Current Developments

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Adjoining Owners/Trees

Defendant cut down two trees, apparently planted on his property, which over time grew on both sides of the property line. His neighbor, the Plaintiff, sued for damages. According to the District Court, Suffolk County, Third District, "where the trunk of the tree, although originally planted on one side of a boundary, has grown over onto both properties, the tree becomes property held as tenants-in-common [citation omitted]. If one tenant-in-common destroys or removes the common tree property, he is liable under the common law in 'trespass quam clausum fregit'" (the tort of wrongful entry onto real property). The Court awarded the Plaintiff one-half of the value of the two trees, computed at their replacement cost, and the expense for stump removal. O'Shea v. Shanzer, decided August 8, 2013, is reported at 40 Misc.3d 1224 and 2013 WL 4017352.

Adverse Possession

Plaintiffs sought a declaratory judgment establishing their title to a strip of land between their property and the property of the Defendants based on a claim of adverse possession. The Plaintiffs also sought damages for the Defendants having demolished a wall the Plaintiffs had erected on the strip of land. The Supreme Court, Queens County, dismissed the causes of action for title by adverse possession and for damages. The Appellate Division, Second Department, reversed and remanded for entry of an amended judgment declaring that the Plaintiffs owned the property by adverse possession and awarding damages.

According to the Appellate Division, "the plaintiffs demonstrated that, by building and maintaining a wall along the subject strip, which was styled to match their house and attached to a gate attached to their house, they continually possessed the subject strip, for more than 10 years, in a manner that was open and notorious, exclusive, and inimical to the rights of the [Defendants'] predecessor [citations omitted]. Contrary to the Supreme Court's conclusion, there was no indication that the wall was built with the permission of the [Defendants'] predecessor."

Further, "[s]ince the subject strip was owned by the plaintiffs by adverse possession, the [Defendants] '[were] responsible for any damages that [they] caused to the plaintiffs' property by reason of [their] trespass (citation

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omitted')." The Appellate Division awarded compensatory damages in an amount to enable replacement of the wall. Marone v. Kally, decided September 18, 2013, is reported at 2013 WL 5225603.

Leasehold/Commercial Rent and Occupancy

New York City's Department of Finance, in a Ruling dated May 18, 2011 (recently posted to its website), has taken the position that the Commercial Rent and Occupancy Tax under Title 11, Chapter 7 of the Administrative Code is not payable on a lease which is recharacterized as a financing arrangement. The ruling sets forth the basis for the determination that the lease in question was a financing arrangement and not a true lease. FLR 10-4913-007 is posted at: http://www.nyc.gov/html/dof/downloads/pdf/redacted%20letter%20rulings/redacted_rptt_10_4913_007.pdf

Business Corporation Law

Under Business Corporation Law Section 909 ("Sale, lease, exchange or other disposition of assets"), the disposition of all or substantially all of the assets of a corporation not made in its ordinary course of business must be approved by the corporation's shareholders either by a majority of the holders of all outstanding shares or, for corporations "in existence on the effective date of this clause, two-thirds of the votes of all outstanding shares entitled to vote thereon", referred to by the Supreme Court, New York County, in Theatre District Realty Corp. v. Appleby, as a "supermajority vote."

Theatre District Realty Corporation owned one property, which was on Tenth Avenue in Manhattan. The Corporation intended to sell the property in an IRC Section 1031 exchange for other property and continue its primary business of leasing residential and commercial space. The Corporation asserted that the proposed transaction would be in the regular course of its business "in furtherance of the objectives of its existence" [citation omitted] and therefore it required only the approval of a majority of its shareholders. An objecting shareholder, having a 45% interest in the Corporation, argued that a supermajority vote was required to sell the building.

The Supreme Court, New York County, granted summary judgment to the Plaintiff corporation. It held that the proposed sale was in the regular course of the Plaintiff's business in furtherance of the objectives of its existence, only requiring the consent of a majority of shareholders. "This sale and subsequent purchase of a more profitable property that will be used in the same manner satisfies the requirement that the transaction be in furtherance of the purpose of Theatre District's existence." The decision, dated August 20, 2013, is posted at http://www.courts.state.ny.us/reporter/pdfs/2013/2013_31979.pdf

Mansion Tax

The "Additional Tax" under Tax Law Section 1402-a, also known as the "Mansion Tax", is 1% of consideration payable by the grantee on the transfer of a 1-3 family house, an individual residential condominium or a cooperative apartment unit when the consideration for the transfer is $1,000,000 or more. New York State's Department of Taxation and Finance has issued an Advisory Opinion taking the position that a condominium unit in a "transient hotel" is not subject to the Mansion Tax. In a transient hotel, a unit owner has the right to use his or her unit on only a limited basis and the hotel can, when the unit owner is not in occupancy, rent the unit to other persons. The condominium units are, in such a case, primarily used for commercial purposes. Advisory Opinion TSB-A-13(4)R (Petition No. M110714A), dated August 30, 2013, is posted at www.tax.ny.gov/pdf/advisory_opinions/real_estate/a13_4r.pdf

Mortgage Foreclosures/Surplus Monies

A Memorandum dated August 8, 2013 by Hon. Michael V. Coccoma, the Deputy Chief Administrative Judge for Courts Outside New York City, to the Administrative Judges of the Judicial Districts outside of New York City, the District Executives for those Judicial Districts, and the Acting Presiding Judge and Chief Clerk of the Court of Claims, directs the use of a new "Foreclosure Action Surplus Monies Form" in real property foreclosure proceedings. According to the accompanying "Instructions To Chambers", the Form, when completed by

the Referee, is to "be signed by the Referee, the Plaintiff's representative and the purchaser of the foreclosed property." The completed, signed Form is to be delivered by the Referee to the County Clerk within thirty days after the auction, with a copy to the Chambers of the Justice who signed the foreclosure judgment. "All foreclosure cases will be calendared, no later than six months after the Judgment [of Foreclosure] has been signed…to determine whether the sale as ordered has occurred, the outcome, and to make such further orders as necessary." The Surplus Monies Form and the Instructions to Chambers can be obtained at http://www.firstamny.com/doc/867.pdf

Mortgage Recording Tax/New York State Transfer

New York State's Department of Taxation and Finance announced that the interest rates to be charged for the period October 1, 2013 – December 31, 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 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

Mortgages/Apparent Authority

Elgin Realty, Inc. ("Elgin") obtained a loan secured by a mortgage and an assignment of leases and rents. The documents were executed by Elgin's President, who represented to the lenders that he was also Elgin's sole shareholder and director. An Action was commenced by Elgin Realty, Inc. for a judgment declaring that the mortgage and assignment of leases and rents were invalid, that another person was Elgin's sole shareholder and director, and that its President lacked the authority to execute those documents on behalf of Elgin. The Supreme Court, Orange County, granted summary judgment to the lenders-Defendants and dismissed the complaint. The Appellate Division, Second Department, affirmed the lower court's Order, modified to provide that the mortgage and assignment of leases and rents were valid. The Plaintiff's President had apparent authority to execute the mortgage and assignment. Elgin Realty, Inc. v. Klein, decided September 11, 2013, is reported at 2013 WL 4823416.

Mortgage Foreclosures/Estates

In an Action to foreclose a mortgage, the Plaintiff named the deceased last surviving mortgagor as a defendant. Service of the summons and complaint was made upon heirs of the Defendant, one of whom had been issued a certificate of voluntary administration for the Defendant's Estate by the Suffolk County Surrogate's Court. The Plaintiff's motion for issuance of an Order substituting as Defendants the heirs of the deceased, and for the appointment of a referee to compute, was denied by the Supreme Court, Suffolk County.

According to the Court, "…a foreclosing plaintiff may prosecute its claims against the distributees of a deceased mortgagor only where said mortgagor died intestate and no deficiency judgment is sought by the plaintiff in such action [citations omitted]. Where, however, the deceased mortgagor died testate, or where he or she was personally liable on the mortgage note or bond and the plaintiff seeks a deficiency judgment in its mortgage foreclosure complaint, the plaintiff…must proceed against the personal representative of the estate of the deceased mortgagor." In this case, since the deceased mortgagor died testate the foreclosure had to be brought against a personal representative of the Estate. A voluntary administrator is not qualified to appear on behalf of an Estate in a mortgage foreclosure. Everhome Mortgage Company v. Sirignano, decided August 5, 2013, is reported at 2013 WL 4007278.

Mortgage Foreclosures/Surplus Monies

The Court in a divorce proceeding issued an Order enjoining and restraining the husband and wife from transferring any marital property. Notwithstanding the Order, the wife executed a third mortgage on their home. While the matrimonial proceedings were pending, the holder of the first mortgage on the property commenced a foreclosure; the property was sold at a foreclosure sale, leaving surplus funds of $490,000 which were deposited with the Nassau County Treasurer. The husband, the holders of the second and third mortgages, and others

asserted claims to the surplus.

A Referee appointed in the matrimonial action determined that the wife had used the proceeds of the third mortgage for her individual benefit and that the husband's claim to the surplus funds was superior to the claim of the third mortgagee. A judgment was issued in the matrimonial action ordering that any surplus funds remaining after satisfaction of the claim of the second mortgagee were to be distributed to the husband. The Supreme Court, Nassau County, directed the County Treasurer to release $287,644.47 of surplus funds to the husband, and the Appellate Division, Second Department affirmed.

According to the Appellate Division, the record in the foreclosure proceedings established that the third mortgagee's attorney knew or should have known of the restraining order. "[T]he matrimonial court had authority to determine that the husband was entitled to the surplus funds as part of the equitable distribution of the marital property." Emigrant Mortgage Company v. Biggio, decided October 2, 2013, is reported at 2013 WL 5450452.

Mortgages

First and second mortgages, executed to MERS as nominee for Countrywide Homes Loans, Inc., were consolidated into a single lien by a Consolidation, Extension and Modification Agreement ("CEMA"). MERS, as nominee for Countrywide, subsequently assigned only the first mortgage. The mortgagor brought an Action seeking a declaratory judgment that the first mortgage was null and void, alleging that execution of the CEMA "rendered the first mortgage nonexistent." The Supreme Court, Westchester County, denied the branches of the assignee's motion seeking a judgment declaring that the first mortgage was not null and void; the Appellate Division reversed and remitted the matter to the lower court for entry of a judgment declaring that the first mortgage was not null and void. According to the Appellate Division, "[w]here, as here, balances of first mortgage loans are increased with second mortgage loans and CEMAs are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist and may be assigned to other lenders." Benson v. Deutsche Bank National Trust, Inc., decided August 14, 2013, is reported at 2013 WL 4082695.

Real Estate Taxes

An Action was commenced to obtain a refund of real property taxes allegedly overpaid because of an alleged error of the Defendant City of Beacon in calculating the tax rate applicable to the Plaintiff's property. The City moved for an Order dismissing various causes of action on the grounds that the Plaintiff did not allege that it paid the taxes under protest. The Appellate Division, Second Department, affirming the ruling of the Supreme Court, Dutchess County, denied the City's motion. According to the Appellate Division, "[g]enerally, there can be no recovery of taxes paid unless the payments were made involuntarily, i.e., under protest or duress. [citations omitted]. However, recovery may be had without protest where the tax has been paid due to material mistake of fact…under the circumstances alleged in the complaint, the protest requirement is inapplicable." Matteawan On Main, Inc. v. City of Beacon, decided August 21, 2013, is reported at 970 N.Y.S.2d 631.

Real Property Transfer Tax/NYC

A Ruling of the New York City Department of Finance, dated June 3, 2011 (recently posted to its website) takes the position that a Public Subsidy (which may include a grant), paid by a government agency or entity to the seller or to a third party on the transfer of a house or a building with one or more dwelling units, is included in the consideration subject to transfer tax when the property is sold. Although the purchaser's obligations under the Subsidy Documents, secured by an Enforcement Mortgage, are forgiven after a number of years if the purchaser complies with obligations under the Subsidy Documents, "the fact that the Purchaser is forgiven for the Public Subsidy and Grant does not change the fact that they were part of the consideration paid to the grantor." FLR-104090-021 is posted at:
http://www.nyc.gov/html/dof/downloads/pdf/redacted%20letter%20rulings/redacted_rptt_104909_021.pdf

Recording Act

Neil and Karen Baisch owned property in Sodus, New York as tenants-in-common. In 2004, New Horizons Yacht Harbor, Inc. ("New Horizons"), an entity owned by Neil Baisch, to which title had not been conveyed, deeded the property to Sodus Bay Development LLC ("Sodus"), another entity owned by Neil Baisch. Later in 2004, Sodus transferred a townhouse on the property to the Defendants. In 2006, Neil and Karen Baisch conveyed the entire parcel, including the land improved by the townhouse, to the Plaintiffs, who brought an Action to quiet title.

The Supreme Court, Wayne County, held that the Plaintiffs owned the property by reason of the 2006 deed. According to the Court, "[t]he Defendants were on constructive notice that [Sodus] was not the title owner of the Townhouse, as it is clear from public records that the corporation's only claim to the entire parcel was based on a deed from [New Horizons], which never held title to the property." The Defendants "were 'legally bound' to search the grantor-grantee index for prior conveyances before proceeding with the transaction."

The Defendants claimed that they were entitled to reformation of the deed from New Horizons to Sodus, asserting that the conveyance was the result of a scrivener's error or the result of a mutual or unilateral mistake. However, the Court found that the Defendants' argument was not supported by the documentary evidence, noting further that the six years statute of limitations applicable to reformation of a deed had expired. Sodus Holdings, LLC v. Bartucca, decided August 5, 2013, is reported at 40 Misc. 3d 1236 and 2013 WL 4080329.

Rule Against Perpetuities

Under a deed executed in 1946 to the Pine Brook Golf Club, Inc. (the "Golf Club"), a Defendant in an Action to foreclose a mortgage, if the property was not used as a golf course for one year title was to be transferred to the Defendant City of Gloversville for recreational purposes. If the City did not accept a deed on that basis, title was to be transferred to Defendant Nathan Littauer Hospital Association. The Plaintiff asserted that the City and the Hospital had no valid interest in the premises, since the provision in the 1946 deed violated the rule against perpetuities; it moved that their Answers, seeking an Order dismissing the Action, be stricken.

The Supreme Court, Fulton County, held that the City of Gloversville waived its interest in the property when the City's Common Council passed a resolution rejecting any rights it had in operating the land for recreational purposes. As to the Hospital, the contingency in the deed violated the rule against perpetuities and was void. According to the Court, "the above mentioned contingencies in the deed could occur at any remote date without reference to lives in being." Plaintiff's motion for summary judgment against the City and the Hospital was granted, and a default judgment was entered against the Golf Club. NBT Bank, N.A. v. Pine Brook Golf Club, Inc., dated August 27, 2013 (Index No. 01110), is an unreported decision.

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No. 154; October 7, 2013
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