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Current Developments

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Easements

A deed executed in 1950 granted an easement for "access to and the reasonable use" of a private road known as Fifth Street. The Plaintiff's property, benefitted by the easement, includes five commercial buildings, three of which face Fifth Street and two of which are accessed only by use of the easement. Since 1987, the Plaintiff and his tenants have parked vehicles on Fifth Street. Plaintiff brought an Action against the successor owner of the private road for a judgment declaring the extent of the Plaintiff's easement rights The Defendant, which owned two parcels adjacent to the Plaintiff's property and used Fifth Street to park buses, alleged that parking on the easement unreasonably blocked ingress and egress for the Defendant's buses. The Supreme Court, Kings County, prohibited the Plaintiff from parking on the easement; the Appellate Division, Second Department, reversed and remitted for entry of an amended judgment permitting the Plaintiff to park on the easement in accordance with the terms of a settlement agreement executed in 2011.

According to the Appellate Division, although there was no evidence presented as to the intention of the grantor of the easement, "since 1987, the plaintiff and his tenants routinely parked on the easement, and there was no evidence that there was any objection to such parking prior to the instant action…such long-time use of the easement was compelling evidence of the scope and purpose of the easement substantiating the plaintiff's position. Contrary to the defendant's contention, the evidence was insufficient to establish that its use of the easement was obstructed. (citations omitted)." Ribellino v. 110 Fifth Street Private, LLC, decided December 18, 2013, is reported at 2013 WL 6645437.

Judgments/County Clerk

The Queens County Clerk's Office docketed a federal judgment against the judgment debtor as a "debtor/corporation" instead of as a natural person, which was how the debtor was correctly identified on the last page of the judgment attached to the certified copy of the abstract of judgment presented to the Clerk. Due to this error, the judgment debtor was able to convey two parcels of real property free and clear of the judgment. The judgment creditor sued the State of New York, asserting that the County Clerk's negligence in docketing the judgment caused the loss of the judgment lien against the parcels. The Court of Claims granted the State's motion for summary judgment dismissing the claim. The Appellate Division, Second Department, affirmed.

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Although Civil Practice Law and Rules Section 5018 ("Docketing of judgment") requires a county clerk to docket a transcript of a federal judgment, the Appellate Division held that there is no provision in New York law authorizing a private right of action to cover damages for County Clerk negligence. Further, the State did not owe a special duty of care to a judgment creditor in docketing a judgment, since judgment creditors are not the sole class for whose benefit the statutes on docketing judgments were enacted. In addition, as stated by the Appellate Division:

> "After a judgment is submitted for docketing, the judgment creditor is in the best position to check on the accuracy of the public record. To recognize an implied right of action here would shift the responsibility for losses occasioned by improper docketing from the judgment creditor to the County Clerk. This shift is inconsistent with the judgment creditors' obligation under the statutory scheme, in the first instance, to submit the judgment in proper form for docketing to the County Clerk, and inconsistent with the superior knowledge of the judgment creditor over that of the County Clerk and innocent third-party purchasers as to the proper identity of the judgment debtor."

Flagstar Bank, FSB v. State of New York, decided December 26, 2013, is reported at 2013 WL 6800914.

Mechanics' Liens

A mechanic's lien is not enforceable against property owned by the state or a public corporation, except when title is held by an industrial development agency created under Article 18-A of the General Municipal Law. See Lien Law Article 1, Section 2(7) ("Definitions"; "Public improvement") and Article 3, Section 60 ("Judgment in action to foreclose lien on account of public improvement").

In TPE Inc. v. Bass Plumbing & Heating Corp., decided on August 13, 2013 and recently posted, a sub-subcontractor sought to foreclose a mechanic's lien which it had filed for work it claimed was performed for Delta Airlines at JFK Airport. The Supreme Court, Queens County, discharged the mechanic's lien and dismissed the foreclosure. The City of New York owned the property which was leased to the Port Authority which, in turn, leased it to Delta Airlines. According to the Court, "[i]t is well settled law that a private mechanic's lien cannot be asserted on the leasehold interests of property owned by the City of New York even where the property is leased to a private entity." The claim against the Port Authority was also dismissed for the failure to comply with Unconsolidated Laws Section 7107 ("Limitation of actions; service of notice of claim required"), which requires that a notice of claim be served on the Port Authority at least sixty days before a lawsuit against it is commenced.

The decision is posted at https://www.nycourts.gov/reporter/pdfs/2013/2013_33330.pdf.

Mortgage Foreclosures/Deficiency Judgments

Under Subsection 2 of Real Property Actions and Proceedings Law Section 1371 ("Deficiency judgment"), a "deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action…less the market value as determined by the court or the sale price of the property whichever shall be the higher."

In Eastern Savings Bank, FSB v. Brown, decided December 11, 2013 and reported at 2013 WL 6484036, the Appellate Division, Second Department, reversed, in part, an Order of the Supreme Court, Queens County, which granted a deficiency judgment, and remitted the matter for further proceedings. The Plaintiff did not meet its burden of establishing that it was entitled to a deficiency judgment.

To establish fair market value, the Plaintiff had relied on a conclusory affidavit from a real estate appraiser, "two exterior photographs of the front and side of the subject premises, and information purportedly indicating the average sale price of properties in the relevant zip code area, without explaining how those average prices related to the appraiser's conclusion that the fair market value of the subject property on the date of the foreclosure sale was $550,000." The Plaintiff needed to submit proof of comparable sales and market data.

Mortgage Foreclosures/Holder of Easement not a Defendant

The foreclosing Plaintiffs did not name the holder of an easement as a Defendant. After purchasing the property at the foreclosure sale, the Plaintiffs commenced an Action for strict foreclosure and/or reforeclosure to compel the easement holder to redeem the property for the amount bid plus interest or, if the property was not redeemed, to declare the easement extinguished. The Supreme Court, Westchester County, dismissed the complaint holding that neither a strict foreclosure under Real Property Actions and Proceedings Law ("RPAPL") Section 1352 ("Judgment foreclosing right of redemption") nor a reforeclosure under RPAPL Section 1503 ("Action to determine claims where foreclosure of mortgage was void or voidable") can be brought against the holder of an easement. The Appellate Division, Second Department, affirmed.

According to the Appellate Division, "[a]n easement holder, unlike a mortgagee or a tenant, does not fall within the class of persons against whom a strict foreclosure or reforeclosure action may be brought (see RPAPL 1352, 1503). An easement is not a lien or a mortgage. Moreover, an easement holder that is not named in the foreclosure action does not have a right of redemption. An easement holder, unlike a tenant, does not have a possessory interest in the burdened land. Thus, such actions cannot be maintained against an easement holder (citations omitted)." Bass v. D. Ragno Realty Corp., decided November 27, 2013, is reported at 2013 WL 6182914.

Mortgage Recording Tax

New York State's Department of Taxation and Finance has issued two Tax Bulletins dated January 6, 2014 on the application of the mortgage recording tax.

Tax Bulletin MR-570 (TB-MR-570), "Mortgage of a Guarantee Given as Security for a Credit Line Debt", "explains how the mortgage recording tax applies to a mortgage of a guarantee given as security for a credit line debt of another party."

According to the Bulletin, "[w]hen a mortgage secures a guarantee, it secures the guarantor's obligation to repay the funds advanced related to the other party's debt, up to the guarantee amount. Mortgage recording tax must be paid on the maximum amount secured, as expressed in the guarantee, when the mortgage is recorded. If the principal of the debt is advanced up to or exceeding the guaranteed amount, and then subsequently falls below the amount initially secured by the guarantee and mortgage, mortgage recording tax is imposed upon the recording of any instrument evidencing advances and re-advances, up to the guarantee amount." Further, "[a] mortgage of a guarantee pledged as security for a credit line debt does not qualify for the exemption for advances and re-advances provided by Tax Law section 253-b."

The Bulletin is posted at http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/mrt/credit_line_debt.htm

Tax Bulletin MR-575 (TB-MR-575), "Mortgage Recording Tax on Mortgage Transactions After a Deed in Lieu of Foreclosure", "explains that mortgages assigned, modified or otherwise transacted after the mortgaged property has been transferred by a deed in lieu of foreclosure are treated as new mortgages. Mortgage recording tax must

be paid on the full amount of the debt secured when the new mortgage is recorded."

The Bulletin is posted at http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/mrt/deed_in_lieu.htm

Not-for-Profit Corporation Law

On December 18, 2013, Governor Cuomo signed into law what is now Chapter 549 of the Laws of 2013, enacting the "Non-Profit Revitalization Act of 2013". According to the Memorandum in support of the legislation (A08072/S05845), the Act amends "the Not-for-Profit Corporation Law (N-PCL), the Estates Powers and Trusts Law (EPTL), and Article 7-A of the Executive Law, to reduce unnecessary and outdated burdens on nonprofits and to enhance nonprofit governance and oversight to prevent fraud and improve public trust." Among the numerous changes made to the Not-for-Profit Corporation Law, the Act repeals the Type A, B, C or D designations under N-PCL Section 113 and designates a not-for-profit corporation as being either a "Charitable Corporation" or a "Non-Charitable Corporation." In addition, except as otherwise provided in the Act, a not-for-profit corporation will be able to "sell, lease, exchange or otherwise dispose of all or substantially all of its assets" on approval of the State Attorney General in lieu of obtaining court approval. The Act is generally effective on July 1, 2014.

Notice-of-Pendency

The Plaintiff contract vendee commenced an Action to prevent any other sale of the property under contract after the Defendant property owner terminated the contract of sale due to an alleged default. A notice of pendency was filed. The Plaintiff then discontinued the Action without prejudice and cancelled the filed notice of pendency. Plaintiff then filed a new Action for specific performance, damages, and the imposition of a constructive trust; a new notice of pendency was filed.

The Supreme Court, Queens County, denied the Defendant's motion to dismiss but granted the Defendant's motion to vacate and cancel the notice of pendency. Citing Guttman v. Gutman, a 2010 ruling of the Appellate Division, Second Department, reported at 78 AD3d 779, the Supreme Court noted "[i]t is well settled, that successive Notices of Pendency are not permitted…" The Appellate Division in Guttman had concluded that "[e]xcept as provided in subdivision (a) of [CPLR Section 6516; "Successive notices of pendency] [relating to mortgage foreclosure actions], a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective."

The Supreme Court further held that "Plaintiff's contention that the Notice of Pendency is valid because it now contains a cause of action for a constructive trust is without merit." Avdoulos v. Douglaston Realty LLC, decided January 2, 2014, is reported at 2014 WL30675.

Partnerships

In an Action to recover damages for personal injuries, the Appellate Division, Second Department, affirmed the ruling of the Supreme Court, Westchester County, which held that the ownership of a hunting cabin by the three Defendants as tenants in common did not constitute a partnership. "[T]he ownership of the cabin was for recreational use only and was not a business for profit." Under Subsection 1 of Section 10 ("Partnership defined") of New York's Partnership Law, "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit…" Flavin v. Parisi, decided December 26, 2013, is reported at 2013 WL 6800921.

Statute of Frauds

Under Subsection (a)(1) of General Obligations Law ("GOL") Section 5-701 ("Agreements required to be in writing"), an agreement not evidenced by a writing is void if the agreement "is not to be performed within one

year from the making thereof…" There is an exception to that general rule in GOL Section 5-703 ("Conveyances and contracts concerning real property required to be in writing") when there is partial performance of an oral agreement for a real estate contract. The question before the Appellate Division, First Department, in Gural v. Drasner was whether a part performance exception to the statute of frauds may be applied in cases not involving real estate contracts.

Plaintiff Jeffrey Gural and Defendant Fred Drasner owned adjoining lands in Dutchess County. The Plaintiff alleged that the Defendant and he agreed in 2001 that the Plaintiff would be allowed to use part of the Defendant's land for his horses until the Defendant sold the land, in exchange for the Plaintiff's clearing, re-seeding and fencing in the land, constructing a "run-in" shed for horses, digging a well and constructing a road improving a portion of the Defendant's land. On the Defendant's sale of the land, the Plaintiff was to be reimbursed for his expenses from the sale proceeds. The Defendant sold the land; after unsuccessfully demanding repayment of his expenses but not being paid, the Plaintiff sued for breach of contract and unjust enrichment.

The Defendant moved for an Order dismissing the Complaint, contending that the purported oral agreement was unenforceable under GOL Section 5-701 because it was not being capable of being performed within one year of its having been entered into. The Plaintiff countered that part performance rendered the oral contract enforceable. The Supreme Court, New York County, denied the Defendant's motion, finding that there was an issue of fact as to whether the Plaintiff's activities unequivocally stemmed from the alleged contract. The Appellate Division reversed the lower court, granted the Defendant's motion for summary judgment and dismissed the complaint, holding that "the law simply does not provide for or permit a part performance exception for oral contracts other than those to which GOL Section 5-703 applies." The decision of the Appellate Division, dated December 17, 2013, is reported at 2013 WL 6595991.

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