Current Developments

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Bankruptcy

Under 11 U.S.C. Section 365(a) ("Executory contracts and unexpired leases"), a bankruptcy trustee, "subject to the court's approval, may assume or reject any…unexpired lease of the debtor." New York State's Court of Appeals, responding to a question certified to it by the United States Court of Appeals for the Second Circuit, held that a debtor's interest, in this case under a Chapter 7 bankruptcy, as the tenant under a rent-stabilized lease for an apartment in New York, is exempted from the debtor's bankruptcy estate under Debtor and Creditor Law Section 282 ("Permissible exemptions in bankruptcy").

Under 11 U.S.C. Section 522 ("Exemptions"), exemptions from a debtor's bankruptcy estate may be claimed under either the Bankruptcy Code or the law of the state of the debtor's domicile. Section 282 of New York's Debtor and Creditor Law recites that "an individual debtor domiciled in this state may exempt from the property of the estate, to the extent permitted by [11 U.S.C. Section 522(b)]…[t]he debtor's right to receive or the debtor's interest in…a local public assistance benefit…" The Court of Appeals found that the debtor's interest in a rent stabilized lease is a governmentally conferred local public assistance benefit. Santiago-Monteverde v. Pereira, decided November 20, 2014, is reported at 2014 WL 6473698.

Carbon Monoxide Detectors

Chapter 541 of the Laws of 2014, signed into law on December 29, 2014, amends Executive Law Section 378 ("Standards for New York state uniform fire prevention and building code") to require the State's Uniform fire prevention and building code (which does not apply to buildings in New York City) to include standards for the installation and maintenance of carbon monoxide detectors in restaurants and other commercial buildings. Effective on the 180th day after enactment, the Chapter recites that "[t]his Act shall be known and may be cited as 'Steven Nelson's law'", after the manager of a restaurant in Copiague who died from carbon monoxide poisoning. Assembly Bill 8963A/Senate Bill 6657-C is posted to the State Assembly website at http://assembly.state.ny.us/leg/?term=2013&bn=A08963

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Condominiums

New York State Department of Law's Real Estate Finance Bureau issued a Memorandum dated December 3, 2014 captioned "Submission of Building Plans in Electronic Format in Lieu of Paper." It states that "[e]ffective immediately, the DOL will accept digital copies of proposed or approved building plans in lieu of paper copies at the time of plan submission…The attorney for sponsor should include a statement in the Attorney Transmittal Letter that the building plans have been provided electronically and include an 'Encl.' notation at the bottom of the letter. The Encl. notation should also state whether the plans were provided via CD-ROM, USB flash drive, [or] external USB hard drive." The Memorandum, which further states that the Department "reserves the right to request paper copies of the building plans at any time during plan review", is posted at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/real_estate_finance/Effective-memos/12.3.2014%20Electronic%20Copies%20of%20Building%20Plans.pdf

Contracts of Sale

A contract for the sale of three parcels provided that the properties would be sold to Plaintiff if Plaintiff satisfied two liens on the properties. The Supreme Court, Queens County, granted Defendant's motion to dismiss the complaint in an Action for specific performance and to cancel the filed notices of pendency. The Appellate Division, Second Department, affirming the ruling of the lower court, held that Plaintiff had failed to state a cause of action. The parties had entered into an option contract; because Plaintiff did not satisfy the liens, the option contract did not ripen into an enforceable bilateral contract. Pfeifer v. Groisman, decided December 3, 2014, is reported at 2014 WL 6778609.

Contracts of Sale

Plaintiff entered into a contract to purchase two properties in Manhattan from Defendant Broche. Before closing under that contract, Broche signed a contract to sell the same properties to Property 215 LLC, and they were conveyed to Property 51 LLC, the assignee of Property 215 LLC. Plaintiff commenced an Action against Broche for specific performance and against Property 215 LLC and Property 51 LLC for damages for tortious interference with the Plaintiff's contract. The Supreme Court, New York County, granted partial summary judgment against Broche for specific performance and ordered a hearing on an abatement of the purchase price. Plaintiff's tortious interference claim was referred to a special referee. The Appellate Division, First Department, affirming the rulings of the lower court, held that Property 215 LLC was liable for damages for its tortious interference with Plaintiff's contract despite having assigned its contract to Property 51 LLC. Panasia Estate, Inc. v. Broche, decided November 13, 2014, is reported at 122 A.D.3d 454 and 2014 WL 5856915.

Contracts of Sale/Statute of Frauds

Plaintiffs property was being sold at auction online. Defendant, which was the highest bidder, delivered to the auctioneer an executed bidding package, including the then required down payment. However, on delivery by the auctioneer of a contract of sale, Defendant refused to execute the contract and return it with the balance of the down payment. Plaintiff sued for specific performance or, alternatively, for damages for breach of contract. The Supreme Court, Sullivan County, granted Defendant's motion to dismiss the complaint because there was no agreement satisfying the statute of frauds, and the Appellate Division, Third Department, affirmed.

To satisfy the statute of frauds, under subsection 2 of General Obligations Law Section 5-703 ("Conveyances and contracts concerning real property required to be in writing"), there must be a "contract or some note or memorandum thereof, expressing the consideration, [which] is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized in writing." To satisfy that requirement, according to the Appellate Division, "the memorandum 'must designate all parties, identify and describe the subject matter and state all of the essential terms of a complete agreement.'" [citations omitted] In this case, the writings prior to the delivery to Defendant of the contract of sale did not identify the selling party; therefore they did not include all of the essential terms of a contract of sale.

Plaintiff could not rely on the part performance exception to the statute of frauds in GOL Section 5-703(4). There being other bidders, "plaintiff's actions in proceeding with the auction were not unequivocally referable to a consummated agreement with defendant, but are explainable as one preliminary step toward forming a contract with some bidder in the future." Post Hill, LLC v. E. Tetz & Sons, Inc., decided November 20, 2014, is reported at 122 A.D.3d 1126 and 2014 WL 6475131.

Indian Lands

An Action was commenced to foreclose a mechanic's lien against the Lewiston Golf Course Corporation ("Lewiston Golf"), an indirect, wholly owned subsidiary of the Seneca Nation of Indians, a federally recognized Indian Tribe. The Defendants moved to dismiss the complaint, claiming that Lewiston Golf was protected by the sovereign immunity afforded the Seneca Nation. The Supreme Court, Niagara County, denied the motion, holding that Lewiston Golf was not an "arm" of the Seneca Nation. The Appellate Division, Fourth Department, affirmed, and granted Lewiston Golf leave to appeal, certifying the question of whether the Appellate Division's ruling as to sovereign immunity was proper. The Court of Appeals answered the certified question in the affirmative and affirmed the Order of the Appellate Division. The Seneca Nation did not own the property, and a suit against Lewiston Golf "will not impact the Seneca Nation's fiscal resources." According to the Court of Appeals, "[h]ere, the financial obligations were assumed by Lewiston Golf and any liability insurer, not by the Seneca Nation…If a judgment against a corporation created by an Indian tribe will not reach the tribe's assets, because the corporation lacks 'the power to bind or obligate the funds of the tribe' [citation omitted], then the corporation is not an 'arm' of the tribe." Sue/Perior Concrete and Paving, Inc. v. Lewiston Golf Course Corporation, decided November 25, 2014, is reported at 2014 WL 6633546.

Lien Law

Under Lien Law Section 9 ("Contents of lien"), a mechanic's lien "shall state…2. The name of the owner of the real property against whose interest therein a lien is claimed…" Section 9 also states that "[a] failure to state the name of the true owner…or a misdescription of the true owner, shall not affect the validity of the lien." Lien Law Section 12-1 ("Amendment") allows a court, "in a proper case…[to] make an order amending a notice of lien… nunc pro tunc" unless the amendment prejudices "an existing lienor, mortgagee or purchaser in good faith, as the case may be."

Although a mechanic's lien was filed against Fawn Builders, Inc. ("Fawn Builders"), the property against which the lien was filed had been conveyed by Fawn Builders for no consideration to Rigano, its sole shareholder. Rigano moved for an Order discharging the mechanic's lien for misidentifying the name of the property's true owner. The lienor moved to have the lien amended. The Supreme Court, Westchester County, issued an Order discharging the mechanic's lien and the Appellate Division, Second Department, affirmed, holding that "a misidentification of the true owner is a jurisdictional defect which cannot be cured by an amendment nunc pro tunc." The Court of Appeals reversed, holding that the defect was in this instance "a misdescription and not a misidentification" of the name of the true owner. According to the Court of Appeals:

> "Here, the true owner Rigano, and the listed owner, Fawn Builders, are closely related, as the deed to the property made clear. Rigano and Fawn Builders had the same interest and control over the property in question – Rigano owned 100% of Fawn Builders…Further, Rigano had notice of the lien because he shares an address with Fawn Builders. Naming Fawn Builders gives, at the very least, inquiry notice to the public that there is a lien on the property, and a correct address to contact the true owner. And Rigano, who appears to have consented to a substantial majority of the work done on the property, signing as an individual and for Fawn Builders as its one and only shareholder, understood that a lien could be placed on the property upon a failure to pay for the work. This notice of lien would not have caught Rigano off guard. Finally, no third-party purchaser was or would be prejudiced by this amendment."

Rigano v. Vibar Construction, Inc., decided December 16, 2014, is reported at 2014 WL7069379.

Lien Law

Lien Law Section 22 ("Building loan contract") requires that a building loan contract be filed on or before the date of the recording of the related building loan mortgage. "If not so filed, the interest of each party to such contract in the real property affected thereby is subject to the lien and claim of a person who shall thereafter file" a mechanic's lien. The priority of a building loan mortgage over later filed mechanics' liens may be impaired by this "subordination penalty".

A building loan contract was filed in 2008, thirteen days after the related building loan mortgage was recorded. A mechanic's lien was filed against the mortgaged property on July 23, 2013 for allegedly unpaid architectural and design services. The mortgage was foreclosed; on February 1, 2013, the mortgagee ("Archer") was the successful bidder. The mechanic's lienor ("Corporate Design") was not a party to the mortgage foreclosure, its lien having been filed after the notice of pendency was filed. Corporate Design commenced an Action to foreclose its mechanic's lien, claiming that Archer's mortgage was subject to the subordination penalty for the failure to strictly comply with the filing requirement of Section 22.

In the proceeding to foreclose the mechanic's lien, the Supreme Court, Queens County, granted Archer's motion to dismiss as to it, and the Court directed the County Clerk to cancel the notice of pendency. According to the Court:

> "…imposition of the subordination penalty on defendant Archer herein, to alter the order of record priority so as to allow plaintiff to seek foreclosure of its mechanic's lien, would not promote the legislative purpose of Lien Law Section 22. Plaintiff indicates in its mechanic's lien that the first item of work was not performed until May 31, 2011, which date is three years after defendant Archer made its Lien Law Section 22 filing. Plaintiff makes no allegation that notwithstanding it performed the work three years later, it actually was retained to perform the architectural work during the thirteen-day gap period. Under such circumstances, it would be unjust to impose the subordination penalty upon defendant Archer…"

Corporate Design of America, P.C. v. Jako Realty Group LLC, decided November 3, 2014, is reported at 2014 NY Slip Op 33179.

Mortgages

JPMorgan Chase Bank, N.A., as successor by merger to Washington Mutual Bank, F.A., commenced an Action in 2012 seeking an Order which would, in effect, require the Suffolk County Clerk to record a mortgage executed in 2005, the original of which was lost or destroyed. The Supreme Court, Suffolk County, granted the Defendant-mortgagor's motion to dismiss the complaint, holding that the Action was time-barred under the six-year statute of limitations for "an action for which no limitation is specifically prescribed by law" in Civil Practice Laws and Rules Section 213(1). Plaintiff asserted that the ten-year limitations period under CPLR Section 212(a) for actions to quiet title to real property should apply. The Appellate Division, Second Department, agreed that this was not an action to quiet title. However, as a valid cause of action was not stated, the applicable limitation period could not be determined. The complaint did not allege that a copy of the mortgage was valid on its face, which is "a necessary element of a cause of action to compel a county clerk to record a mortgage." For the failure to state a cause of action, the lower court should have dismissed the complaint. JPMorgan Chase Bank, N.A. v. Mbanefo, decided December 3, 2014, is reported at 2014 WL 6780577.

Mortgages

Under subsection "1" of Real Property Actions and Proceedings Law Section 1307 ("Duty to maintain foreclosed property"), [a] plaintiff in a mortgage foreclosure action who obtains a judgment of foreclosure and sale… involving residential property…that is vacant, or becomes vacant after the issuance of such judgment, or

is abandoned by the mortgagor but occupied by a tenant…shall maintain such property until such time as ownership has been transferred through the closing of title in foreclosure, or other disposition, and the deed for such property has been duly recorded…"

A fire at property encumbered by a mortgage being foreclosed by Defendant Bank of New York Mellon ("BNY") resulted in the deaths of the Plaintiff's decedent and other occupants of the property. An Action for negligence was brought BNY and the record owner of the property, alleging that if the Defendants had adequately maintained the property Plaintiff's decedent's death could have been avoided. The complaint further alleged that BNY knew the record owner had abandoned the property and that the property was in disrepair and a fire hazard. BNY countered that it had no duty to maintain the property, and it moved to dismiss. The Supreme Court, Bronx County, granted the motion but the Appellate Division, First Department, reversed. The Appellate Division held that the complaint adequately pleaded a claim against BNY under RPAPL Section 1307(1) and that the evidence submitted by BNY did not establish as a matter of law that the property was not abandoned. Lezama v. Cedano, decided July 17, 2014, is reported at 119 A.D.3d 479 and 991 N.Y.S.2d 32.

Mortgage Foreclosures

In the foreclosure of a mortgage against property held of record by Defendant and her now deceased husband as joint tenants with rights of survivorship, Defendant opposed the foreclosing Plaintiff's motion for summary judgment, claiming that the Plaintiff failed to join her, as the Executrix of her husband's estate, as a necessary party to the foreclosure. The Supreme Court, Suffolk County, granted Plaintiff's motion for summary judgment. According to the Court, "[t]he estate of [the Defendant's] deceased husband…is not a necessary party since his interest in the subject premises passed by operation [of law] upon his death to his joint tenant with survivorship rights, namely [the Defendant], and the plaintiff has no [sic] pleaded claims against the deceased obligor/mortgagor", such as for a deficiency judgment against decedent as an obligor under the mortgage note or as a guarantor. Wells Fargo Bank, N.A. v. Cerotano, decided December 9, 2014, is reported at 45 Misc.3d 1226 and 2014 WL 6912862.

Mortgage Foreclosures

A referee, appointed in the foreclosure of a mortgage on property for which subdivision approval into a thirty lot residential subdivision was issued, reported that the property should be sold as one parcel. Defendants countered that separate sales of each lot would result in a higher price. The Supreme Court, Suffolk County, granted the Plaintiff's motion to confirm the referee's report. According to the Court, "[t]he fact that the single parcel is comprised of multiple lots…neither requires nor warrants individual sales of each separate tax lot. [citation omitted] Moreover, the defendant's estimation that individual sales will garner a higher aggregate purchase price is unaccompanied by any estimation of the price a single sale of the entire parcel may bring." Darby Group Companies, Inc. v. Wulforst Acquisition, LLC, decided November 20, 2014, is reported at 45 Misc.3d 1222 and 2014 WL 6755964.

Nassau County Recordings/Tax Lot Verification

The Office of the Nassau County Clerk has issued the following Notice:

> "Due to the implementation of the Department of Assessment's Tax Map certification requirement, effective Wednesday, January 14, 2015, all deeds, mortgages, satisfactions, assignments, and consolidations must have their Section, Block and Lot verified with the Department of Assessment prior to presenting the instrument for recording in the Clerk's office. Instruments presented without the Department of Assessment certification page cannot be accepted for recording.
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> "Please direct all inquiries regarding this requirement to the Department of Assessment."

NYC Recordings/Transfer Tax Forms

New York State's Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax ("TP-584") and New York City's Real Property Transfer Tax Return ("RPT") require the entry of an Employer Identification Number or a Social Security Number for each Transferor and Transferee. The New York City Register has advised the New York State Land Title Association that her offices will continue to accept returns with only one transferor's EIN or SSN, provided that (a) there is one valid EIN or SSN, and (b) "9s" are entered for the party without an EIN or SSN. However, an affidavit must accompany the return, signed by the party without the EIN or SSN or by an attorney, stating the reason that the required EIN or SSN is not available. The City Register advised that the affidavit will be subject to review.

Notice of Pendency

In a decision dated May 23, 2013, the Supreme Court, Kings County, ruled that Plaintiff's wrongful filing of a notice of pendency and commencement of a frivolous Action for the specific performance of a purported contract of sale prevented Defendant from closing on a sale of its real property in 2012. The Court held that Defendant was entitled to recover from Plaintiff $268,784.99 for Defendant's increased capital gains tax liability, incurred due to the delay until 2013 in selling the property because of the Fling and Action, and $88,471.27 for legal fees incurred by Defendant to oppose Plaintiff's frivolous claims, to discharge the notice of pendency, and to obtain the Order dismissing the Action, together with any interest from the date determined by a special referee and costs and disbursements. J Group Holdings I LLC v. Michem Properties, Inc., decided September 29, 2014, 2014 NY Slip Op 32792, is posted at http://www.courts.state.ny.us/reporter/pdfs/2014/2014_32792.pdf

Rockland County

The Office of the Rockland County Clerk has issued a notice advising that it "will begin scanning barcodes on RP-5217 [Real Property Transfer Report] forms for electronic transmission to NYS ORPTS [Office of Real Property Tax Services]; therefore "[h]andwritten information will not be accepted." Accordingly, effective February 1, 2015, the County Clerk "will not accept ANY handwritten RP-5217 forms, or forms not completed through the states [sic] PDF download. We will also not accept saved, blank forms that are completed on a typewriter. These do not generate a unique barcode, making the form unable to be scanned." Form RP-5217-PDF can be downloaded for completion on a computer at http://www.tax.ny.gov/research/property/assess/rp5217/index.htm

Transfer Tax/REITS

Under Tax Law Section 1402 ("Imposition of tax"), which applies to New York State's Real Estate Transfer Tax, and, as to New York City's Real Property Transfer Tax, under Tax Law Section 1201 ("Taxes administered by cities of one million or more") and Section 11-2102 ("Imposition of tax") of the City's Administrative Code, New York State and New York City transfer taxes are applied to certain "real estate investment trust transfers" at a rate equal to fifty percent of the otherwise applicable rate. Chapter 500 of the Laws of 2014 has extended the date to which the reduced tax rates may apply when a conveyance of real property is made to an existing REIT from September 1, 2014 to September 1, 2017. Assembly Bill 9394/Senate Bill 7208 is posted at http://assembly.state.ny.us/leg/?default_fld=&bn=A09394&term=2013&Summary=Y

Transfer Tax/NYC RPTT

Current Developments dated November 2, 2012 reported the decision of the Appellate Division, Second Department, in Trump Village Section 3, Inc. v. City of New York, reported at 952 N.Y.S.2d 65. Trump Village Section 3, Inc. ("Trump Village"), the owner of a residential housing cooperative complex in Brooklyn subject to the Mitchell-Lama housing program, terminated its participation in the program in 2007. Pursuant to Private Housing Law Section 35(3) ("Voluntary dissolution"), Trump Village was "reconstituted" as a private cooperative corporation under the Business Corporation Law by amending its certificate of incorporation. The existing stock certificates were exchanged for new stock certificates, each shareholder holding the same number of shares as before.

New York City's Department of Finance issued a Notice of Determination claiming Real Property Transfer Tax ("RPTT") of $21,149,592.50, including interest and a penalty. It asserted that there was a transfer taxable "conveyance of the underlying real property" when Trump Village terminated its participation in the Mitchell-Lama program and reconstituted itself as a private cooperative corporation. The Supreme Court, Kings County, denied Trump Village's motion for summary judgment and awarded summary judgment to The City of New York. The Appellate Division, Second Department, reversed, granted Trump Village's motion for summary judgment, and remitted the case to the Supreme Court, Kings County, for entry of a judgment declaring that the RPTT was improperly imposed. The Appellate Division also certified the issue to the Court of Appeals.

The Court of Appeals affirmed the Appellate Division's Order. Rejecting what it termed the City's "strained interpretation" of Administrative Code Section 11-2102(a), which imposes a transfer tax "on each deed at the time of delivery by a grantor to a grantee…", it held that the amendment to Trump Village's certificate of incorporation to delete reference to the Private Housing Finance Law did not form a new corporation and was not a document of conveyance. Trump Village Section 3, Inc. v. City of New York, decided December 17, 2014, is reported at 2014 WL 7150362.

Transfer Tax/NYS RETT

The Office of Counsel of New York State's Department of Taxation and Finance ruled that the Petitioner's transfer of a condominium unit to an Intentionally Defective Grantor Trust established by the Petitioner in exchange for $5,000,000 Petitioner had previously contributed to the Trust is subject to the Real Estate Transfer Tax and the Mansion Tax. Consideration for the conveyance is the $5,000,000 received by Petitioner from the Trust. Advisory Opinion TSB-A-14(2)R, dated December 4, 2014, is posted at
http://www.tax.ny.gov/pdf/advisory_opinions/real_estate/a14_2r.pdf

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