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NATIONAL COMMERCIAL SERVICES

Current Developments

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Contracts of Sale/Ethics Option 993

As reported in Current Developments issued December 20, 2007, Opinion 817 of the Committee on Professional Ethics of the New York State Bar Association dated November 2, 2007 dealt with whether an attorney's participation in a residential closing with a "seller's concession" and a "grossed up" sales price violates New York's Code of Professional Responsibility. Under the facts considered in Opinion 817, the sales price was increased by 3% to cover the purchaser's closing costs, with the seller granting the purchaser a "seller's concession" in the same amount. The purchaser obtained a mortgage based upon the increased amount. According to the Opinion:

> "…we hold that a lawyer may not ethically participate in such a 'gross up' of the actual purchase price and concomitant seller's concession unless there is neither deception nor misrepresentation at work in the transaction and its predictable consequences. At a minimum this means that the gross-up (and not merely the grossed-up purchase price) must be disclosed in the transaction documents. We are persuaded that merely reporting a 'seller's concession' may imply either that the seller has agreed to reduce the purchase price he or she would otherwise have obtained or that the reported sales price is the actual price of the property, less certain costs the seller has agreed to pay. If neither of these is the case, then reporting a concession, without more, is misleading under DR 1-102.
>
> On the facts presented here, and for the reasons above, we conclude that participation in such transactions is unethical unless there is no unlawful conduct, and there is full disclosure in the transaction documents of the substance and effect of the transaction".

Ethics Opinion 882, dated October 14, 2011, further stated the following:

> "We conclude that Rule 8.4(c) does not permit lawyers to participate in residential real estate transactions involving a grossed-up sales price that was exchanged for an equivalent seller's concession unless all documents stating the grossed-up sales price also disclose that the sales price has been increased by the amount of the seller's concession. Conversely, when a residential real estate transaction involves both a seller's concession and a grossed-up sales price, but each document stating the grossed-up sales price also discloses that the sales price has been increased by a sum equal to the seller's concession, there is no misrepresentation, and therefore no ethical violation."

The Committee on Professional Ethics has issued Opinion 993, dated November 13, 2013, stating the following:

> "We adhere to the conclusions in N.Y. State 882 and N.Y. State 817. The mere existence of a seller's concession does not require a statement that the purchase price has been increased. However, when the purchase price in a sale of residential real estate has in fact been grossed up in connection with a seller's concession, then a lawyer who participates in the transaction is required to ensure that the grossing up of the price is disclosed."

Ethic Opinions 817, 882 and 893 are posted at:

https://www.nysba.org/CustomTemplates/Content.aspx?id=5228 – Opinion 817
https://www.nysba.org/CustomTemplates/Content.aspx?id=5188 – Opinion 882
https://www.nysba.org/CustomTemplates/Content.aspx?id=45372– Opinion 993

Easement by Necessity

The Defendants subdivided lot 115 and sold to the Plaintiff's predecessor in title newly created lot 215. An Action was commenced under Real Property Actions and Proceedings Law Article 15 ("Action to compel the determination of a claim to real property") for a ruling that the Plaintiff's land had the benefit of an easement by necessity for ingress and egress over an alleyway located on the easterly five feet of new lot 215. Affirming the ruling of the Supreme Court, Queens County, the Appellate Division, Second Department, held that the Plaintiff's land had an easement for access over the alleyway, directed the Defendants to remove any obstructions interfering with the use of the easement, and permanently enjoined the Defendants from interfering with the Plaintiff's access over the alleyway.

According to the Appellate Division, "[t]he Plaintiff established that the easement through the alleyway on Lot 115 was absolutely necessary to gain access to Lot 215. The Patel defendants do not dispute that Lot 215 has no direct access to a public highway or street, without the necessity of crossing a lot owned by the Patel defendants or by a third party. The plaintiff adduced proof that, upon subdivision, Lot 215 became landlocked with no access to a public highway or street…The need to use the alleyway on Lot 115 to access the property was not a mere convenience." Faviola, LLC v. Patel, decided February 19, 2014, is reported at 2014 WL 623994.

Lien Law

Under Lien Law Section 38 ("Itemized statement may be required of lienor"), "[a] lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished." If the lienor fails to comply with a Court Order requiring the production of such statement, the court "may make an order canceling the lien."

The Appellate Division, Third Department, affirmed an Order of the Supreme Court, Sullivan County, denying a motion to compel the mechanic to provide an itemized statement. According to the Appellate Division, there is no "unrestricted right to an itemization of labor and materials…Itemization is instead required only when it is necessary 'to apprise the owner of the details of the lienor's claim'" (citations omitted). In this case, the construction contract specified the amount to the paid, the Plaintiff asserted that it performed the construction contract in full, and the Defendant which had engaged the Plaintiff was routinely provided with invoices for the work done. Plaintiff had "sufficiently detailed the basis for its mechanic's lien, and any further itemization would be 'superfluous'…." Associated Building Services, Inc. v. Pentecostal Faith Church, decided December 12, 2013, is reported at 976 N.Y.S. 2d 699.

Mortgage Foreclosure

The management company was named as a Defendant in the foreclosure of a mortgage on the hotel to which it provided services. It moved for the complaint to be dismissed as against it, asserting that since the management agreement was a personal services contract, not an interest in real property, its interest could not be foreclosed. The Plaintiff countered that the Defendant was a proper party to the Action, either because the management agreement was an incumbrance on the property or the management company had a possessory interest in the property.

The Supreme Court, New York County, dismissed the complaint as to the management company. A personal services contract does not create a property interest, and, without a property interest, the management company was not a necessary party defendant under Real Property Actions and Proceedings Law Section 1311. It was also not a permissible defendant under RPAPL Section 1311 since it was not liable for payment of the debt. "…[I]n

certain cases, a court may exercise its discretion to order permissive joinder of a party for the protection of those who the decree will directly affect [citation omitted], here, [the management company] has asserted a contractual right…that is unrelated to the foreclosure, and 'there are no common questions of law and fact relating to the issue of plaintiff's right to foreclose' which would make permissive joinder advisable." German American Capital Corp. v. Sochin Downtown Realty LLC, decided on January 27, 2014, is reported at 2014 NY Slip Op 30308 which is posted at: http://www.courts.state.ny.us/reporter/pdfs/2014/2014_30308.pdf

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance announced that the interest rate to be charged for the period April 1, 2014 – June 30, 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

Partnership

The partners of Empire State Building Associates syndicated their interests into "Participation Interests" which were sold to more than 3,000 passive investors. Plaintiffs, the holders of certain participation interests, asserted that buy-out provisions in the participation agreements, applied to the investors in connection with the transfer last October of the Empire State Building to the Empire State Realty Trust, were invalid and unenforceable under Limited Liability Company Law Section 1002 ("Procedures for merger or consolidation"). Under Section 1002(f), a member of a limited liability company dissenting as to a merger or consolidation with a limited liability company or other business entity "shall be entitled to receive in cash…the fair value of his or her membership interest… as of the close of business of the day prior to the effective date of the merger or consolidation…" The Appellate Division, First Department, affirming the ruling of the Supreme Court, New York County, held that appellants were "not 'members' in a limited liability company and therefore not entitled to the fair value appraisal protections set forth in Section 1002(f)." In Re Empire State Realty Trust Inc. Investor Litigation v. Malkin Holdings L.L.C., decided February 25, 2014, is reported at 2014 WL 700470.

Reverse Mortgages

An Action was commenced to foreclose a reverse mortgage entered into under the United States Department of Housing and Urban Development's Home Equity Conversion Mortgage ("HECM") program. Although the complaint did not identify the event of default, the Supreme Court, Kings County, stated that the mortgagor default was failing to pay a water bill of approximately $5,407.24. The Court denied the Plaintiff's application for an Order of Reference and dismissed the Action.

Under 24 CFR Section 206.205 ("Property charges") as to the servicing of HECM mortgages as noted by the Court), "[i]f the mortgagor fails to pay the property charges [taxes, ground rents, flood and hazard insurance premiums and special assessments] in a timely manner, and has not elected to have the mortgagee make the payments, the mortgagee may make the payment for the mortgagor and charge the mortgagor's account. If a pattern of missed payments occurs, the mortgagee may establish procedures to pay the property charges from the mortgagor's funds as if the mortgagor elected to have the mortgagee pay the property charges under this section."

According to the Court, "[t]he remedies provided in the law for failure of the mortgagee to pay any property charges do not include foreclosure. As such, plaintiff cannot foreclose on defendant's reverse mortgage because of her default in paying the NYC water bill." Furthermore, "serving a senior citizen holding a reverse mortgage

with a complaint that fails to specify what the default is can only be described as unconscionable." Metlife Home Loans v. Vereen, decided February 11, 2014, is reported at 2014 WL 590210.

Setbacks

The Plaintiffs and the Defendants own adjacent properties in Rye. The Defendants intended to demolish the house on their property and replace it with a new home having a front yard setback of 44.75 feet. The Plaintiffs brought an Action seeking an injunction permanently enjoining the Defendants from construction which would violate a front yard setback on a subdivision map approved by the local Planning Commission in 1967 of at least 60 feet. The Plaintiffs alleged that the setback lines on the subdivision map are deed restrictions running with the land.

The Supreme Court, Westchester County, granted the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, reversed and remitted the matter to the lower court for entry of an amended judgment holding that the setback lines drawn on the subdivision map are not deed restrictions that run with the land. According to the Appellate Division, "there is nothing in the defendants' chain of title which indicates that these setback lines are deed restrictions that run with the land." Butler v. Mathisson, decided February 26, 2014, is reported at 2014 WL 715158.

Surrogate's Court/Uniform Civil Rule

The Hon. A. Gail Prudenti, the Chief Administrative Judge of the Courts of the State of New York, issued an Administrative Order dated February 19, 2014, adding to the Uniform Civil Rules of the Surrogate's Court new Section 207.64, which is effective immediately. Section 207.64, "Public Access to Certain Filings", reads as follows:

> "The following documents may be viewed only by persons interested in the estate of the decedent, as defined by SCPA Section 103(39) ['any person entitled or allegedly entitled to share as beneficiary in the estate or the trustee in bankruptcy or receiver of such person…'] or their counsel, the Public Administrator or counsel thereto; counsel for any Federal, State or local government agency; or court personnel; except upon written permission of the Surrogate or Chief Clerk of the court, which shall not be unreasonably withheld:
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> (1) all papers and documents in proceedings instituted pursuant to Articles 17 ["Guardians and Custodians"] or 17-A ["Guardians of Mentally Retarded and Developmentally Disabled Persons"] of the SCPA;
> (2) death certificates;
> (3) tax returns;
> (4) documents containing social security numbers;
> (5) Firearms inventory; and
> (6) Inventory of Assets.

Section 207.64, as proposed for comment in a Memorandum dated September 30, 2013, is posted by the Unified Court System at: http://www.nycourts.gov/rules/comments/PDF/PC-PacketRule207.64.pdf

Tax Sales

A church conveyed real property in the City of Hudson to their minister in 1985 without having obtained a Court Order as required by Religious Corporation Law Section 12 ("Sale, mortgage and lease of real property of religious corporation"). Due to the non-payment of real estate taxes assessed beginning in 2008, a tax sale deed was issued to the City of Hudson. The religious corporation commenced a proceeding to set aside the judgment of foreclosure. It asserted that because the 1985 deed was invalid and the religious corporation remained the lawful owner of the real property, it was entitled to notice of the tax sale which it had not received. The Appellate Division, Third Department, affirmed the Order of the Supreme Court, Columbia County, dismissing the Petitioner's application, holding that notice of the tax foreclosure proceeding was not required to be afforded the Petitioner.

Under Real Property Tax Law Section 1125 ("Personal Notice of commencement of foreclosure proceeding"), "[t]he enforcing officer shall…cause a notice [of the tax sale proceeding] to be mailed to (i) each owner and any other person whose right, title and interest was a matter of public record as of the date the list of delinquent taxes was filed…and whose name and address are reasonably ascertainable from the public record…." "On its face, the public record here did not disclose that petitioner had any interest in the property...", and notice of the tax sale proceeding was given to the owner of record, who was also listed on the tax rolls as the property owner. The Appellate Division also noted that while the Court could take into account the conduct of the interested parties, the petitioner "intended to convey the property [in 1985]… and [it] did not take any action…to regain title…." Matter of City of Hudson, decided February 27, 2014, is reported at 2014 WL 741259.

Title Insurance/Agent Licensing

Part V of New York State's Budget Bill, signed into law on April 1, provides for the licensing and regulation of title insurance agents effective September 28, 2014. Regulations will be issued by the state's Department of Financial Services. A copy of the Part, and further information, is posted to the web site of the New York State Land Title Association at http://nyslta.org/advocacy/2013-2014-title-agent-licensing-bill

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