



# Current Developments

By *Michael J. Berey*

Senior Vice President, Chief Underwriting Counsel – New York  
First American Title National Commercial Services

## Adverse Possession

The Plaintiff in an Action against the Metropolitan Transportation Authority (“MTA”) sought a determination that the Plaintiff owned certain property by adverse possession as to which the MTA was the record owner. The MTA brought a motion to dismiss, claiming that all property owned by it is immune from claims of adverse possession. The Supreme Court, Kings County, denied the motion. There is no immunity against adverse possession for property held by a governmental entity in a “proprietary capacity”, and the MTA had “not established that the disputed property here is immune from adverse possession as a matter of law.” *The Brocho V’Hatzlocho Corporation v. Metropolitan Transportation Authority*, decided July 3, 2013, is reported at 40 Misc.3d 1204 and 2013 WL 3336824.

## Creditors’ Rights

Under Debtor and Creditor Law Section 276 (“Conveyances made with intent to defraud”) “[e]very conveyance made and every obligation incurred with actual intent...to hinder, delay, or defraud either present or future creditors, is fraudulent...” The Appellate Division, Second Department, reversing the Order of the Supreme Court, Kings County, held that the Defendant’s conveyance of his interest in property, in which he continued to reside, to his wife was intended to hinder the Plaintiff in the collection of a judgment, granted the Plaintiff-creditor’s motion for summary judgment, and remitted the case to the Supreme Court, Kings County, for entry of a judgment that the deed was null and void. The case was also remitted to determine attorneys’ fees to be awarded to the Plaintiff. Debtor and Creditor Law Section 276-A (“Attorneys’ fees in action or special proceeding to set aside a conveyance made with intent to defraud”), states, in part, the following:

“In an action or special proceeding brought by a creditor...to set aside a conveyance by a debtor...received by the transferee with actual intent...to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor...shall recover judgment, the justice...presiding at the trial shall fix the reasonable attorneys’ fees of the creditor...in such action or proceeding, and the creditor...shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment...”

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The Appellate Division's decision in *5706 Fifth Avenue, LLC v. Louzieh*, dated July 10, 2013, is reported at 2013 WL 3455551.

## Lien Law

Under Lien Law Section 70 ("Definition of trusts"), funds received by an owner of real property for or in connection with an improvement of real property constitute assets of a trust as to which the owner is trustee. Trust assets are to be held by the trustee and applied to payment of the cost of the improvement (Lien Law Section 71; "Purposes of the trust"). Application of trust assets to a purpose other than that of the trust is a diversion of trust assets (Lien Law Section 72; "Diversion of trust assets"). In an Action brought to enforce the trust, a Court may, among other forms of relief, "compel an interim or final accounting by the trustee to identify and recover trust assets in the hands of any person together with interest accrued thereon from the time of the diversion..." (Lien Law Section 77; "Action to enforce trust").

In *Holt Construction Corp. v. Grand Palais, LLC*, a mechanic's lien filed by the Plaintiff was bonded; the property subject to the lien was then sold. The Plaintiff sought to foreclose on the lien, to set aside the conveyance as fraudulent under Debtor and Creditor Law Section 273 ("Conveyances by insolvent"), and to recover damages for the diversion of trust assets under Lien Law Article 3-A ("Definition and enforcement of trusts"). The Appellate Division modified the judgment of the Supreme Court, Queens County, which had awarded damages to the Plaintiff.

The Appellate Division held that the lower court improperly awarded judgment in favor of the Plaintiff on the cause of action to set aside the conveyance of the property as fraudulent; once the mechanic's lien was bonded "the debt no longer existed for the purposes of Debtor and Creditor Law §273 (citations omitted). Further, "the filing of the bond did not necessitate the dismissal of the...causes of action, which were to recover damages for diversion of trust assets pursuant to article 3-A of the Lien Law."

The Appellate Division also held that the lower court improperly awarded judgment in favor of the Plaintiff on the causes of action seeking damages for violation of the trust fund provision in Lien Law Section 13(5) ("Priority of liens"). Lastly, the Court found that the Supreme Court improperly dismissed the causes of action for diversion of trust assets against a Defendant who was a principal of the Defendant for which the work was done. According to the Appellate Division,

"This Court has held that the individual officers of a corporate trustee may be held personally liable pursuant to Lien Law article 3-A for knowingly participating in a diversion of trust assets [citations omitted]. Here, the record demonstrates that, in contravention of Lien Law § 71(1), [Defendant] Lepow failed to hold the proceeds from the sale of the property to Brisam in trust to pay for the cost of improvements, and that he used those proceeds, in part, to satisfy other various debts in contravention of Lien Law §72. Thus, the Supreme Court should have awarded judgment in favor of Holt [the Plaintiff] against Lepow...on those portions of the...causes of action which sought damages for violations of Lien Law §§ 72 and 77."

The decision of the Appellate Division, dated July 10, 2013, is reported at 2013 WL 3455596.

## Mortgage Foreclosures/Certificate of Merit

Chapter 306 of the Laws of 2013 adds Section 3012-B ("Certificate of merit in certain residential foreclosure actions") to the Civil Practice Law and Rules. This new Section requires the complaint in a mortgage foreclosure on owner-occupied property securing a home loan (defined in Real Property Actions and Proceedings Law Section 1304), to be accompanied by a certificate of merit signed by the attorney for the plaintiff. The certification must state that the attorney "has reviewed the facts of the case and that, based on consultation with representatives of the plaintiff identified in the certificate and the attorney's review of pertinent documents [such as the note, the mortgage and any assignments] to the best of such attorney's knowledge, information

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and belief there is a reasonable basis for the commencement of such action and that the plaintiff is currently the creditor entitled to enforce rights under such documents.” For the willful failure to comply with the requirements of the Chapter the Court may dismiss the complaint without prejudice or deny to the lender interest, costs, and attorney’s fees. Section 3012-B is effective August 30, 2013; it applies to actions commenced on or after its effective date.

### Mortgage Recording Tax

Under Real Property Law Section 339-ee (“Effect of other laws”), upon the recording of a mortgage executed to finance the initial sale of a condominium unit there is a partial credit for mortgage tax paid on (i) a building loan mortgage, (ii) a blanket mortgage the proceeds of which were applied to capital expenditures or expenses for the development or operation of the condominium, or (iii) a mortgage to purchase the land or buildings for the condominium, provided that the purchase was within two years of the recording of the condominium declaration so long as a unit is sold no more than two years after the construction or blanket mortgage was recorded.

The Office of Counsel of New York State’s Department of Taxation and Finance (the “Department”) issued an Advisory Opinion allowing the mortgage tax credit on the first sale of units under the following facts. The original Sponsor acquired the property in 2005, executing a purchase money mortgage and, later, a consolidated building loan mortgage. In 2008, a Declaration of Condominium was recorded and a unit was sold. The original Sponsor lost its title to the property in 2011 as the result of the foreclosure of the consolidated mortgage. Petitioner acquired title to the property by the Referee’s Deed in the foreclosure. It executed a Land and Construction Mortgage and a Project Loan Mortgage. Petitioner recorded an Amended and Restated Declaration of Condominium on February 16, 2012 and first conveyed a unit to a purchaser on July 11, 2012.

According to the Department, “in the post-foreclosure condominium situation here, the 339-ee credit will be allowed...The land and buildings were acquired by Petitioner through the Referee’s Deed on September 28, 2011 and the Amended and Restated Declaration of Condominium was recorded by Petitioner on February 16, 2012. In addition, since the first conveyance of a condominium unit by the Petitioner occurred on July 11, 2012, the first sale occurred less than two years after the mortgage was recorded.”

Advisory Opinion TSB-A-13(2)R, Petition No. M1203330B, dated July 15, 2013, is posted at [http://www.tax.ny.gov/pdf/advisory\\_opinions/mortgage/a13\\_2r.pdf](http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a13_2r.pdf)

### Mortgage Recording Tax

The mortgage tax rate for mortgages securing a principal obligation of \$500,000 or more recorded in the City of New York is \$2.175 per \$100 of the principal obligation secured for a mortgage on a one-to-three family house or individual residential condominium unit and \$2.80 per \$100 of the principal obligation secured in all other instances. Petitioners purchased a residential condominium unit in 2008 and in 2012 they purchased the adjoining residential unit, intending to combine the units. At the closing in 2012, a consolidated mortgage was recorded against both units for \$1,584,000; it included the existing mortgage on the unit first acquired, spread to encumber both units, and a gap mortgage for \$704,000. Petitioner paid mortgage tax at the rate of \$2.80 per \$100 and sought a refund of excess mortgage tax paid.

According to the Department, under the “facts and circumstances” stated in the Petition, Petitioners had a “clear intent” prior to acquisition of the second unit to combine the units into one primary residence. Architectural plans for the combined unit had been completed, and an Apartment Alteration Agreement was submitted to the Condominium’s managing agent requesting consent to the combination of the units. Therefore, the applicable rate was \$2.175 per \$100. Advisory Opinion TSB-A-13(3)R, Petition No. M121119A, dated July 15, 2013, is posted at [http://www.tax.ny.gov/pdf/advisory\\_opinions/mortgage/a13\\_3r.pdf](http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a13_3r.pdf)

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## Mortgages

Julie borrowed \$1,050,000 from Steven, the foreclosing Plaintiff, secured by three mortgages executed by Julie on her interest in property she owned with her husband, Robert, as tenants by the entirety. Only \$9,321.21, secured by the first mortgage, was provided by the Plaintiff; the balance of the loan was funded by his wholly-owned corporation. At the conclusion of divorce proceedings as to Julie and Robert, sole title to the property was awarded to Robert. The amount Julie owed Steven was deducted from Julie's share of the equitable distribution award in the divorce. The Plaintiff then commenced an Action to foreclose the mortgages.

The Supreme Court, Westchester County, held that the mortgages were invalid and unenforceable except as to the first mortgage but only to the extent loan proceeds secured by that mortgage were advanced by the Plaintiff. The Appellate Division, Second Department, reversed, stating "[i]t is not necessary...that the party seeking to foreclose provided the consideration...that [Steven's corporation] provided the consideration, rather than [Steven], does not, by itself, render the mortgages invalid."

The Appellate Division further ruled that after the divorce Julie and Robert's interests in the property were converted, by operation of law, into those of tenants-in-common. Although the mortgages were invalid as to Robert's interest in the property, the Plaintiff retained a mortgage on Julie's tenancy-in-common interest, "notwithstanding that the equitable distribution award divested Julie of the monetary equivalent of her interest in the property. [citations omitted]"

The Appellate Division remitted the case to the Supreme Court, Westchester County, for entry of a judgment that the mortgages were invalid as to Robert's interest as a tenant-in-common. *Rose v. Levine*, decided June 26, 2013, is reported at 2013 WL 3199057.

## Notice of Pendency

The Supreme Court, Albany County, dismissed the Complaint in an Action for specific performance of a contract of sale and canceled the notice of pendency. The Plaintiff appealed and the Defendant sold the property to a third party. The Appellate Division, Third Department, dismissed the appeal as moot. The Plaintiff "did not seek injunctive relief to protect his interests while the appeal was pending [citation omitted]...and specific performance of the contract is no longer possible." *Drake v. Friedenthal*, dated July 11, 2013, is reported at 2013 WL 3466815.

## Restrictive Covenants

The homeowners' association representing a community of approximately 1,305 households in Queens sought an injunction to prevent the Defendant from sub-dividing its corner lot to build two single family homes in violation of a 1909 restrictive covenant affecting approximately 541 homes in the subdivision. The covenant requires a house on a corner property to be at least 80 feet wide by 100 feet long, and a house on a different parcel, not a corner lot, to be on a lot at least 60 feet wide by 100 feet long. The proposed sub-division would comply with zoning requirements.

The Supreme Court, Queens County, first held that the Plaintiff had standing to enforce the covenant. "Given [the Association's] size and composition of over 500 members in the affected area, [the Plaintiff] should be allowed to take an adversarial position and represent the individually affected homeowners."

A permanent injunction was granted. The Court found "that the restrictions continue to serve a legitimate purpose, especially as it relates to corner lots, to allow for the continued ambiance afforded the community by open and unobstructed views", and that the number of homes not complying with the restrictions was "relatively insignificant." "Failure to object to the previous de minimis violations does not result in forfeiture of the right to enforce the Covenant in present and future situations." *Broadway Flushing Homeowners' Association, Inc. v. Eastern NY Enterprises, Inc.*, decided July 17, 2013, 2013 NY Slip Op 51243 is posted at [http://www.nycourts.gov/reporter/3dseries/2013/2013\\_51243.htm](http://www.nycourts.gov/reporter/3dseries/2013/2013_51243.htm)

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## Transfer Tax/New York City

New York City's Real Property Transfer Tax ("RPTT") rate for the conveyance of a one-to-three family home or an individual condominium unit is 1% when the consideration is \$500,000 or less and 1.425% when the consideration is greater than \$500,000. The City's Department of Finance ("DOF") has issued a ruling holding that the lower rate applies to the conveyance by separate deeds of two adjacent parcels of real property for \$387,500 per parcel, each lot improved by a separate two-family home and constituting a separate tax lot, notwithstanding that there was a single contract of sale. According to the Department of Finance, "...the conveyance of each of these parcels using a separate deed is subject to the lower RPTT schedule applicable to the conveyance of a one, two or three family house. Given that there are separate deeds conveying each of the properties, each will be treated separately and the conveyances will not be aggregated to trigger the higher rate schedule." The Department's Letter Ruling, FLR-12-4932, dated June 6, 2013, is not posted on the DOF website.

## First American News

"New York's Court of Appeals Rules on the Lien Law", authored by Michael J. Berey, was published in the New York Law Journal on August 6, 2013.

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## Michael J. Berey

Senior Vice President

Chief Underwriting Counsel - New York

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mberey@firstam.com