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Current Developments

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Actions

An Action to foreclose a common charge lien against a condominium unit was brought against a deceased unit owner. Since an Action cannot be brought against a deceased person, the Action was dismissed by the Supreme Court, Queens County, without prejudice and the related notice of pendency was cancelled. The personal representative of the decedent's Estate could not be substituted as a defendant since the decedent was not properly a party to the Action. Further, designating as Defendants fictitious named persons could not include as Defendants heirs of the decedent or the Executor of his Estate. *The Board of Managers of the Wingate Condominium v. Ruf,* decided June 15, 2012, is reported at 35 Misc.3d 1241 and 2012 WL 2295755.

Contracts of Sale

A survey disclosed that a wood deck at a property under a contract of sale extended 2.1 feet over the property line. The sellers modified the deck to be entirely within their property, but the purchasers refused to attend the closing and deliver the purchase price because "the property is not as defined in the contract," under which title was to be delivered in "as is" condition. The Supreme Court, Suffolk County, held that the sellers were entitled to remove the encroachment since the contract allowed the sellers to remove any defects or objections to title prior to closing. The sellers being ready, willing and able to close, and the purchasers failing to proceed with the closing, the Court held that the sellers were entitled to retain the down payment as liquidated damages, as provided in the contract. *Semerjian v. Byer-White*, decided September 25, 2009, was posted by the New York State Law Reporting Bureau on May 31, 2012 at:
http://www.courts.state.ny.us/reporter/3dseries/2009/2009_52840.htm

Easements

An easement granted by deed afforded the benefitted parcel "access to and a reasonable use of that part of the Private Road which is described above…provided that the right herein granted...shall be exercised in such manner as not to interfere with nor unreasonably obstruct the reasonable use of said Private Road…by such other owners or occupants." The Plaintiff, the owner of the benefitted property, contended that the parking of cars on the easement is a use contemplated by the grant; the Defendant, the adjoining property owner and owner of the servient estate, asserted that parking on the easement unreasonably interfered with its ingress and egress.

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According to the Supreme Court, Kings County, although parking was not prohibited by the express terms of the easement, parking on the easement area was "unreasonably obstructive to the servient estate." The Plaintiff, its tenants and assigns were therefore not allowed to park in the area of the easement. The Court also held that use of the easement by grant with the permission of the grantor did not support the finding of an easement by prescription. *Ribellino v. 110 Fifth Street Private LLC,* decided July 5, 2012, is reported at 36 Misc.3d 1209 and 2012 WL 2732027.

Mortgage Foreclosures

Real Property Actions and Proceedings Law Section 1303 ("Foreclosures; required notices") requires the Plaintiff in an Action to foreclose a mortgage on property improved by a one-to-four family dwelling to serve on any mortgagor, with the summons and complaint, a statutory notice captioned "Help for Homeowners in Foreclosure." As reported in Current Developments dated July 18, 2011, the Supreme Court, Nassau County, in *Board of Directors of House Beautiful at Woodbury Homeowners Association v. Godt,* decided May 18, 2011 and reported at 926 N.Y.S. 2d 812, held that this requirement applies to the foreclosure of a homeowner's association lien for the failure to pay assessments and related costs. The Appellate Division, Second Department, in a decision dated June 27, 2012, has held that "[t]he plain language of HETPA [the Home Owners Theft Prevention Act] [Chapter 308, Laws of 2006, of which Section 1303 is a part], limits its applicability to 'mortgage foreclosure action[s]'. The statute makes no reference to foreclosures of other types of liens on real property." (Citation omitted) The decision of the Appellate Division is reported at 2012 WL 2401865.

Mortgage Foreclosures

A mortgage executed in favor of New Century Mortgage Corporation ("New Century"), as lender, and to MERS, as its nominee, was assigned by MERS to Deutsche Bank National Association, as Trustee, which commenced an Action to foreclose the mortgage. The Defendants defaulted in answering the complaint.

The note secured by the mortgage, payable to the order of New Century, not having been endorsed to the order of the Plaintiff or in blank, the Supreme Court, Nassau County, vacated its prior Order denying the Defendants' application to vacate their default due to law office failure, and deemed the proposed answer timely served nunc pro tunc. According to the Court, "[i]n the exercise of this court's discretion and in light of the proposed defense regarding standing…this court is prompted to accept the proffered excuse, and not sit 'idly by' in this foreclosure action in which the defendants have touched upon serious issues of public policy and standing." Deutsche Bank National Trust Company, as *Trustee v. Vasquez*, decided May 8, 2012, is reported at: http://www.nycourts.gov/reporter/pdfs/2012/2012_31395.pdf.

Mortgage Foreclosures/New York City

Local Law 4 of 2012 requires a lender foreclosing a mortgage on residential real property to notify the City's Department of Housing Preservation and Development within fifteen days of the date on which such lender commences or discontinues a foreclosure and enters a judgment of foreclosure, and within fifteen days of the date on which the referee transfers title to the purchaser at the sale. The Local Law took effect on June 15, 2012, with the earliest reporting dates being either July 1 or July 15, depending on when the action was commenced. The Local Law is posted on the City Council website at: http://legistar.council.nyc.gov/Legislation.aspx. Rules implementing the Local Law, issued by the Department as new Chapter 43 of Title 28 of the Rules of the City of New York, are posted at: http://www.nyc.gov/html/hpd/downloads/pdf/Foreclosure-Notification-Rules-Proposed.pdf

Mortgage Foreclosures/Protective Advances

After the foreclosure sale, the Plaintiff sought to recover from surplus monies amounts it paid during the pendency of the Action for what it considered protective advances, including real estate taxes and insurance premiums, expenses for environmental assessments and appraisal reports, commissions to a real estate marketing company, and various miscellaneous expenses. The Supreme Court, Otsego County, held that the Plaintiff was not authorized to make advances after a receiver was appointed, but permitted the Plaintiff to be reimbursed for amounts paid for real estate taxes and insurance premiums, without interest. The Court found that the Plaintiff's other expenses, some of which were allowed under the mortgage, were not necessary and were for the Plaintiff's benefit.

The Appellate Division, Third Department, held that the Plaintiff's "[e]xpenses for appraisals, environmental assessments and marketing commissions were…not necessary to maintain the property or preserve its condition." Further, "[p]laintiff…no longer had the authority to [pay taxes and other necessary expenses and preserve and maintain the premises] once the court appointed its own agent – a receiver - to do so. As the receiver would not have been authorized to pay for appraisals or the environmental assessments without court approval, plaintiff was not entitled to reimbursement after it paid these expenses without court approval."

As regards the Plaintiff's payment of real estate taxes and insurance premiums, the Supreme Court had the discretion to approve payment of such otherwise unauthorized expenditures since they are necessary to maintain the premises. The Appellate Division affirmed the Order of the lower court, as modified to allow for interest on the amounts paid for real estate taxes and insurance premiums, and remitted the case to the Supreme Court for the computation of interest. *Bank of America, N.A. v. Oneonta, L.P.,* decided July 19, 2012, is reported at 2012 WL 2924031.

Mortgage Foreclosures/Standing

A mortgage made to IndyMac Bank, F.S.B. as lender, and to MERS as its nominee, secured a note made to IndyMac. The mortgage was assigned to Deutsche Bank National Trust Company, as Trustee under a Pooling and Service Agreement, and the note was endorsed in blank. Deutsche Bank brought an Action to foreclose the mortgage, alleging that it held the note and mortgage pursuant to the Assignment of the mortgage. The Defendant moved, in lieu of serving an Answer, to dismiss the Complaint for lack of standing, asserting that the Plaintiff did not own the note and mortgage when it commenced the Action.

According to the Supreme Court, Queens County, the mortgage did not specifically afford MERS the right to assign the note, and the note was not assigned to the Plaintiff by the terms of the Pooling and Serving Agreement executed by IndyMac. However, the Plaintiff would have standing to foreclose if it had physical possession of the note, endorsed in blank, on the date it commenced the Action. The Court denied the motion to dismiss, directing the Defendant to serve an Answer asserting lack of standing as an affirmative defense. *Deutsche Bank National Trust Company v. Haque*, dated June 20, 2012, is reported at 36 Misc.3d 1203 and at 2012 WL 2435577.

Mortgage Recording Tax

Current Developments dated December 16, 2011 reported that New York State's Department of Taxation and Finance had expanded its web-based Tax Bulletins to include guidance on issues relating to the Mortgage Recording Tax, the State's Real Estate Transfer Tax, and the "Mansion Tax." One of the Tax Bulletins issued in November 2011, "$10,000 Residential Property Exclusion on Certain Mortgages," has, according to an e-mail issued by the Department, "been revised and reissued to include further details in example 1 and include a new example 2." This Tax Guidance Bulletin, as revised, is posted at:
http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/mrt/10,000_residential.htm.

Notice of Pendency

A notice of pendency filed in connection with an Action for specific performance was not properly indexed. When the error was discovered, and the lis pendens was properly indexed, the Complaint was amended to add, as Defendants, various subsequent purchasers and encumbrancers of the property. The Supreme Court, Queens County, granted the motion of Bank of America, a mortgagee which obtained its interest in the property after the Action was commenced, for the Complaint to be dismissed as to it. The Appellate Division, Second Department, affirmed, holding that Bank of America was a bona fide purchaser for value without actual or constructive notice of the Plaintiff's claim. According to the Court, "…the notice of pendency must be indexed in a block index in order for the notice of pendency to afford constructive notice.…' (Emphasis added). *Del Pozo v. Impressive Homes, Inc.*, dated May 30, 2012, is reported at 95 A.D.3d 1272 and at 2012 WL 1940331.

Restrictive Covenants

The Supreme Court, Saratoga County, held that leases of lots in a campground, providing that each lot was to be "use[d] as a campsite for the erection and maintenance of a camp or summer cottage, and for no other use whatsoever," prohibited the use of the lots for year-round residency. The Defendants contended that the restriction was only as to the type of structures that could be built. The Appellate Division, Third Department, affirmed the ruling of the lower court, concluding that to accept the Defendants' position would be to "ignore the inherently temporary nature of the occupancy of camps and summer cottages." *Ruback's Grove Campers Association, Inc. v. Moore*, decided June 14, 2012, is reported at 2012 WL2136323.

Tax Sales/Notice

Orange County Local Law No. 7 (2001) affords the owner of a property being foreclosed for unpaid taxes an opportunity, on approval of a majority vote of the County legislature, to repurchase the property after the County acquires title at the foreclosure sale and prior to the public auction of the property. Following entry of a foreclosure judgment and the taking of title by the County, the County sent a letter by certified mail, return receipt requested, to the owners of tax foreclosed property informing them that the property had been acquired by the County and advising that they had an opportunity to repurchase the property. The mailing was returned as not deliverable. The property owners asserted that the County did not afford sufficient notice of the so-called "release option." There was no claim asserted that notice of the underlying tax foreclosure action was deficient.

The Supreme Court, Orange County, held that the notice afforded as to the release option was inadequate, and the Appellate Division affirmed. The Court of Appeals reversed, holding that there was no constitutional duty to afford notice of the release option. According to the Court of Appeals, "the release option was a courtesy extended to the previous landowner, but its mere availability should not be equated with the establishment or guarantee of a property right." In the Matter of the *Foreclosure of Tax Liens v. Helseth,* decided February 21, 2012, is reported at 18 N.Y.3d 634.

Tax Sales/Notice

The City of Buffalo sold a parcel of real property at a tax sale. The Plaintiff, successor in interest to the assignee of a mortgage on the property, claimed that it had not received notice of the tax sale, and it sought to set aside the tax foreclosure so it could redeem the property. Notice of the tax foreclosure proceedings was not mailed to the initial mortgagee or its nominee, to the assignee of the mortgage, or to the Plaintiff.

Under Real Property Tax Law Section 1125 ("Personal notice of commencement of foreclosure proceedings"), parties entitled to notice of the commencement of a tax lien foreclosure proceeding include "each owner and any other person whose right, title or interest was a matter of public record as of the date the list of delinquent taxes was filed…." According to the Appellate Division, Fourth Department, the Plaintiff was not entitled to notice since the mortgage assignment was not recorded when the list of delinquent taxes was filed. However, the original mortgagee was entitled to notice and the Plaintiff, as assignee, could assert the failure to give notice to the mortgagee. Notwithstanding, the Appellate Division, Fourth Department, affirmed the Supreme Court, Erie County's denial of the summary judgment motions of the City and of the purchaser at the tax sale, as well as the cross-motion of the Plaintiff, since there were triable issues of fact, including as to Plaintiff's ownership of the mortgage.

The dissent asserted that since the list of delinquent taxes for the tax foreclosure was filed before the mortgage was assigned, the Plaintiff should be bound by the foreclosure proceeding. Real Property Tax Law Section 1122 ("Filing of list of delinquent taxes") provides that the filing of a list of delinquent taxes in the county clerk's office has the same force and effect as the filing of a notice of pendency pursuant to Article 65 of the Civil Practice Law and Rules. *U.S. Bank, National Association v. Denisco,* decided June 29, 2012, is reported at 2012 WL 2478273.

Tax Sales/Notice

The County of Suffolk published notice of its tax lien sale but did not mail notice of the sale to the Plaintiff - property owner. Notice of the Plaintiff's right to redeem, mailed to its address as set forth on the last deed of record, was returned as undeliverable. The property was deeded to the County and subsequently sold at auction.

Claiming it had not been provided constitutionally adequate notice prior to the tax lien sale, the Plaintiff sought a declaration that it had the right to redeem the property and that the deeds to the County and to the purchaser at the auction sale were void. The Supreme Court, Suffolk County, granted the Plaintiff's motion for summary judgment, which ruling was affirmed by the Appellate Division, Second Department. According to the Appellate Division, "[s]ince the notice [of the tax lien sale] was never mailed to Bridgehampton at its actual address, and, thus, Bridgehampton was not provided with actual notice of the tax lien sale, the Supreme Court properly held that its right to due process of law was violated." *Bridgehampton Development Corp. v. County of Suffolk,* decided June 20, 2012, is reported at 2012 WL 2330728.

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