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NATIONAL COMMERCIAL SERVICES

Current Developments

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Adverse Possession

The Supreme Court, Westchester County, in an action under Real Property Actions and Proceedings Law Article 15 ("Action to compel the determination of a claim to real property"), held that the Plaintiff acquired title to part of a parking lot adjoining its property by adverse possession. The Defendants were the record owner of the parking lot, the owner's managing agent and a mortgagee. Only the managing agent appealed the lower court's ruling, and the Appellate Division, Second Department, dismissed the appeal. The appellant did not, as managing agent, have a direct interest in the ownership of the property; even appellant's interest as a member interest in the record owner, if supported by the record, "would not make him an aggrieved party with respect to the judgment against [the record owner]." The Appellate Division affirmed that part of the judgment enjoining the appellant from trespassing on the subject property. 270 North Broadway Tenants Corp. v. Round Oaks Properties, LLC, decided April 30, 2014, is reported at 2014 WL 1687759.

Bankruptcy

A deed executed in 2000 purported to transfer the Plaintiff's tenant-in-common interest to her then-husband. She commenced an Action seeking a determination that she owned the property, the deed was forged by her husband and she was granted his interest in the property by their 1992 divorce settlement and order. Defendant Country Wide Home Loans, Inc., the holder of a mortgage on the property executed by her husband, moved to dismiss the complaint on the grounds of judicial estoppel. In the Plaintiff's Chapter 7 Bankruptcy petition, filed in Florida in 2004, she represented that she had no interest in any real property assets. The Supreme Court, Bronx County, granted the motion to dismiss, holding that the Plaintiff was judicially estopped from claiming an equitable interest in the property as well as rental income from the property. According to the Court, "even if Plaintiff only had a contingent claim to the Property at the time of her bankruptcy petition, she was obligated to disclose such a potential claim and her failure to do so bars the instant action. It makes no difference that Plaintiff had no intent to mislead or deceive. Neither ignorance of the law nor inadvertent mistake excuses a plaintiff's failure to list such a claim as a potential asset in a bankruptcy petition." Kriz v. Loaknauth, decided March 17, 2014, 2014 NY Slip Op 31072, is posted at http://www.nycourts.gov/reporter/pdfs/2014/2014_31072.pdf

Condominium Common Charge Liens

A common charge lien against a condominium unit was filed after commencement of a mortgage foreclosure against the unit. The Board of Managers of the condominium was therefore not named as a Defendant in the foreclosure. On the resale of the unit by the purchaser at the foreclosure sale, the Board claimed that its common charge lien was still effective and it demanded payment of the common charges from the proceeds of that sale. The Supreme Court, Rockland County, held that the Board's common charge lien was extinguished, and that the Board was not entitled to any common charges owed prior to the date that the property was purchased at the foreclosure sale.

The common charge lien having been filed after the mortgage foreclosure was commenced, the Board was not a necessary party to the foreclosure action under Real Property Actions and Proceedings Law Section 1311 ("Necessary defendants"). Further, under the terms of the Declaration of the condominium, a purchaser of a unit at a mortgage foreclosure commenced by an "institutional lender" is not liable for unpaid common charges accruing before the purchaser at the foreclosure sale takes title. The foreclosing mortgagee was an institutional lender.

Although the terms for the foreclosure sale provided that the unit was to be sold subject to prior liens of record, and the common charge lien was filed before entry of the foreclosure judgment, the outstanding common charges were extinguished by the judgment of foreclosure. Acqua Capital, LLC v. Board of Managers of Spook Rock Industrial Park Condominium I, decided March 11, 2014, is reported at 2014 WL 2198306.

Deeds/Forgery

In July 2002, the Plaintiff purchased certain residential property in Queens County. She did not contribute any money to the purchase; the purchase was financed by a mortgage loan since satisfied. The Plaintiff never visited the property and the property was managed by her cousin. In April 2006, a deed purportedly executed by the Plaintiff conveyed the property to Defendant Alana Archer. A mortgage loan financed that purchase; the mortgage was assigned to U.S. Bank National Association, which foreclosed and purchased the property at the foreclosure sale.

The Plaintiff brought an Action pursuant to RPAPL Article 15 for a determination of claims to the property. She alleged that the deed to Archer was a forgery and sought a judgment declaring that she owned the property and that U.S. Bank had no interest in the property.

The Supreme Court, Queens County, although finding that the April 2006 deed was forged, held that the Plaintiff had unclean hands in the purchase and sale of the property and therefore she was not entitled to equitable relief. The Appellate Division, Second Department, reversed and remitted the matter to the Supreme Court for entry of an amended judgment declaring that the Plaintiff owned the property and U.S. Bank had no interest in the property.

According to the Appellate Division, "'[a] deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid'" [citations omitted]. Notwithstanding, "[t]he doctrine of unclean hands may bar a party from seeking equitable relief…" However, in this case, "U.S. Bank failed to show that the plaintiff was guilty of immoral or unconscionable conduct…Furthermore, there is no evidence that the plaintiff [or her cousin] was involved, in any way, in the fraudulent 2006 transaction." Jiles v. Archer, decided April 2, 2014, is reported at 2014 WL 1303073.

Deeds/Reformation

A deed contained a covenant restricting the use of the property being conveyed to residential purposes by no more than two families. The restrictive covenant was not, however, set forth in the contract of sale. The grantee commenced an Action seeking reformation of the deed to delete the restrictive covenant. The Supreme Court, Sullivan County, held that the Plaintiff had not established grounds to reform the deed, and the Appellate Division, Third Department, affirmed. The attorney for the now-deceased Defendant-grantor testified that he believed it was the intention of the parties to include the restrictive covenant in the deed and there was no proof that the Plaintiff relied on any misrepresentation by the Defendant. Further, the restrictive covenant was "clearly evident on the face of the executed deed and would easily have been discovered with even a cursory examination"; the Plaintiff's attorney conceded that he failed to examine the deed at closing. Timber Rattlesnake, LLC v. Devine, et al., as Executors of the Estate of Benjamin Ira Wechsler, deceased, decided May 22, 2014, is reported at 2014 WL 2118472.

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 July 1, 2014 – September 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

Estate Taxes/New York

New York State's Budget Bill signed into law on April 1, 2014 increases over a five year period New York's basic exclusion amount, the amount that passes from a decedent to a non-spouse without being subject to New York estate tax. Prior to enactment of this change in the law, the exclusion amount had been $1,000,000. According

to the "Summary of Tax Provisions in SFY 2014-2015 Budget issued in April by the Office of Tax Policy Analysis of New York State's Department of Taxation and Finance,

> "The unified threshold of $1 million is replaced with an applicable credit equal to the tax on a basic threshold amount equal to $2,062,500 for those dying in State Fiscal Year 2014-15; $3,125,000 in SFY2015-16; $4,187,500 in SFY2016-17; and $5,250,000 from April 1, 2017 to December 31, 2018. The basic threshold will equal the Federal basic threshold amount with annual indexing for those dying on or after January 1, 2019. The applicable credit is reduced for New York taxable estates exceeding the basic threshold amount and equals zero for those exceeding one hundred five percent of such amount. This is similar to the loss of the benefit of the $1 million unified threshold under previous law."

The Summary is posted at www.tax.ny.gov/pdf/stats/sumprovisions/summary_of_2014_15_tax_provisions.pdf

Mortgages/"HAMP"

The Plaintiffs made reduced monthly payments to Defendant Citimortgage, Inc., under a federal Home Affordable Modification Program ("HAMP') trial period plan ("TPP") entered into in 2009. Notwithstanding that the reduced payments were made, the Defendant denied the Plaintiffs' request for a permanent HAMP loan modification. The Plaintiffs commenced an Action claiming that the Defendant and co-Defendant Citibank, N.A. breached the TPP Agreement and asserted causes of action alleging, inter alia, breach of contract, fraud in the inducement, promissory estoppel, and a violation of General Business Law Section 349 ("Deceptive acts and practices unlawful"). The Defendants moved to dismiss the amended complaint; they argued that there is no private right of action against a lender or a loan servicer under HAMP, and the Plaintiffs were judicially estopped for failing the disclose the TPP Agreement in their Chapter 13 bankruptcy petition filed in 2010. The Supreme Court, Nassau County, dismissed the complaint, holding that the Plaintiffs were judicially estopped from prosecuting the action due to their failure to list the mortgage obligation in the bankruptcy petition. The Order was affirmed by the Appellate Division, Second Department, but on different grounds.

The Appellate Division held that the doctrine of judicial estoppel did not bar the Action; the bankruptcy petition was dismissed and there was no discharge of the Defendants' debts. However, it further ruled that the Supreme Court should have granted the Defendants' motion to dismiss for the failure to state a cause of action. No private right of action exists under HAMP, and no private right of action would be implied. According to the Appellate Division, "private rights of action could conceivably deter lenders and loan servicers from participating in the HAMP, which would, in turn, undermine the HAMP's purpose…" Davis v. Citibank, N.A., decided April 16, 2014, is reported at 2014 WL 1465111.

Notices of Pendency

The holder of a mortgage on a hotel in Syracuse commenced a foreclosure action. The mortgagee did not bid at the sale and the Referee conveyed the property to a third-party bidder by a referee's deed in 2012. In 2013, New York's Court of Appeals held, in a ruling reported at 21 NY3d 352, that the $5,500,000 acquisition loan secured by the mortgage was not subordinate to mechanics' liens because of the failure to file a building loan agreement for other funds also secured by the mortgage. The mortgagee moved for an order vacating the order confirming the referee's report of sale, setting aside the referee's deed, modifying the judgment of foreclosure to give the mortgage priority over the mechanic's liens to the extent of $5,500,000, and ordering a new foreclosure sale. In the alternative, the mortgagee sought an Order modifying the judgment of foreclosure so that the property remained subject to the mortgage to the extent of $5,500,000. The mortgagee asserted that the purchaser at the foreclosure sale bought the property knowing there would be an appeal. The Supreme Court, Onondaga County, denied the requests for relief in their entirety.

The mortgagee, the Plaintiff in the foreclosure, allowed its notice of pendency to lapse and never moved for it to be extended. According to the Court, "[i]n the absence of that simple, yet crucial, step this court is compelled to apply the principles outlined by the Court of Appeals in DaSilva v. Musso, 76 N.Y.2d 436 (1990). A purchaser with actual knowledge of a pending appeal affecting title is a good faith purchaser where there is no outstanding notice of pendency or stay." Altshuler Shaham Provident Funds, LTD. V. GML Tower LLC, decided February 24, 2014, is reported at 42 Misc.3d 1232 and 2014 WL903123.

- In a separate action decided November 23, 2011, the Supreme Court, Bronx County, dismissed the complaint and cancelled the notice of pendency in an Action brought by the purchaser under a purported real estate contract. On November 25, 2011, the Defendant conveyed the property to a third-party bona fide purchaser for value. There was no notice of pendency in effect; no stay of the Order canceling the notice of pendency was sought by the Plaintiff.

The Appellate Division, First Department, citing DaSilva v. Musso, held that the motion court properly dismissed causes of action seeking, in effect, the imposition of a vendee's lien because a vendee's lien is not enforceable against a bona fide purchaser. Malco Realty Corp. v. Westchester Condos, LLC, decided February 4, 2014, is reported at 114 A.D.3d 413 and 2014 WL 391307.

- In yet another case involving a notice of pendency, the vendee under two contracts of sale, one for the purchase of hotel condominium units and certain commercial space (collectively the "Hotel Units") and the other for the purchase of residential condominium units (the "Residential Units") claimed, in an Action to recover the contract deposits, that its vendee's liens had priority over the liens of first mortgages on the units. The contract deposit for the Hotel Units was released to the Seller. The contract deposit for the Residential Units remained in escrow. The notice of pendency for the Action brought by the contract vendee was discharged by the filing of an undertaking by the fee owner. The Supreme Court, New York County, granted the mortgagee's motion to dismiss the second amended complaint for the failure to state a cause of action.

According to the Court, as to the Hotel Units,

> "[u]pon the filing of an undertaking, any equitable lien detaches from the property, and is transferred to the undertaking [citations omitted]. After the alleged equitable lien has shifted to the undertaking, the property is relieved of the encumbrance [citation omitted]. Once the encumbrance is lifted, the party claiming the equitable lien has no claim against parties holding prior liens on the property, inasmuch as the only available remedy is to procure a judgment on the undertaking, rather than foreclose on the property…With the undertaking in place and the notice of pendency cancelled, [the contract vendee) no longer has a claim for an equitable vendee's lien against the property and the project…"

As to the claim for an equitable lien against the Residential Units, there was no basis upon which to subordinate the mortgage since the Plaintiff's interest "is fully protected by the continued escrow of that deposit." Honua Fifth Ave. LLC v. 400 Fifth Realty LLC, decided May 5, 2014, 2014 NY Slip Op 31223 is posted at http://www.nycourts.gov/reporter/pdfs/2014/2014_31223.pdf.

Restrictive Covenants

The Declaration for a residential subdivision in the Town of Pompey, Onondaga County, states that "[n]o animals, livestock, or poultry of any kind shall be raised, bred or kept on the Properties [except for normal household pets]…provided that such pets are not kept, bred, or maintained for any commercial purpose..." It further stated that "[t]he Board shall have the absolute power to prohibit a pet from being kept on the Properties…" The Plaintiff, a not-for-profit corporation comprised of property owners in the subdivision, including the Defendants,

directed the Defendants to remove two chickens and sought a permanent injunction ordering their removal. The Appellate Division, Fourth Department, reversed the Supreme Court, Onondaga County's grant of the Defendants' motion to dismiss the complaint and granted the Plaintiff's motion for summary judgment. The Board was acting within its authority and there was no evidence that the Defendants were "'deliberately single[d] out… for harmful treatment…'" [citation omitted]. Two dissenting Judges would have voted to affirm the ruling of the lower court. They concluded that "there is no evidence in the record that chickens are not 'normal household pets' within the meaning of the restrictive covenant." The Preserve Homeowners' Association, Inc. v. Zhan, decided May 2, 2014, is reported at 2014 WL 1717037.

- In a separate decision, the Plaintiff and Defendant Bryant own adjoining parcels within a four lot subdivision. The developer's deed to the Plaintiff's lot required that the Plaintiff obtain the developer's approval as to the height, design, landscaping and location of the residence to be constructed on that lot. The developer's deed to Bryant's lot, instead, required that the house to be built on that lot be "located per [the] attached plan", which plan required a setback of 45 feet from the property line separating Bryant's lot from the Plaintiff's lot. However, Bryant obtained a building permit for and staked out the footing for a house she intended to construct within 33 feet of the common property line. The restriction in the Plaintiff's deed was also set forth in a deed to one of the other lots in the subdivision.

The Plaintiff sought to enforce the restrictive covenant in Bryant's deed and to enjoin Bryant from erecting a house in violation of that covenant. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Orange County, granting the Plaintiff's cross-motion for summary judgment. Bryant's construction violated the side line setback restriction and the Plaintiff had standing to enforce the restrictive covenant in Bryant's deed. It was "part of a common development scheme created for the benefit of all property owners within the subdivision." That the building was substantially completed did not render the action "academic" since Bryant was on notice that if she proceeded with construction she did so at her own risk. Hidalgo v. 4-34-68, Inc., decided May 14, 2014, is reported at 2014 WL 1910447.

Statute of Frauds

In an Action for specific performance of a contract for the sale of real property, the Defendants-Sellers appealed from an Order of the Supreme Court, Kings County, denying their motion to dismiss and cancel the notice of pendency filed against the property. The Appellate Division, Second Department, affirming the ruling of the lower court, held that the contract satisfied the requirements of the statute of frauds (General Obligations Law Section 703, "Conveyances and contracts concerning real property required to be in writing").

According to the Appellate Division, "[h]ere, the subject contract identifies the parties to the transaction, describes the property to be sold with sufficient particularity, states the purchase price and the down payment received, and is subscribed by the party to be charged [citations omitted]. While the contract did not specify how or when the balance of the purchase price was to be paid" or a closing date, it is presumed that the balance of the purchase price was to be paid at closing and "that the closing will take place within a reasonable time." Simpson v. 1147 Dean, LLC, decided April 16, 2014, is reported at 2014 WL 1465567.

Tax Sales

A mortgage foreclosure was commenced in June 2008. In November 2008, the owner of the property filed a Chapter 7 Bankruptcy petition. In March 2009 the Bankruptcy Court lifted the automatic stay to allow the foreclosure to continue. A judgment of foreclosure and sale was entered in June 2009, but the foreclosure sale was never completed. In June 2012 the mortgage was assigned to Nationstar Mortgage, LLC ("Nationstar").

The City of Troy, New York commenced an In Rem proceeding in April 2009 to foreclose for unpaid real estate taxes. An amended judgment in the tax foreclosure was entered and the property was conveyed by a tax deed to the City of Troy in October 2009. Notices of the tax sale were mailed to Lehman Brothers, to Lehman Brothers' nominee, and to the mortgagee which commenced the foreclosure and later assigned the mortgage to Nationstar.

Nationstar moved for relief from the judgment of foreclosure and for the mortgage lien to be reinstated, asserting that when the City of Troy commenced the tax foreclosure the automatic stay was still in effect and, therefore, the County Court lacked jurisdiction to issue the amended tax sale judgment. The County Court, Rensselaer County, denied the motion. The Appellate Division, Third Department, affirmed.

According to the Appellate Division, "[w]here an entity with a purported interest in real property that was subject to a tax sale neglects to challenge the sale in any fashion for two years, a conclusive presumption arises regarding the procedural regularity of all proceedings regarding the sale…Here, the amended judgment of foreclosure and tax deed transfer occurred in October 2009 and Nationstar did not challenge that action until December 2012, after more than three years had passed." Matter of the Foreclosure of Tax Liens by the City of Troy, decided March 13, 2014, is reported at 2014 WL 958493.

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