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NATIONAL COMMERCIAL SERVICES

Current Developments

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Association Dues

Sea Gate Association sought to collect unpaid dues and charges owed by the Defendants who owned property within the Sea Gate neighborhood in Coney Island. The Defendants alleged that the Plaintiff lacked standing to collect the sums allegedly owed because, when the Defendants purchased their property, they did not receive an agreement requiring payment of such charges or a copy of the Association's By-Laws, and no payment obligation appeared in their chain of title. They further asserted that the amount claimed by the Association was disproportionate to the value of the services being provided to them. The Supreme Court, Kings County, ordered the Defendants to pay all outstanding dues and charges. According to the Court, the Defendants' "agreement to pay the dues and charges was 'implied in fact by [their] purchase of property within the Association's gated community' [citation omitted]." Further, the Defendants "duly paid plaintiff the assessment dues and charges for five years following their purchase of the property without any ostensible protest." The Sea Gate Association v. Vozny, decided May 17, 2013, is reported at 39 Misc. 3d 1229 and at 2013 WL 2215207.

Building Loans

In 2007, the Plaintiff's predecessor entered into a loan agreement to make a $10,000,000 loan divided into two tranches. One tranche, for $5,500,000, was to refinance a mortgage for $7,000,000 executed in 2005 for the purchase of property in Syracuse, New York. The other tranche, for $4,500,000, was to be advanced to make improvements on that property. The existing mortgage was taken by assignment and, as modified, referenced the $10,000,000 loan but secured a maximum principal amount of $5,500,000. The other tranche was funded into escrow. Over the next year, $2,500,000 of the escrow was advanced, secured only by personal guarantees. No building loan agreement was filed.

In 2008, the original loan agreement was amended and the final $2,000,000 held in escrow was advanced. A "Mortgage Increase, Modification and Spreader Agreement", increasing the principal amount secured to $10,000,000, was recorded. The mortgage, as modified, was treated as a conventional mortgage, rather than a building loan mortgage.

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In an Action to foreclose the $10,000,000 mortgage, the Supreme Court, Onondaga County, held, in a decision reported at 900 N.Y.S.2d 846, that the 2007 loan agreement was a building loan requiring the filing of a building loan agreement; no building loan agreement having been filed, the $10,000,000 mortgage was subordinate in its entirety to subsequently filed mechanic's liens. The Appellate Division, Fourth Department, in a decision reported at 83 AD3d 1563, affirmed. The Court of Appeals also affirmed, but modified the judgment as to which the appeal was taken.

According to the Court of Appeals, the 2007 loan agreement, entered into with the Plaintiff's predecessor, was a building loan contract because it provided for $4,500,000 to make improvements at the property and the agreement modifying the mortgage stated that it secured "payment and/or performance of all indebtedness [of the borrower] described in the [2007 loan agreement]." A building loan agreement should have been filed before the mortgage was recorded. In addition, when the 2008 amendment to the loan agreement was executed, a modification to a filed building loan agreement should have been filed.

According to the Court of Appeals, however, the mortgage had priority over mechanics' liens to the extent of the $5,500,000 advanced in 2007 to purchase the existing acquisition loan mortgage. "Section 22 does not state that the entire interest of each party to an unfiled building loan contract is subject to a later-filed notice of lien… the subordination penalty logically applies only to funds loaned to pay for improvements. Here, the 2007 loan agreement allocated $5.5 million of the loan proceeds to pay off the existing purchase money mortgage. This tranche closed before any monies were advanced for construction, and the 2007 mortgage was in this amount recorded before any contractor began work on the project. The 2008 mortgage [modification]…simply extended the reach of and increased the principal amount secured by the 2007 mortgage. We therefore conclude that $5.5 million of the loan proceeds, secured by the 2007 and 2008 mortgages, was not subject to the subordination penalty." Altshuler Shaham Provident Funds, Ltd. v. GML Tower, LLC, decided June 11, 2013, is posted at 2013 WL 2475863.

Deeds

The Defendants, owners of property in Brooklyn, granted a conservation easement prohibiting any change to the property's façade and exterior without the written consent of the National Architectural Trust, Inc. The easement was recorded in 2003. In 2010, the Defendants sold the property to the Plaintiffs, who allegedly learned of the easement for the first time after the closing and brought an Action for damages. The Supreme Court, Kings County, granted the Defendants' motion to dismiss.

The Appellate Division, Second Department, affirmed dismissal of the causes of action alleging unjust enrichment and breach of the duty of good faith and fair dealing. The easement was a matter of public record and the Defendants had no obligation to disclose the fact of the easement under the doctrine of caveat emptor. However, the Appellate Division further held that the Supreme Court should have denied that branch of the Defendant's motion to dismiss the cause of action alleging breach of the deed's covenant against grantor's acts. According to the Court, "[t]he deed indicates that the Netzer defendants covenanted that they had not done anything to encumber the property, and the complaint alleges that, in conveying the property to the plaintiffs subject to the easement, the Netzer defendants violated the covenant against grantor's acts." Schottland v. Brown Harris Stevens Brooklyn, LLC, decided June 5, 2013, is reported at 2013 WL 2420967.

Deeds/Doctrine of Practical Location

Plaintiff sought a judgment declaring that the boundary line between the Plaintiffs' and the Defendants' properties was the boundary line described in the deeds to them, and to enjoin the alleged encroachment of the Defendants' driveway onto the Plaintiffs' property. The Defendants counterclaimed for a judgment that a hedgerow and a chain link-fence running parallel to the boundary line in the deeds was the legal boundary line under the doctrine of practical location. The Supreme Court, Westchester County denied the Plaintiffs' motion for summary judgment, and the Appellate Division, Second Department, affirmed the ruling of the lower court.

As stated in the Appellate Division's decision, "[p]ursuant to the doctrine of practical location, '[a] practical location of a boundary line and an acquiescence therein for more than the statutory period is conclusive of the location of such boundary…although such line may not in fact be the true line according to the calls of the deeds of the adjoining owners [citation omitted].'" In this case, however, there was an issue of fact "as to whether the parties' predecessors-in-interest acquiesced to the hedgerow and chain-link fence for a period of more than 10 years." Jakubowicz v. Solomon, decided June 19, 2013, is reported at 2013 WL 3023907.

Indian Lands/Sovereign Immunity

Property in the Town of Lewiston is owned by the Lewiston Golf Course Corporation ("LGCC"), which is a wholly owned subsidiary of the Seneca Gaming Corporation, which, in turn, is wholly owned by the Seneca Nation of Indians. The LGCC was formed under the laws of the Seneca Nation of Indians. In an action to foreclose a mechanic's lien against the property, in which other causes of action against the LGCC, the Seneca Falls Gaming Corporation, and others were asserted, the Appellate Division, Third Department, affirmed, as modified, the Order of the Supreme Court, Niagara County, denying the Defendant-Appellants' motion to dismiss on the ground of sovereign immunity.

According to the Appellate Division, the LGCC is not an "'arm of the tribe'" for application of the doctrine of sovereign immunity. The purpose of the LGCC, to "develop a golf course as an 'amenity' to the [Seneca] Nation's gaming operations-is several steps removed from the purposes of tribal government"; the LGCC "has no power to bind or otherwise obligate the funds of the Nation"; and "the record is devoid of evidence that as lawsuit against LGCC would adversely impact the Nation's treasury, directly or indirectly." The Appellate Division also held that the cause of action alleging breach of the implied covenant of good faith and fair dealing should have been dismissed as duplicative of the claim for breach of contract. Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corporation, decided June 14, 2013, is reported at 2013 WL 2674470.

Mechanic's Liens

Under Lien Law Section 10 ("Filing of notice of lien"), a mechanic's lien may be filed against a one-family dwelling within four months of the last date on which a mechanic performs work or a materialman furnishes materials for an improvement being made to real property. For any other type of property, the period within which to file a mechanic's lien is eight months. The property on which a mechanic's lien was filed was used by the Defendant-property owner as a one-family dwelling but it was being converted from a two-family to a single-family dwelling. The Defendant moved for the lien to be discharged since it was not filed within the four month period in which a mechanic's lien can be filed on a one-family dwelling.

The Supreme Court, Queens County, denied the motion. According to the Court, although the property may have been used as a single-family dwelling, "the premises was actually a two-family dwelling that was being converted into a single-family dwelling… when the work began the premises constituted a multiple dwelling and the plaintiff properly served the notice within the applicable eight month statutory time period." J.B. Custom Masonry & Concrete, Inc. v. Sutera, decided May 2, 2013, is reported at 39 Misc.3d 1222 and 2013 WL 1867040.

Mortgage Foreclosures

In an Order dated July 1, 2011, Judge Schack of the Supreme Court, Kings County, denied a motion for an order of reference, directed dismissal of the complaint, canceled the notice of pendency and scheduled a hearing on the issue of sanctions against the Plaintiff and its counsel. The Judge imposed sanctions following a hearing. He held that the Plaintiff lacked standing to commence the action and, based on his independent internet-based research, concluded that the Plaintiff and its counsel relied on a "robosigner" employed by the loan servicer.

The Appellate Division, Second Department, reversed the ruling of the lower court and granted the Plaintiff's motion for an order of reference, remanding the case for further proceedings before a different Justice. According to the Appellate Division, "…the Supreme Court was not presented with any extraordinary circumstances

warranting sua sponte dismissal of the complaint. Moreover, as the defendants failed to answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing [citations omitted]. Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint by the court."

The Appellate Division noted that the Judge's "independent internet investigation of the plaintiff's standing that included newspaper articles and other materials that fall short of what may be judicially noticed, and which was conducted without providing notice and an opportunity to be heard by any party [citation omitted], was improper and should not be repeated." HSBC Bank USA, N.A. v. Taher, decided March 20, 2013, is reported at 962 N.Y.S. 2d 301.

When a mortgage is being foreclosed on an owner-occupied residence, Rule 3408 ("Mandatory settlement conference in residential foreclosure actions") of the Civil Practice Law and Rules requires "settlement discussions" to be held. One of the purposes of the conference is to determine whether the parties can reach an agreement to help the defendant avoid losing his or her home. Under subsection (f) of the Rule, "[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible."

The Supreme Court, Kings County, held that the foreclosing Plaintiff had not acted in good faith. According to the Court, the Plaintiff failed to "deal honestly, fairly, and openly", as "evidenced [in the Record] by conflicting information, a refusal to honor agreements, unexcused delay, unexplained charges, and misrepresentations..." The Court therefore imposed sanctions; it ordered that the Plaintiff forfeit attorneys' fees and other legal costs incurred between the date of the first mandatory conference and the date of the Court's Order and required that the Plaintiff include in its computations reasonable legal fees incurred by the Defendants to March 5, 2013. A hearing was scheduled to "determine…the precise sum to be assessed as costs against the plaintiff and whether the costs should be paid outright or credited to the defendants in diminution of their debt to the plaintiff." Wells Fargo Bank, N.A. v. Ruggiero, decided May 29, 2013, is reported at 39 Misc.3d 1233 and 2013 WL 2350381.

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, 2013 – September 30, 2013 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 notice issued by the Department is posted at http://www.tax.ny.gov/pay/all/int_curr.htm.

First American News

"New York's Mortgage Recording Tax–Partially Securing Multiple Obligations", by Michael J. Berey, and "Leasehold Title Insurance: A Pathway to Closing?", by S.H. Spencer Compton, were published in the Spring/ Summer 2013 edition of the N.Y. Real Property Law Journal.

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