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NATIONAL COMMERCIAL SERVICES

Current Developments

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No. 155. December 9, 2013

Adverse Possession

Subsection 1 of Real Property Actions and Proceedings Law Section 543 ("Adverse Possession; how affected by acts across a boundary line"), as added by Chapter 269 of the Laws of 2008, states that "the existence of de minimus [sic] non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse." The Plaintiff in Wright v. Sokoloff asserted that encroaching fences and shrubbery, no matter how large the encroachment, are permissive and non-adverse as a matter of law. The Appellate Division, Second Department, held, however, that non-structural encroachments "could still be adverse if they are not de minimis." Whether the encroachment of hedges upon a right of way is de minimis is a question of fact. The decision of the Appellate Division, dated October 23, 2013, is reported at 2013 WL 5736285.

Common Charge Liens/Mortgages

Real Property Law Section 339-z ("Lien for common charges; priority;...") provides, in part, that a lien for unpaid common charges, held by the Board of Managers of a condominium on behalf of all unit owners, is prior to all liens except the lien of a first mortgage of record. In the foreclosure of a consolidated first mortgage encumbering residential condominium units and a garage unit owned by the Sponsor, the Board of Managers of the Condominium (the "Board") cross-claimed to foreclose its common charge lien against the same units. Each of the Plaintiff-mortgagee and the Board asserted that its lien had priority. The Supreme Court, New York County, granted summary judgment to the Plaintiff.

The Board asserted that the Plaintiff's mortgage was not a first mortgage, and thus entitled to the benefits of Section 339-z, because it was a blanket mortgage not executed for the purchase of a condominium unit. The Court held that "first mortgage of record" in Section 339-z does not prohibit a blanket mortgage from being a first mortgage or require a mortgage to be a purchase money mortgage.

The Board also contended that since the Condominium's By-Laws entitled unit owners to give a first mortgage, the mortgage given to the Plaintiff by the Sponsor could not be a first mortgage. The Court held that the By-Laws did not preclude the Sponsor from giving a first mortgage.

The Board further argued that only the first executed mortgage, not the mortgages that were consolidated with the initial mortgage, was entitled to priority over the Board's common charge lien. The Court held that, since the consolidation of the mortgages of record predated the recording of the common charge lien, the consolidated mortgage lien had priority. According to the Court, however, "[h]ad only the initial mortgage been recorded before the Board of Managers recorded its lien, and then plaintiff's predecessor or plaintiff, after acquiring the mortgage, consolidated other mortgages with it, the applicable rule [that "consolidation of mortgages will not impair the priority rights of parties uninvolved in the consolidation"] would support the Board's contention."

Finally, the Board claimed that the Plaintiff's payment of real estate taxes on the units was voluntary. Therefore, those amounts should not be part of the mortgage debt senior to the common charge lien. The Court disagreed, holding that the mortgage entitled the Plaintiff to add the real estate tax payments to the mortgage debt. AMT CADC Venture, LLC v. 455 CPW, L.L.C., decided October 18, 2013, is posted at: http://www.nycourts.gov/reporter/pdfs/2013/2013_32779.pdf

Guardians

New York State's Mental Hygiene Law and the Surrogate's Court Procedure Act were amended by Chapter 427 of the Laws of 2013, enacted October 23, 2013. The Chapter is effective April 21, 2014, one hundred eighty days from enactment. Chapter 427 adds to the Mental Hygiene Law a new Article 83, to be known as the "Uniform Guardianship and Protective Proceedings Jurisdiction Act." According to the Memorandum in Support of the legislation (A00857/S02534), "[t]he legislation establishes a uniform set of rules for determining jurisdiction, and thus, simplifies the process for determining jurisdiction between multiple states in adult guardianship cases. It also establishes a framework that allows state court judges in different states to communicate with each other about adult guardianship cases." The Memorandum notes that thirty-one other states have adopted the Act.

Mortgage Foreclosures

Real Property Actions and Proceedings Law Section 1304 ("Required prior notices") ("Section 1304") requires "a lender, an assignee or a mortgage loan servicer [commencing] legal action against the borrower, including [a] mortgage foreclosure", to send a notice required by Section 1304 to the borrower at least ninety days before an action on a "home loan" is

commenced. The notice is captioned "You Could Lose Your Home. Please Read the Following Notice Carefully."

In an Action to recover on a mortgage note executed for a "home loan", the Supreme Court, Kings County, vacated the default judgment in "the interests of justice" and dismissed the Action for the failure to serve the notice required by Section 1304, without prejudice to the Plaintiff commencing a new action preceded by the notice required under Section 1304.

The Plaintiff contended that Section 1304 did not apply because the Plaintiff was not foreclosing on a mortgage and it was not a "lender", defined in Section 1304 to include "a mortgage banker" or an "exempt organization" under Banking Law Section 590. The Court held that Section 1304 applies also "to actions at law to recover on a note executed in connection with a 'home loan'" and to actions brought by an "assignee." In any event, the entity which assigned the note to the Plaintiff is a "lender". Cadelrock Joint Venture, L.P. v. Callender, decided October 4, 2013, is reported at 2013 WL 5509124.

Mortgage Recording Tax/Local Development Corporations

The Office of Counsel in New York State's Department of Taxation and Finance, in an Advisory Opinion dated October 3, 2013, ruled that a mortgage made to a local development corporation incorporated under Not-for-Profit Corporation Law Section 1411 ("Local development corporations") ("LDC"), and recorded by the LDC, is exempt from mortgage recording tax. According to the Advisory Opinion, "[t]he tax is imposed on the act of recording a mortgage, rather than on the mortgage itself", and the mortgage remains exempt even after the mortgage is assigned to the true lenders. "The act of assigning a recorded mortgage, in and of itself, does not create a new mortgage subject to the MRT." Advisory Opinion TSB-A-13(6)R is posted at: http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a13_6r.pdf

Mortgage Recording Tax/New York State Transfer Tax

The Office of Tax Policy Analysis in New York State's Department of Taxation and Finance has posted its Annual Statistical Report of New York State Tax Collections for the State's fiscal year 2012-2013 (April 1, 2012-March 31, 2013). According to the Report, the Real Estate Transfer Tax collected in FY 2012-2013 was $756,354,761, up from $610,047,675 collected in FY 2011-2012. Mortgage recording tax collected statewide in FY 2012-2013 was $1,481,063,300, the mortgage recording tax collected in New York City being $946,196,020. As reported in the Annual Statistical Report issued for FY 2011-2012, for that fiscal year the mortgage recording tax collected statewide was $1,124,159,703 and the mortgage tax collected in New York City was $677,550,993. The Report for Fiscal Year 2012-2013 is posted at: http://www.tax.ny.gov/research/stats/statistics/new_reports.htm

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance announced that the interest rates to be charged for the period January 1, 2014 – March 31, 2014 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

Mortgage Recording Tax/Tax Paid on Instruments Not Recorded

Under Tax Law Section 258-a ("Payment of tax on instruments not recorded") and 20 NYCRR Section 650.1, when mortgage recording tax is being paid on an instrument not entitled to be recorded, but which is not lost or destroyed, the tax may be paid to the recording officer. A copy of the instrument upon which tax is paid "shall be filed with the recording officer and preserved among his mortgage tax records." If the unrecorded instrument has been lost or destroyed, the State Department of Taxation and Finance may determine the amount of tax due and "by order authorize the recording officer to receive and receipt for the tax as fully and with the same force and effect, as far as this article is concerned, as if the instrument has been duly recorded and the tax thereon paid." Section 258-a and 20 NYCRR do not require a recording officer to record a notice that mortgage recording tax has been paid on an instrument not being recorded, and they did not deal with issues of actual or constructive notice or of lien priority when such a notice is recorded. In a number of counties, notices of "Tax Paid on [an] Unrecorded Document" have been recorded, stating that mortgage tax has been paid. The notices do not reference, and are not accompanied by, the document for which mortgage tax has been paid.

Legislation to deal with this issue, introduced at the request of the New York State Land Title Association, was signed into law on October 23 as Chapter 435 of the Laws of 2013. Under Chapter 435, amending Tax Law Section 258-a, "[t]he filing or recording of a notice of the payment of tax under this section is ineffective to give notice under Article Nine of the Real Property Law ["Recording instruments affecting real property"] of any estate or interest in the real property affected by

the instrument on which tax is being paid or to create a duty of inquiry with regard thereto." Effective on enactment, the Chapter "shall apply to all notices filed prior to and on and after such effective date."

New York City/Appointment of Administrator for Distressed Property

Chapter 455 of the Laws of 2013 (Senate Bill 05465A/Assembly Bill 07834-B) amends Sections 770 and 778 of Real Property Actions and Proceedings Law Article 7-A ("Special Proceedings by Tenants of Dwellings in the City of New York and the Counties of Nassau, Suffolk, Rockland and Westchester for Judgment Directing Deposit of Rents and the Use Thereof for the Purpose of Remedying Conditions Dangerous to Life, Health or Safety") effective October 23, 2013. According to the summary accompanying the legislation, Chapter 455 "[a]uthorizes the commissioner of housing preservation and development for the city of New York to bring a special proceeding for appointment of an administrator for distressed property; provides for owner liability for costs of operating property and costs of the administrator after the administrator takes over management of the property." Senate Bill 05465A is posted at: http://assembly.state.ny.us/leg/?bn=S05465&term=2013

New York State Transfer Tax

The Owners of real property conveyed an 87.68% tenant in common interest to Developer, retaining a 12.32% tenant-in-common interest. Transfer taxes were paid on that conveyance. Owners and Developer also simultaneously entered into an agreement under which the Developer would construct a building on the property, Owners would reimburse the Developer for the Owners' share of the costs incurred in the design and construction of commercial space in the new building, and, on completion of the building, the commercial space (12.32% of the new building) would become a condominium unit conveyed to Owners. Once the condominium was formed, Owners were to transfer their 12.32% tenant in common interest to Developer, and Developer would transfer its interest in the commercial unit to Owners.

The Office of Counsel in New York State's Department of Taxation and Finance, in an Advisory Opinion dated October 17, 2013, ruled that the transfer by Owners of their tenant in common interest to Developer after the building was constructed, and the Developer's transfer of its interest in the commercial unit to Owners, were not subject to the State's transfer tax. The transfers constituted a mere change of identity or form or ownership or organization with no change in beneficial interest. According to the Advisory Opinion,

"After the conveyances, Owners will have a fee interest in the commercial space equal to the fee interest in the property that they had prior to the construction of the building…After the conveyances, Developer will own the same beneficial interest in the Property...that it acquired under the Contract. The parties were in exactly the same position before and after the conveyances."

The Department also held that Owners' payment to Developer of construction costs attributable to the commercial space was not subject to transfer tax; it was not consideration paid for the transfer of an interest in real property. Advisory Opinion TSB-A-13(7)R is posted at on the Department's website at: http://www.tax.ny.gov/pdf/advisory_opinions/real_estate/a13_7r.pdf

Recording Act/Fraud

Rivka Leifer ("Leifer") took title to property by a no consideration deed she executed as President of 223 Associates, Inc. She later executed a $450,000 mortgage to MERS, as nominee for Greenpoint Mortgage Funding, Inc. ("Greenpoint"), which mortgage was assigned to Defendant Federal National Mortgage Association ("FNMA"), and also executed a home equity mortgage since satisfied. The Plaintiffs, one of whom claimed to be the sole shareholder of the corporation, asserted that Leifer was not President of the corporation, and not even one of its shareholders; the Plaintiffs sought an Order discharging the mortgage held by FNMA.

Real Property Law Section 266 ("Rights of purchaser or incumbrancer for valuable consideration protected") protects the title of a purchaser or an incumbrancer for valuable consideration "unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." The interests of subsequent purchasers or encumbrances are not protected when title is obtained by a forged deed or by a conveyance executed under false pretenses, but a deed procured by "fraudulent inducement" is merely "voidable". A mortgage procured by "fraudulent inducement" is protected under Real Property Law Section 266 when there is no notice of the fraud. According to the Court, "even where one signs a deed on behalf of a corporation without authority to make the conveyance, such would not defeat the interest of a bona fide purchaser or encumbrancer for value."

The Court granted FNMA's motion to dismiss. The deed was not forged; Leifer signed her own name and held herself out as the person signing the deed. Further, FNMA was a bona fide encumbrancer for value; neither it nor Greenpoint had knowledge that Leifer had no authority to execute the deed, and no facts would have required them, as a "reasonable lender", to make further inquiry. Retek v. 233 Associates, Inc., decided October 4, 2013, is reported at 2013 WL 5809264.

Uniform Commercial Code ("UCC")/"Soverign Citizen" Filings

Chapter 490 of the Laws of 2013 enacts legislation introduced at the request of New York State's Chief Administrative Judge. The legislation (A8013/S4042-A), as stated in the Memorandum in Support, is intended to "redress 'paper terrorism' [by members of separatist groups and others] against judges and other public servants committed to harass them or to retaliate against them for discharge of their official duties" by the filing of false financing statements against their property. Except as noted below, Chapter 490 is effective November 13, 2013.

Penal Law Section 175.35 ("Offering a false statement for filing in the first degree"), as amended effective November 1, 2014, makes a Class E felony the crime of offering a false instrument in the second degree by filing, against property of a state or local public officer, as defined in the Public Officers Law, or a judge or justice of the Unified Court System, a financing statement which does not relate to an actual transaction but which is filed "in retaliation for the performance of official duties by such person." This applies to financing statements and amendments to financing statements filed on or after "such effective date."

UCC Section 9-518 ("Claim concerning inaccurate or wrongfully filed record"), as amended by new subsection (d), authorizes a "special proceeding to redact or expunge a falsely filed or amended financing statement." If a court holds that a financing statement was falsely filed against the petitioner's property or amended to retaliate for the performance of the petitioner's official duties, or filed against a petitioner who is an attorney "to retaliate for the performance of the petitioner's duties in his or her capacity as an attorney for the respondent in a criminal court", the court shall order that the financing statement, as filed, be expunged or redacted and "may grant any additional relief authorized by [UCC] Section 9-625 ("Remedies for secured party's failure to comply with article)." Upon a finding that the respondent "has engaged in a repeated pattern of false filings… the court may also enjoin the respondent from filing or amending any further financing statement…without leave of court."

Judiciary Law Section 212 ("Functions of the chief administrator of the courts"), as amended, directs the Chief Administrative Judge to establish rules for the special proceedings authorized by UCC Section 9-518, which rules may authorize a court to appoint a referee "to hear and determine such special proceeding."

Usury

Under Banking Law Section 14-a ("Rate of interest") and subsection 6(a) of General Obligations Law Section 5-501 ("Rate of interest; usury forbidden"), when the interest rate on a loan secured primarily by an interest in real property improved by a one or two family residence exceeds 16% per annum the interest rate charged is usurious. In an Action to foreclose a mortgage, the Appellate Division, Second Department, reversing the Order of the Supreme Court, Putnam County, which had entered a judgment of foreclosure and sale, found that the effective interest rate of 16.3% on the loan secured by the mortgage was usurious. The Appellate Division set aside the judgment, held that the note and mortgage were void, and dismissed the complaint.

The Plaintiff contended that civil usury did not apply since the borrower did not reside in the mortgaged premises. However, according to the Court, "[c]ontrary to the plaintiff's contention, the plain language of [General Obligations Law] section 5-501(6) (a) does not require that a one-or-two family residence securing a loan be occupied by the owner for the civil usury limit to apply." Oliveto Holdings, Inc. v. Rattenni, decided October 23, 2013, is reported at 2013 WL 5734040.

Wishing everyone an enjoyable holiday season and a healthy and prosperous New Year!

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