



Current Developments

By Michael J. Berey
Senior Underwriting Counsel
First American Title National Commercial Services

Condominiums

The Offering Plan for a condominium in Manhattan provided that the Sponsor, acting on behalf of all unit owners in the condominium, would apply for a partial real estate tax exemption under Real Property Tax Law Section 421-a; that each unit owner would reimburse the Sponsor, pro rata, for the costs the Sponsor incurred in obtaining the tax abatement; and that the condominium's Board of Managers, as agent for the Sponsor, would collect the reimbursements from the residential unit owners. If a unit owner failed to pay his or her pro rata share of such costs, the Board of Managers, as agent for the Sponsor, was authorized to assess late charges and/or to place a lien on the unit of such owner as if the unpaid amounts were Common Charges. The Board of Managers refused to demand reimbursement from the unit owners after New York City approved the tax abatement. Therefore, the Sponsor demanded payment directly from the unit owners. It commenced an action to recover \$8,902.51, the pro rata amount of the Sponsor's abatement costs, plus interest, and costs, disbursements and attorneys' fees, alleged to be due from the Defendant unit owner. The Sponsor also claimed that it had an equitable lien on the Defendant's unit.

The Civil Court, New York County, denied the Sponsor's motion for summary judgment and, "upon searching the record", granted the Defendant summary judgment, thereby dismissing the Action. According to the Court, Plaintiff Kolanu Partners, LLC, the Sponsor,

"...does not independently have the power to demand reimbursement..., or an equitable lien on a residential unit. The Offering Plan expressly empowers the Board, as the Sponsor's agent, to collect the individual unit owners' pro rata reimbursement for Kolanu's abatement costs and authorizes the Board to enforce these payments in the manner provided for. This Court will enforce the parties' agreement in accordance with its terms....Although Kolanu could have included a provision in the Offering Plan authorizing it, as the Sponsor, to collect and enforce reimbursement from the unit owners for its abatement costs – that provision was omitted....

Absent contractual authority, this Court will not allow Kolanu to step into the Board's shoes to collect reimbursement...Based on the terms of the Offering Plan, this Court finds that Kolanu lacks

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standing to maintain this action as Kolanu is not permitted to take direct action against a unit owner to recover abatement costs..." Kolanu Partners, LLC v. Perry, decided March 11, 2015, is reported at 46 Misc.3d 1226 and 2015 WL 1059372.

Estates

The Last Will and Testament of Dorothy, who was divorced and whose children were Betty Ann and Paul, granted a life estate in her home in Ardsley to Betty Ann. On Betty Ann's death or on Betty Ann's failure to maintain the home, title to the house was to "pass to a Trust which is to be hereinafter created..." The Will left Paul only his mother's "love and affection". Betty Ann died in 2002 without issue, and Dorothy died in 2011. The Trust referred to in the Will was not located. The Surrogate's Court, Westchester County, held that since the bequest to the Trust failed and the Will contained no alternate disposition, the home lapsed into intestacy and was to be distributed as if Paul predeceased Dorothy. Paul's two children were to take the property in equal shares. According to the Court, "EPTL Section 1-2.19 ["Will"] provides that a will can direct how property shall not be disposed of, and such negative disposition not only bars its subjects from inheriting under the will but also from sharing in any disposition that lapses into intestacy." Estate of Grutzner, decided March 17, 2015, is reported at 46 Misc.3d 1228 and 2015 WL 1215772.

Estates/Ademption

Three parcels of land in Elmira were to be left to the testator's daughter under his Last Will and Testament executed in 2004. In 2007, however, the testator transferred title to the parcels to a limited partnership in which the testator was a limited partner with a ninety-nine percent interest and the general partner was his son. On the death of the testator in 2012, after the Will was admitted to probate, the daughter commenced a proceeding under Surrogate's Court Procedure Act Section 2102 ("Proceedings for relief against a fiduciary") seeking an Order directing the Estate to transfer the parcels to her. Respondent, the decedent's son and the executor of the Estate, argued that the parcels were not part of the Estate because they had been deeded to the limited partnership. The Surrogate's Court, Chemung County, held that the parcels remained part of the decedent's Estate and passed to the Petitioner under the terms of the Will. The Appellate Division, Third Department, reversed the Order and dismissed the Petition.

Respondent asserted that the devise of the parcels by the decedent's Will failed because the properties had been deeded during decedent's lifetime, a situation known as "ademption". Estates, Powers and Trusts Law Section 3-4.3 ("Reversionary effect of a conveyance, settlement or other act affecting property previously disposed of by will") sets forth the principles of "ademption":

"A conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the estate passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it."

According to the Appellate Division, "...because the conveyance of the Elmira parcels to [the limited partnership] 'wholly divested' the estate of them, we are constrained to find that, at the time of probate, the testamentary disposition of the Elmira parcels had adeemed because the parcels were not available for disposition to petitioner." Matter of the Estate of Braunstein, decided February 26, 2015, is reported at 125 A.D.3d 1267 and 2015 WL 790102.

Mechanic's Liens

Lien Law Section 3 ("Mechanic's lien on real property") provides that a mechanic's lien may be filed when payment is owed for labor performed or materials furnished "for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor." A notice of mechanic's lien and a notice of pendency filed in an Action to enforce a mechanic's lien were discharged of record

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by the Supreme Court, Westchester County, and the Court directed the County Clerk, Westchester County, to make on his records that the notice of pendency was discharged. The fee owner demonstrated “that it did not give its consent directly to the plaintiff for the work plaintiff performed for the [fee owner’s] tenant.” *Matell Contracting Co., Inc. v. Fleetwood Food Corp.*, decided May 16, 2014, was posted on March 2, 2015 at http://www.courts.state.ny.us/reporter/pdfs/2014/2014_33467.pdf.

Mortgage Foreclosures

The Plaintiff in a mortgage foreclosure moved for confirmation of the referee’s report computing the amounts due and for issuance of a judgment of foreclosure and sale. The Defendant-mortgagor claimed that the referee’s report should not be confirmed since she was not given notice of the hearing held by the referee and an opportunity to be heard at the hearing. The Supreme Court, Suffolk County, granted the Plaintiff’s motion. A discharge of the Defendant in bankruptcy purportedly released her from her obligation to pay any deficiency. “The defendant’s jural interest in the computations of the referee was thus eradicated by her conduct in pursuing the discharge and gives rise to a waiver [of her right to notice of the hearing by the referee to compute] and/or estoppel of any right to a hearing on the matters referred.” *Onewest Bank, FSB v. Rojas*, decided March 12, 2015, is reported at 2015 WL 1241348.

Mortgage Foreclosures/Election of Remedies

A separate note and mortgage were executed for each of a construction loan, a line-of-credit loan, and a revolving credit loan. An Action to foreclose the three mortgages was discontinued “without prejudice” against a Defendant which had guaranteed the revolving credit loan. The Plaintiff then filed a supplemental summons and amended verified complaint to foreclose only on the mortgages securing the construction and line-of-credit loans. To settle, the Plaintiff accepted a deed in lieu of foreclosure. The Plaintiff then sued to recover on the guarantee of the revolving credit loan.

The Supreme Court, Orange County, granted the Defendant-Guarantor’s motion to dismiss the complaint as to him, holding that the Action against the Guarantor was barred by Real Property Actions and Proceedings Law (“RPAPL”) Section 1301 (“Separate action for mortgage debt”), subsection 3 of which states that “[w]hile the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.” The Supreme Court also held that the Action against the Guarantor was barred by RPAPL Section 1371 (“Deficiency judgments”), subsection 3, which states that “[i]f no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.” The Appellate Division, Second Department, reversed the Order of the lower court and denied the Defendant-Guarantor’s motion to dismiss the complaint.

According to the Appellate Division, “...the prior foreclosure action was settled and discontinued, without the entry of any judgment. Since the foreclosure was not pending at the time the Bank commenced the instant action to recover on the guarantee and no judgment was entered for the Bank, RPAPL 1301(3), which must be strictly construed [citation omitted], is not applicable.” Further, RPAPL Section 1371(3) “has no applicability where, as here, no foreclosure sale was conducted.” *Hometown Bank of Hudson Valley v. Colucci*, dated April 1, 2015, is reported at 2015 WL 1447908.

Mortgage Foreclosures/Standing

An Action to foreclose a mortgage was commenced by PNC Bank, National Association, the successor to the original lender as the result of a series of mergers. The Defendant asserted that Plaintiff PNC lacked standing. The Supreme Court, Rockland County, rejected the Defendant’s defense of lack of standing and granted the Plaintiff’s motion for summary judgment. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division, “[c]ontrary to the [Defendant’s] contention, the merger of the various banking entities obviated the need for any assignment of the mortgage and note, as PNC and its predecessors have continuously possessed the mortgage and note.” *PNC Bank National Association v. Klein*, decided February 25, 2015, is reported at 125 A.D.3d 953 and 2015 WL 774579.

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Mortgage Foreclosures/Syndications

Plaintiffs commenced an Action for an accounting and for breach of fiduciary duty against The Bank of New York Mellon, N.A., as Trustee of the REMIC Trust to which the Note and the deed of trust on their property in Washington State were assigned for securitization. They claimed that the securitization of the mortgage created a partnership or agency relationship with the Trustee and that they were entitled to an accounting of profits received from the securitization. The Plaintiffs also alleged that the Trustee breached a fiduciary duty owed to the Plaintiffs. The Supreme Court, New York County, granted the Defendant's motion to dismiss the complaint.

According to the Court, although a partnership can be established by the "conduct, intention, and relationship between the parties" [citation omitted], there was no promise made and no action taken between the parties to share profits or help fulfill any losses. Further, as to the claim of an agency relationship, "[p]laintiffs allege no facts that show they established any control over BNY Mellon or allowed BNY Mellon to act on their behalf in any securitization of their mortgage." Without a partnership or an agency relationship, the Trustee did not owe a fiduciary duty to the Plaintiffs and the Plaintiffs were not entitled to any accounting. *Melville v. Bank of New York Mellon, N.A.*, 2015 NY Slip Op 30402, was decided on March 11, 2015 and is posted at http://www.courts.state.ny.us/reporter/pdfs/2015/2015_30402.pdf.

Tax Sales

The Appellate Division, First Department, affirmed an Order of the Supreme Court, New York County, which denied a motion by the holders of a mortgage being foreclosed to vacate the judgment entered in an In Rem Tax Foreclosure and to reverse the transfer of the property by tax deed to the Neighborhood Restore Housing Development Fund, and which dismissed the complaint as against The City of New York and Neighborhood Restore. Neighborhood Restore was designated by the Department of Housing Preservation and Development under Administrative Code Section 11-412.1 ("Special procedures relating to final judgment and release of class one and class two real property") to take title by the tax deed.

The Appellate Division held that The City of New York was not required to provide the foreclosing Plaintiffs with notice of the tax foreclosure since they did not follow procedures under the Administrative Code which would have required that they be mailed notice. Under Code Section 11-406(c) ("Public notice of foreclosure"), "[o]n or before the date of the first publication of [notice of the tax foreclosure], the commissioner of finance shall cause a copy of the notice to be mailed to all owners, mortgagees, lienors or encumbrancers, who may be entitled to receive such notice by virtue of any owner's registration or in rem card filed in the office of the city collector pursuant to section 11-416 or 11-417 of this chapter. If such owner's registration or in rem cards have not been filed in the office of the city collector then said notice shall be mailed to the name and address, if any, appearing in the latest annual record of assessed valuations..." *244 Lenox Avenue LLC v. Bazelais*, decided March 24, 2015, is reported at 2015 WL 1292760.

First American News

An article, "A Primer on New York's Mortgage Recording Tax", by Michael J. Berey, was published in the Spring 2015 N.Y. Real Property Law Journal, a publication of the Real Property Law Section of the New York State Bar Association. See <http://www.firstamny.com/detail.aspx?id=230&mid=20234>.

Michael J. Berey

Senior Underwriting Counsel

Reporting Current Developments since 1997

No. 165; April 21, 2015

mberey@firstam.com