of the property until the sale."

In Re Varrone, decided March 30, 2012, is reported at 2012 WL 1079005.

Party Walls

The Appellate Division, First Department, affirmed a ruling of the Supreme Court, New York County, dismissing an Action in which it was claimed that the placement atop of a party wall of steel beams extending two inches beyond the center line of the wall, supporting equipment on the adjoining property, constituted a trespass. According to the Appellate Division, "there is no allegation that the structural integrity of the wall or plaintiff's property has been affected by the beams or that there is a possibility that the beams will prevent plaintiffs from using the party wall." *Lei Chen Fan v. New York SMSA Limited Partnership dba Verizon Wireless,* decided April 24, 2012, is reported at 94 A.D.3d 620 and 2012 WL 1392990.

Tenancy by Entirety/Severance

Stephen and Lucille, a married couple, entered into a separation agreement in 1980 providing that their marital home would be sold to Lucille or to another purchaser at fair market value when their youngest child reached 16 years of age, or if Lucille remarried or desired to purchase the home. The separation agreement further provided that "[i]f the property is sold, the parties shall share equally in the net proceeds of the sale…" There was no matrimonial proceeding. Stephen died in 2009 and Lucille died in 2010, before the property was sold. In 2011, the Administrator of Stephen's Estate commenced a proceeding in the Surrogate's Court, Queens County, for a determination that Stephen's Estate held a one-half interest as a tenant in common from the severance of the tenancy by the entirety into a tenancy in common by the separation agreement. The Surrogate, holding that title to the property remained in tenants by the entirety until Stephen predeceased

Lucille, at which point Lucille became the sole owner of the property, denied the Petitioner's motion for summary judgment and dismissed the petition.

Under General Obligations Law Section 3-309 ("Husband and wife may convey to each other or make partition"), spouses "may make partition or division of any real property held by them" as tenants by the entirety. Although the separation agreement provided that "each party shall own and enjoy, independently of any claim or right of the other, all items of real and personal property of every kind…with full power to dispose of the same as if unmarried", the marital residence was not specifically mentioned. To sever a tenancy by the entirety by the execution of an agreement between a husband and wife requires a '"clear expression of intent [Citation omitted].'"

Although the promise in the separation agreement to sell the property and divide the proceeds of the sale when their child reached 16 years of age is a contractual claim enforceable against Lucille's personal representative under Estates, Powers and Trusts Law Section 11-3.1 ("Actions"), the six-year statute of limitations expired in 1994, six years after their child reached the age of 16. Matter of the Petition of James N. Scola, Administrator of the Estate of Stephen J. Scola, decided May 9, 2012, is reported at 35 Misc. 3d 1223 and 2012 WL 1660663.

Michael J. Berey
Senior Vice President
Chief Underwriting Counsel - New York
First American National Commercial Services
mberey@firstam.com