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NATIONAL COMMERCIAL SERVICES

Current Developments

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Bankruptcy/Automatic Stay

Debtor, who with her husband owned real property in North Babylon, filed a Chapter 7 bankruptcy petition on July 30, 2010. She was discharged from the bankruptcy on October 26, 2010, and the bankruptcy case was closed on January 4, 2011. On December 7, 2007, the County of Suffolk purchased the tax lien at auction, and, on December 7, 2010, the County Treasurer delivered a notice to redeem to the Debtor and her husband, as required by the Suffolk County Tax Act. The tax lien was not redeemed and the County acquired the property by a tax deed dated August 23, 2011. The holder of a mortgage on the property asserted that the giving of the notice to redeem was an action to collect a debt which violated the automatic stay under Bankruptcy Code Section 362(a). Therefore, it claimed, the tax deed was void and the three year period from the date of the tax lien sale in which the property could be redeemed under the County Tax Act had not expired.

The Supreme Court, Suffolk County, upheld the validity of the tax deed. According to the Court, the giving of a notice to redeem while the bankruptcy was pending was an act to preserve rather than to enforce the tax lien, which is not prohibited by the automatic stay. Under 11 USC Section 362(b)(3), the filing of a bankruptcy petition "does not operate as a stay… of any act to perfect, or to maintain or continue the perfection of an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title…" JP Morgan Chase, N.A. v. Hagemeyer, decided February 11, 2015, is reported at 2015 WL 591784.

Equitable Mortgages

Pursuant to an agreement extending the maturity date of a consolidated mortgage, the borrower delivered to lender's counsel a deed to be held in escrow, to be released for recording if the borrower failed to make any payment of the mortgage debt. The borrower defaulted and on December 3, 2009 the deed was recorded. In July 2011, the borrower and its related entities commenced an Action alleging, among other things, that the release from escrow and the recording of the deed without commencing a foreclosure violated Real Property Law Section 320 ("Certain deeds deemed mortgages"). Under Section 320, "[a] deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a

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mortgage, although an absolute conveyance in terms, must be considered a mortgage…" The Defendants moved to dismiss, asserting that the extension agreement only provided for a deed in lieu of foreclosure; in exchange for the recording of the deed the mortgage debt was forgiven. The Defendants also claimed that the Plaintiffs' challenge to the deed was barred by laches.

The Supreme Court, New York County, denied the Defendants' motion to dismiss, holding a valid claim was asserted for a violation of Real Property Law Section 320 and the deed did not, as a matter of law, constitute a conveyance of title. The Appellate Division, First Department, affirmed the ruling of the lower court. According to the Appellate Division, "[e]ven if the [extension] agreement had been structured or titled as a 'deed in lieu of foreclosure' – and it was not – [the borrower] gave defendants the deed as security for the debt to defendants." As to the claim of laches, the Appellate Division found that there were not "sufficient facts in the record establishing that [the Plaintiffs] intentionally delayed bringing this action, or that any delay caused defendants prejudice so as to demonstrate laches as a matter of law." Patmos Fifth Real Estate Inc. v. Mazl Building LLC, decided January 8, 2015, is reported at 124 A.D.3d 422 and 2015 WL 94793.

Land Under Water

Plaintiffs brought an Action under Real Property Actions and Proceedings Law Article 15 for a determination that they owned the land under water adjoining their adjacent upland property, and to enjoin the Defendant from entering the Plaintiffs' property. The Supreme Court, Jefferson County, granted the Plaintiffs' motion for summary judgment and the Appellate Division, Fourth Department, affirmed. According to the Appellate Division, "'when land under water has been conveyed by the state to the owner of the adjacent uplands, the lands under water so conveyed become appurtenant to the uplands, and will pass by a conveyance of the latter without specific description.'" [citations omitted]. Here, the uplands and underwater lands were conveyed by the State to a predecessor in title to the Plaintiffs, and the underwater land passed by deed to the Plaintiffs appurtenant to the uplands when they were deeded to them. The Defendant could not establish that she owned adjacent uplands or that she otherwise acquired title to the land under water. Kernan v. Williams, decided February 6, 2015, is reported at 2015 WL 499237.

Life Estates

The holder of a life estate in property in Huntington failed to pay real property taxes, resulting in the filing of tax liens against the property, and also failed to pay hazard insurance premiums. Plaintiffs, one of which held the remainder interest to take effect on termination of the life estate, paid off the tax liens and paid the insurance premiums. An Action was commenced to recover damages for unjust enrichment, restitution and waste and to extinguish the Defendant's life estate. The Supreme Court, Suffolk County, denied the Plaintiffs' motion to strike the Defendant's answer and for summary judgment. The Appellate Division, Second Department, modified the Order to grant the Plaintiffs' motion for summary judgment. According to the Appellate Division, the Plaintiffs "demonstrated, prima facie, that the defendant was unjustly enriched by the plaintiffs' payment of these expenses for the defendant, and that equity warrants extinguishing his life estate in the subject property." Main Omni Realty Corporation v. Matus, decided January 14, 2015, is reported at 2015 WL 161532.

Mortgage Foreclosures

The Supreme Court, Suffolk County, denied a motion by the assignee of a mortgage to require the Suffolk County Clerk to record a copy of the mortgage, the original of which was lost or destroyed and not recorded. According to the Court, "[e]ven if a certified copy of said mortgage was provided, an order directing that the certified copy of the mortgage be recorded nunc pro tunc to the date of the original execution [of the mortgage] would constitute unprecedented relief running contrary to Real Property Law Section 291 as well as the expectations of bona fide purchasers for value." The Court, however, held that the assignee had an equitable lien based on the application of the doctrine of equitable subrogation, in the amount of loan proceeds applied to satisfy a prior mortgage. The Defendant's motion to dismiss the action based on his Chapter 7 bankruptcy discharge was

denied because the discharge extinguished only his personal obligations and not the Plaintiff's security interest. Lastly, the Court held that the Plaintiff had standing to foreclose notwithstanding that the mortgage was assigned to the Plaintiff after the foreclosure was commenced. An affidavit submitted on behalf of the Plaintiff averred that the mortgage note was endorsed and delivered to the Plaintiff prior to the foreclosure, which the Defendant did not contest. "Once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note." Citimortgage, Inc. v. Chouen, decided December 4, 2014, is reported as 2014 NY Slip Op 33251.

Mortgage Foreclosures

Real Property Actions and Proceedings Law Section 1304 ("Required prior notices") requires that a statutory form of notice, captioned "You Could Lose Your Home", be mailed to the borrower at least ninety days before a lender commences an action to foreclose a home loan. Real Property Actions and Proceedings Law Section 1306 requires that the Superintendent of New York State's Department of Financial Services be notified of the lender's intention to foreclose within three days of the mailing of the Section 1304 notice. The Supreme Court, Suffolk County, held that these notices are not required when the borrower died before the foreclosure is commenced; the co-executors of the borrower's estate did not assume the mortgage or obtain a new mortgage in their own names. U.S. Bank National Association v. Pontecorvo, decided December 29, 2014, is reported as 2014 NY Slip Op 33413.

Mortgage Foreclosures/Standing

The Plaintiff in an Action to foreclose a mortgage claimed that it was the assignee of a note and mortgage from MERS acting as nominee for the original lender. The Supreme Court, Suffolk County, denied the Defendants' motion to dismiss the complaint based on the Plaintiff's lack of standing. The Appellate Division, Second Department, reversed, holding that the lower court should also have canceled the notice of pendency. According to the Appellate Division, "MERS was never the holder of the note and was without authority to assign the note to the Plaintiff." Further, the Plaintiff did not establish delivery of the note to MERS before the assignment to the Plaintiff was executed. Citibank, N.A. v. Herman, decided February 4, 2015, is reported at 2015 WL 447609.

Navigable Waters

Current Developments dated March 7, 2013 reported the February 25, 2013 decision of the Supreme Court, Hamilton County, in Friends of Thayer Lake LLC v. Brown (Index No. 6803/10). The Court held that a waterway, known as the Mud Pond waterway (the "Waterway"), in the Town of Long Lake, the Outlet of which is, on average, sixteen feet wide and seventeen inches deep with a minimum width of twelve feet and a depth of four inches, is navigable-in-fact. It granted the Defendants' motion for summary judgment and an injunction enjoining the Plaintiff, who claimed title to the Waterway, from posting signs prohibiting trespassing and from prosecuting those using the public right of navigation over the Waterway and making incidental use of a 500 foot hiking trail, identified as a "portage", over which canoes and gear are carried to circumvent a bedrock ledge and rapids. The Plaintiffs sought a declaratory judgment that the Waterway was not navigable-in-fact and that they had the right to bar the general public from its use. The Court found, based on evidence in the record, that the Waterway "has a practical utility for travel and the transport of some materials." In addition, "…the 500 foot portage is considered a very short portage, and the right to navigate 'carries with it the incidental privilege to make use, when absolutely necessary, of the beds and banks on riparian lands.'"

The Appellate Division, Third Department, affirmed the ruling of the lower court, holding that that the waterway was "navigable-in-fact and subject to a public right of navigation, including the right to portage on plaintiff's land where absolutely necessary for the limited purpose of avoiding obstacles to navigation such as the Mud Pond rapids." It upheld the Supreme Court's Order enjoining the Plaintiffs from interfering with the public right of navigation. According to the Appellate Division:

> "A waterway that is navigable-in-fact "is considered a public highway, notwithstanding the fact that its

> banks and bed are in private hands" [citation omitted]…[T]estimony fully established that, throughout most of its length, the Waterway is capable of being used for canoe travel and has in fact been used for this purpose for many years.…The Waterway's narrow, shallow character does not preclude such a finding, as a stream that can carry only small boats may nevertheless be navigable-in-fact…Likewise, neither the portage around the relatively short Mud Pond rapids nor the presence of other incidental obstacles… renders the Waterway nonnavigable…"

Friends of Thayer Lake LLC v Brown, decided January 15, 2015, is reported at 2015 WL 176289.

Subdivisions

Strips of land eleven feet wide on either side of a public street were dedicated by a sponsor of a planned unit development to the Town of Queensbury. Petitioners, who owned a home in the subdivision, since 2004 had displayed a political sign on this strip of Town land. In 2008, the Board of Directors of the homeowners association claimed that the placement of the sign violated restrictive covenants governing the development and ordered that it be removed. A fine was imposed for the alleged violation and in 2012 the Board filed a lien against the Petitioners' property to collect its sign fees. Petitioners sought a declaration that the Board did not have the authority to ban their signs. The Board of Directors argued that the dedicated strips of land were subject to the restrictive covenants.

The Supreme Court, Warren County, dismissed the cause of action seeking a declaration that the restrictive covenant banning the sign did not apply to the strips of land. The Appellate Division, Third Department, reversed and vacated the lien, holding that the sign restriction did not apply to Town property. "The 1997 deed conveying certain property within the development…to the Town…does not explicitly reserve [to the homeowners' association or the Sponsor] any interest in the conveyed property. In the absence of such reservation, respondents lack the authority to enforce [the homeowners' association's] sign restriction on Town land as a matter of law." Jasinski v. Hudson Pointe Homeowners Association, Inc., decided January 8, 2015, is reported at 124 A.D.3d 978 and 2015 WL 94571.

Tax Deeds

An Action to determine title to an approximately one-quarter acre parcel (the "disputed parcel") was commenced under Real Property Actions and Proceedings Law Article 15. The chain of title for the Plaintiff's land included the disputed parcel. A deed in 1959 to Defendants' predecessor in title erroneously included the disputed parcel, and the County tax map included the disputed parcel as part of the Defendants' land. The Defendants' tax lot was conveyed in 2002 by a tax deed to the third-party Defendant who executed a warranty deed to the Defendants in 2008.

The Supreme Court, Onondaga County, held that the tax deed was voidable, not void. Further, because the Plaintiff had not brought the action within six years of the date of the tax deed, as required by Civil Practice Law and Rules Section 213 ("Actions to be commenced within six years: where not otherwise provided for…"), the Defendants owned the disputed property. The Appellate Division, Fourth Department, reversed the ruling of the lower court, holding that the Plaintiff is the lawful owner of the disputed property. According to the Appellate Division, "the tax deed to the defendants' predecessor in interest was void with respect to the disputed property because the County of Onondaga could not convey an interest in land that it did not have." Crain v. Mannise, decided February 6, 2015, is reported at 2015 WL 499230.

Uniform Commercial Code

Approximately $300 Million was loaned to General Motors in 2001 for a transaction involving a synthetic lease. A financing statement, naming as secured party JPMorgan Chase Bank, N.A. ("JPM") as administrative agent, was filed in Delaware. Five years later, a term loan for approximately $1.5 Billion was made to General Motors. Financing statements were filed in Delaware, again naming as secured party JPM, as administrative agent. In 2008,

in connection with the planned payoff of only the synthetic lease financing, the financing statement for the term loan was, in error, also terminated. In 2009, General Motors filed for reorganization under Chapter 11 of the Bankruptcy Code. The Committee of Unsecured Creditors sought a determination that the lenders for the term loan were unsecured creditors.

Under UCC Section 9-509 ("Persons entitled to file a record"), "a person may file a termination statement "only if (1) the secured party of record authorizes the filing…" The United States Bankruptcy Court for the Southern District of New York held that the mistakenly filed UCC-3 termination statement was unauthorized and therefore not effective. The United States Court of Appeals for the Second Circuit reversed and remanded the case to the District Court with instructions to enter partial summary judgment in favor of the Committee.

The Delaware Supreme Court, responding to a question certified to it by the Court of Appeals, stated that a UCC-3 termination statement is effective if the secured party of record authorized its filing, regardless of whether the secured party intended or understood the effect of the filing. The Court of Appeals found that JPM authorized the filing. "JPM and its counsel knew that, upon the closing of the Synthetic Lease transaction, [the law firm which prepared the UCC-3] was going to file the termination statement that identified the Main Term Loan UCC-1 for termination and that JPMorgan reviewed and assented to the filing of that statement. Nothing more is needed." In re Motors Liquidation Company, decided January 21, 2015, is reported at 2015 WL252318.

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