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NATIONAL COMMERCIAL SERVICES

Current Developments

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

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Condemnation

The Supreme Court, Onondaga County, denied the plaintiff's motion for summary judgment in an action to foreclose two mortgages. The City of Syracuse Industrial Development Agency then acquired the mortgaged premises pursuant to eminent domain. The Appellate Division, Fourth Department, dismissed the appeal of the lower court's Order. Since all interests in property are extinguished by the vesting of title in a condemnation proceeding, "[t]he relief sought by plaintiff in the motion, i.e., appointment of a receiver and foreclosure of the mortgages, is no longer available, and the appeal must therefore be dismissed as moot." Financitech, Ltd. v. GML Syracuse LLC, dated June 12, 2015, is reported at 2015 WL 3649681

Condominiums & Cooperatives

New York State's Department of Law's Real Estate Finance Bureau issued Memoranda, posted at http://www.ag.ny.gov/real-estate-finance-bureau/hot-topics regarding "Occupied Buildings and Part 20 ['Newly Constructed, Vacant or Non-Residential Condominiums'] Offerings", "N.Y. Real Prop. Tax Law Section 421-a" ["Exemption of new multiple dwellings from local taxation"], and "Tenant Buyouts".

Contracts of Sale/Merger

The purchaser of property at auction from the County of Albany sought to recover for damage to the property alleged to have occurred between the date on which the contract was executed and the date on which title was transferred. The Supreme Court, Albany County, granted the Defendant County's motion to dismiss the complaint and the Appellate Division, Third Department, affirmed. According to the Appellate Division, "the terms and conditions of the auction provided that the sale would be governed by the Uniform Vendor and Purchaser Risk Act [UVPRA, General Obligations Law Section 5-1311]…However, there was no indication that the plaintiff's rights under the UVPRA [to recover money paid toward the purchase price under certain circumstances] would survive transfer of title…Therefore, any rights that plaintiff may have asserted under the UVPA were extinguished when title was transferred to plaintiff." Burkins & Foley Trucking and Storage, Inc. v. County of Albany, decided June 18, 2015, is reported at 2015 WL 3767294.

Contracts of Sale/Merger

The contract for the sale of a 115 unit residential apartment building provided that the purchaser would take the property "in the condition existing on the closing date, subject to faults of every kind and nature whatsoever whether latent or patent and whether now or hereafter existing." In addition, under the contract, the seller represented and warrantied that there were no actions or proceedings pending or threatened which could have a material adverse effect on any portion of the property, that the seller had received no written notice "of any claims…by any tenant with respect to its Lease", and that the seller had delivered to the purchaser "true and complete copies" of all documents "used by Seller in the operation of the Property." The representations and warranties were to survive for a period of nine months following the closing, but the plaintiff was not entitled to rely on any representation made by the seller "to the extent…[the purchaser] shall have or obtain current, actual conscious knowledge…of facts contradictory to such representation or warranty."

On February 28, 2011, the day before the closing, the purchaser's representative was presented with a letter dated January 26, 2011 from tenants in the building, purportedly sent to the seller's property manager, complaining of excessive heating bills, excessive air infiltration and inadequate heating. The seller's managing member advised the purchaser by email that issues with the heating units and apartment window/door assemblies had been repaired. An escrow in the amount of $175,000 was arranged at closing for any remaining remedial work.

An architectural firm retained by the purchaser after the closing reported that the building had no insulation and there were gaps within the interior walls between the sheetrock and the slab. The purchaser then commenced an Action against the seller, the seller's managing agent, managing member and manager, asserting that the seller breached the representations it made in the contract by failing to turn over correspondence with tenants. The purchaser also

asserted causes of action for fraud, fraudulent concealment and fraudulent misrepresentation. The Supreme Court, New York County, denied the Defendants' motion to dismiss, holding that the "merger doctrine" did not apply due to the latent nature of the problems with the building, and that the nine-month limitations period in the contract was "equitably tolled" due to the defendants' concealing problems with the building's air filtration system.

The Appellate Division, First Department, declined to adopt the latent defect exception to the merger doctrine. However, it affirmed the lower court's denial of the defendants' motion to dismiss, as modified to dismiss as being time-barred the causes of action for breach of contract and to pierce the corporate veil to hold the seller's managing member and manager subject to damages. That the contract provided that the purchaser was to take title to the property "as is" did not bar the claim that the representations made by the seller were breached. "…[T]he three specific representations which plaintiff alleges were breached trump the 'as is' clause. To the extent that plaintiff asserts fraud claims not directly related to the three surviving representations, the merger doctrine still does not apply."

The Appellate Division noted that under the contract of sale the plaintiff could undertake "without limitation…surveys, engineering studies and environmental investigations" of the building. Whether it was practical for the plaintiff to perform testing which would have revealed the defects alleged to exist in the building before closing was an issue for the trier of fact. TIAA Global Investments, LLC v. One Astoria Square LLC, decided March 3, 2015, is reported at 127 A.D.3d 75 and 2015 WL 868157.

Election of Remedies

Under Real Property Actions and Proceedings Law ("RPAPL") Section 1301("Separate action for mortgage debt") provides that "[w]hile an action is pending or after final judgment for the plaintiff therein [in a mortgage foreclosure], 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 Appellate Division, Second Department, affirmed an Order of the Supreme Court, Nassau County, denying a motion to dismiss an action to recover on a promissory note when the proceeding commenced by the plaintiff's assignor to foreclose on the mortgage note was "effectively abandoned". According to the Appellate Division,

> "[t]he record supports the conclusion that the plaintiff's assignor, the former mortgagee, effectively abandoned its prior action to foreclose the mortgage because its status as a junior mortgagee made it improbable that foreclosure would satisfy the underlying debt. Although the foreclosure action was not formally discontinued, the effective abandonment of that action is a 'de facto discontinuance' which militates against dismissal of the present action.… [citation omitted] Allowing the plaintiff to pursue this action on the note, which was commenced more than four years after the foreclosure action was effectively abandoned, is not inconsistent with the purpose of RPAPL 1301(3)…."

The Appellate Division also held that dismissal of the action was not warranted under Civil Practice Law and Rules Section 3211 ("Motion to dismiss"), subsection (a)(4), allowing for an action to be dismissed when "there is another action pending between the same parties for the same cause of action…" The mortgage foreclosure was commenced by the plaintiff's assignor, and the plaintiff was not a party to the foreclosure. Old Republic National Title Insurance Company v. Conlin, dated June 10, 2015, is reported at 2015 WL 3604845.

Mortgage Foreclosures/Common Charge Liens

RPL Section 339-z ("Lien for common charges") provides that "[t]he Board of Managers, on behalf of the unit owners, shall have a lien on each unit for unpaid common charges thereof, with interest thereon, prior to all other liens except…(ii) all sums unpaid on a first mortgage of record." As reported in Current Developments dated November 10, 2014, the Appellate Division, Second Department, held in Plotch v. Citibank, N.A., reported at 992 N.Y.S.2d 114, that under Section 339-z a consolidated mortgage on a condominium unit has priority over a common charge lien. The Appellate Division, Second Department, has again held in Plotch v. US Bank National Association, decided June 10, 2015 and reported at 2015 WL 3604574, that a consolidated mortgage is a first mortgage lien against a condominium unit "within the ambit of the statutory priority accorded to all sums unpaid on a first mortgage of record over a lien

for unpaid common charges". Leave to appeal the decision in Plotch v. Citibank, N.A. was granted by the Court of Appeals on May 5, 2015 (25 N.Y.3d 905).

Mortgage Foreclosures/Deficiency Judgments

Subsection 2 of RPAPL Section 1371 ("Deficiency judgment") provides that "[u]pon [a motion for leave to enter a deficiency judgment] the court…shall determine, upon affidavit or otherwise as it directs, the fair and reasonable market value of the mortgaged premises…and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owed by the party liable…plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action..., less the market value as determined by the court or the sales price of the property whichever shall be the higher." (Emphasis added)

In Flushing Savings Bank, FSB v. Bitar, the Supreme Court, Kings County, granted the plaintiff's motion to confirm the referee's report of the foreclosure sale, but the Court denied the plaintiff's motion for a deficiency judgment, holding that the Plaintiff failed to establish the fair market value of the premises. It found that a four-paragraph affidavit from the plaintiff's appraiser was "conclusory" and lacked "any specific information regarding how he reached his fair market value determination." The Appellate Division, Second Department, affirmed and the Court of Appeals affirmed, as modified, the Appellate Division's Order. The Court of Appeals remitted the matter to the Supreme Court for further proceedings consistent with its ruling.

While the Court of Appeals agreed that "…the appraiser's affidavit consisted of little more than conclusory assertions of fair market value, and, therefore, Supreme Court properly refused to accept the appraiser's valuation", it held that the "Supreme Court should have permitted [the plaintiff] to submit additional proof establishing fair market value." The requirement in RPAPL Section 1371(2) that the Court "shall make an order directing the entry of a deficiency judgment" "is a directive … As such, when the court deems the lender's proof insufficient in the first instance, it must give the lender an additional opportunity to submit sufficient proof, so as to enable the court to make a proper fair market value determination." Flushing Savings Bank, FSB v. Bitar, decided June 4, 2015, is reported at 25 N.Y.3d 307.

Mortgage Foreclosures/Notice of Pendency

A mortgage foreclosure was commenced in 2008. The Supreme Court, Onondaga County, held that because proceeds of the mortgage loan were applied to take an acquisition loan mortgage by assignment the entire mortgage was subordinate to mechanics' liens. The Appellate Division, Fourth Department, affirmed and the plaintiff sought leave to appeal to the Court of Appeals. Pending action by the Court of Appeals, the parties consented to entry of a judgment of foreclosure, which was stayed pending resolution of the appeal. The notice of pendency for the foreclosure expired and was not extended.

The Court of Appeals dismissed the motion for leave to appeal. The stay of the foreclosure judgment was vacated and, on June 6, 2012, the property was sold at auction to The Hayner Hoyt Corporation. Twelve days later it resold the property to Symphony Tower LLC. The Chairman and Chief Executive Officer of The Hayner Hoyt Corporation was listed as the registered agent for Symphony Tower LLC on its initial filing with New York's Department of State.

The plaintiff again sought leave to appeal to the Court of Appeals which ruled, in a decision reported at 21 N.Y.3d 352, that the mortgage had priority over mechanics' liens to extent of the amount advanced to refinance the existing acquisition loan mortgage. (See Berey, "New York's Court of Appeals Rules on the Lien Law", posted at http://www.firstamny.com/group.aspx?id=133). The Court of Appeals remanded the case to the Supreme Court. The plaintiff moved for an Order vacating the Order confirming the Referee's deed and to direct a new foreclosure sale.

The Appellate Division, Fourth Department, reversing the Order of the Supreme Court, Onondaga County, granted the plaintiff's mortgage priority in the amount of the mortgage taken by assignment, plus interest, and ordered a new foreclosure sale, notwithstanding that the notice of pendency had expired and was not extended and the property had

been re-conveyed. According to the Appellate Division, "balancing of the equities in this case favors plaintiff."

> "The Court of Appeals declined to review this Court's order until after the foreclosure sale and order confirming the Referee's report of sale. Had plaintiff been able to appeal this Court's order initially…the priorities would have been established before any judicial sale occurred, and there would have been no need for subsequent litigation to set the sale aside. Moreover, Hayner Hoyt and Symphony, through its agent, had actual notice of the ongoing litigation and the potential risks in buying the property…such knowledge may be considered when balancing the equities in this case…We thus conclude that the prejudice sustained by Symphony does not outweigh the prejudice sustained by plaintiff…. Here, the judicial sale has been 'made the instrument of injustice' and must be set aside."

Altshuler Shaham Provident Funds, Ltd. v. GML Tower LLC, decided June 12, 2015, is reported at 2015 WL 3648304.

Mortgage Foreclosures/Notice to Tenants

Real Property Law ("RPL") Section 1303, as amended by Chapter 507 of the Laws of 2009, requires that a foreclosing mortgagee deliver to "any tenant of a dwelling unit" at the property encumbered by the mortgage a statutorily required form of notice, with the heading "Notice to Tenants in Buildings in Foreclosure". The notice is required to be delivered within ten days of the service of the summons and complaint and is to be delivered to each tenant of a building with fewer than five dwelling units by certified mail, return receipt requested and by first-class mail, if the identity of the tenant is known and, if not, by first-class mail delivered to "occupant". The notice also is to be posted on the outside of each entrance and exit of the building when the building has five or more dwelling units.

The Supreme Court, Kings County, dismissed an action to foreclose a mortgage because the plaintiff failed to comply with this notice requirement, notwithstanding that the tenants were not named as party defendants or served with the complaint. According to the Court, "[t]he failure to enforce the statute as written…would defeat the purpose of the legislation, to protect tenants who might not be otherwise aware of their rights or even of the pendency of the action." 650 Brooklyn LLC v. Hunte, decided February 5, 2015, is reported at 3 N.Y.S.3d 909.

Mortgage Foreclosures/Redemption

After entry of the judgment of foreclosure and sale the Defendants moved for an Order requiring that the Plaintiff provide a payoff statement. The Supreme Court, Kings County, denied the motion, and the Appellate Division, Second Department, affirmed. The mortgage did not afford a right to reinstate the loan and the mortgage and the mortgagor was not entitled to receive a payoff statement. Under RPL Section 274-a ("Certificate of principal amount unpaid on mortgages of real property"), there needs to be a "written contract to convey" [the property], or "….a written commitment to make a mortgage loan….", neither of which was presented. Flushing Savings Bank, FSB v. Toju Realty Corporation, decided June 24, 2015, is reported at 2015 WL 3875781.

Mortgage Foreclosures/Standing

New York's Court of Appeals, affirming the ruling of the Appellate Division, Second Department, held that the servicer under the Pooling and Servicing Agreement for a residential mortgage-backed securitization trust had standing to foreclose because it had taken physical delivery of the mortgage note four days before the foreclosure was commenced, notwithstanding that the validity of the assignment of the mortgage by MERS to the servicer was in dispute. According to the Court of Appeals,

> "…it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law. In the current case, the note was transferred to Aurora [the servicer] before the commencement of the foreclosure action-that is what matters.
>
> A transfer in full of the obligation automatically transfers the mortgage as well unless the parties agree that the

transferor is to retain the mortgage…[T]he argument that Aurora lacked standing because it did not possess a valid and enforceable mortgage as of the commencement of the action is simply incorrect. The validity of the August 2009 assignment of the mortgage [from MERS to Aurora] is irrelevant to Aurora's standing."

Aurora Loan Services, LLC v. Taylor, decided June 11, 2015, is reported at 2015 WL 3616293.

Mortgage Foreclosures/Standing

The Appellate Division, Second Department, reversed an Order by Justice Schack of the Supreme Court, Kings County, denying the foreclosing plaintiff's motion for an order of reference. The lower court held that the plaintiff lacked standing to foreclose and, sua sponte, dismissed the complaint with prejudice and canceled the notice of pendency. According to the Appellate Division, "[s]ince the defendants did not answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing…a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the court." The Appellate Division remitted the matter to the Supreme Court, Kings County, "for further proceedings on the complaint before a different Justice." US Bank National Association v. Flowers, decided May 20, 2015, is reported at 128 A.D.3d 951 and 2015 WL 2384031.

Parkland

As reported in Current Developments dated November 10, 2014, the Appellate Division, First Department, in Glick v. Harvey, reported at 999 N.Y.S.2d 118, reversed the ruling of the Supreme Court, New York County, which held that certain parcels of land used as playgrounds and gardens, to be transferred by New York City to New York University for the expansion of its campus, were public parkland that could not, under the public trust doctrine, be transferred without the approval of the State Legislature. The Appellate Division held that it had that not been shown "that the City's acts and declarations manifested a present, fixed and unequivocal intent to dedicate any of the parcels at issue as public parkland." The Order of the Appellate Division was affirmed by New York's Court of Appeals in Glick v. Harvey, in a decision dated June 30, 2015 and reported at 2015 WL 3948188. According to the Court of Appeals, "[p]etitioners did not establish the City's unequivocal intent to dedicate this municipal property [as permanent parkland], as there was evidence that the City intended the uses to be temporary, with the parcels to remain under the City's control for possible alternative future uses."

Parkland

Reversing the ruling of the Supreme Court, Queens County, the Appellate Division, First Department, held that New York City's leasing of a parking area in Flushing Meadows Park adjoining Citi Field for construction of a retail entertainment center without state legislative approval violated the public trust doctrine and the Court enjoined taking further action toward its construction. The public trust doctrine requires "the direct and specific approval of the State Legislature, plainly conferred" to use dedicated park areas for other than park purposes. [Citation omitted]

The Appellate Division interpreted New York City Administrative Code Section 8-118 ("Renting of stadium in Flushing Meadow Park…") as authorizing the land to be used for a purpose "associated with the stadium and the necessary and natural appurtenances to it." "No reasonable reading of Administrative Code Section 18-118 allows for the conclusion that the legislature in 1961 contemplated, much less gave permission for, a shopping mall, unrelated to the anticipated stadium [then Shea Stadium], to be constructed in the Park." Avella v. The City of New York, decided July 2, 2015, is reported at 2015 WL 3999296.

Right of First Refusal/"Stranger to the Deed"

Generally, under case law in New York, "'a deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed', does not create a valid interest in favor of that third party" [citation omitted]. The rule has been applied to the creation of an easement, for which the dominant and servient parcels must have a common grantor, and to the reservation of a life estate, but not to a restrictive covenant imposed by a deed. The Appellate Division, Third Department, in Basile v. Rose, reported at 7 N.Y.S.3d 664, held that the rule applies to

reservations and exceptions from conveyances, not to the grant of a remainder interest in real property.

Two parcels in East Hampton were conveyed by deeds which recite that the grants were subject to a right of first refusal ("ROFR") exercisable by each of four individuals who were not the grantors, collectively identified as the "Smolian Family." The ROFR was to remain in effect so long as the Smolian Family owned a certain filed map lot. The Supreme Court, Suffolk County, held that the right of first refusal was not subject to the so-called "stranger to the deed" rule. According to the Court,

> "…an exception or reservation to a third person not a party to the deed is void and is ineffectual to convey any interest or estate whatsoever in the lands described to a stranger to the conveyance [citation omitted]. However,… the right of first refusal, which is repeatedly set forth in the deeds in question, does not constitute an exception or reservation….The fact that the preemptive right is contained in an instrument of record does not change the fundamental contractual nature of the preemptive right. It embodies a contract right – the right to purchase – and the fact that the world is given notice of this right in a recorded deed, simply prevents any other buyer from claiming the equities of an innocent third party purchaser."

The Court further held that the ROFR did not violate the rule against perpetuities or the rule against remote vesting. The right was exercisable by four named individuals, measuring lives for application of the rules, the ROFR was exercisable so long as the Smolian Family owned a certain filed map lot, and the ROFR had to be exercised, on the same terms as would be contained in an offer to purchase, within ten days of the date on which notice of an offer was mailed to the Smolian Family. Peters v. Smolian, decided June 25, 2015, is reported at 2015 WL 3936142.

Statute of Limitations/Promissory Notes

In 1992, the defendant, the obligor under notes executed in 1990 and 1991, executed an additional note and a standby agreement in which the plaintiff agreed not to enforce the earlier two notes until the obligation evidenced by the 1992 note was paid in full. In 2005, the defendant executed a consolidated note and an agreement consolidating and extending the related mortgages. The plaintiff commenced an action in 2013 seeking to recover amounts due under the notes. The Supreme Court, Clinton County, granted the defendant's cross-motion to dismiss, holding that the six-year statute of limitations to enforce the notes under Civil Practice Law and Rules Section 213(2) ("Actions to be commenced within six years…") had elapsed before the action was commenced. The Court further ruled that the CEMA executed in 2005 extinguished the 1992 note and mortgage, released the plaintiff from his standby obligations, starting the statute of limitations running again.

The Appellate Division, Fourth Department, modified on the law the Order of the lower court and, as so modified, affirmed. According to the Appellate Division, the CEMA did not operate to extinguish the 1992 note. "[T]he plain language of the CEMA does not support Supreme Court's conclusion that the CEMA extinguished the 1992 note and thereby recommenced the running of the statute of limitations... 'Where, as here, balances of first mortgage loans are increased with second mortgage loans and CEMAs are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist.'" [Citation omitted] Bechard v. Monty's Bay Recreation, Inc., decided June 4, 2015, is reported at 2015 WL 3495348.

Transfer Tax/New York State

An Advisory Opinion dated May 12, 2015, issued by the Office of Counsel, Advisory Opinion Unit of the New York State Department of Taxation and Finance, takes the position that the transfer of a unit in a newly constructed two-unit condominium to each of the two members of the LLC owning the property is exempt from transfer tax as a mere change of identity or form of ownership when each member's ownership interest in the unit it receives equates to each member's original ownership interest under the LLC's operating agreement.TSB-A-15(2)R is posted at http://www.tax.ny.gov/pdf/advisory_opinions/real_estate/a15_2r.pdf.

Zoning/Development Rights

Agreements transferring development rights did not specify the quantity of development rights intended to be transferred. The defendant-developer's property, to which the development rights were transferred, submitted an application to the Buildings Department which, based on a surveyor's computation of unused floor area in the transferor's building, did not account for floor space attributable to a mezzanine level. The plaintiff sought an Order requiring the transferee to submit an application to the Buildings Department that did not incorporate development rights utilized on the plaintiff's property. The Supreme Court, New York County, in a decision reported at 997 N.Y.S.2d 668 and in Current Developments dated September 12, 2014, granted the defendant's motion to dismiss, except as to causes of action to compel the defendant to file corrective documents with the Buildings Department. The Appellate Division, First Department, in a decision reported at 2015 WL 2185183, reinstated causes of action for declaratory relief, breach of contract and monetary damages. The plaintiff then filed an amended complaint.

The defendant filed an answer asserting counterclaims against the plaintiff and its sole member ("Drucker"). The Supreme Court, New York County, granted the plaintiff's motion to dismiss the defendant's counterclaims for fraud, negligent misrepresentation, reformation of the contract, and, with leave to replead, breach of contract. The defendant's counterclaim for declaratory relief was not dismissed. The plaintiff's request for sanctions was denied.

As to the counterclaim for fraud, the defendant sought to recover for its having overpaid for development rights that were available to be transferred, and damages resulting from its building having included development rights attributable to the mezzanine level in the plaintiff's building. However, the contract for the sale of the development rights stated that the seller made "no representation as to the number of square feet of floor area" that were transferable and the purchaser acknowledged that the "seller has made no representations regarding the amount of the Excess Development Rights…" The Court held that Drucker could invoke the protection of these disclaimers "since he signed the agreements as a member and representative of [the transferor] and not in his individual capacity."

Further, as to the counterclaim for fraud, two publicly filed certificates of occupancy ("COs") indicated the existence of a mezzanine level in the transferor's building, and the transfer tax return ("RPTRR") signed by the plaintiff and the defendant set forth an amount of square footage for the transferor's building different from what was reported by the surveyor. According to the Court, "with the existence of the COs and RPTTR available to [the defendant] prior to the closing of the transaction it's clear that [the defendant] should have done more due diligence as a sophisticated investor in an arm's length transaction to ascertain the facts regarding the amount of development rights, existence of a mezzanine, and actual square footage prior to the closing."

As to the counterclaim for a declaration that the square footage of the mezzanine did not properly constitute "Utilized Development Rights" under the Zoning Lot and Development Agreement executed between the parties and the development rights transferred were not reduced by the square footage attributable to the mezzanine, the Court held that "[s]ince the parties are in dispute as to whether the New York City Zoning Resolution applies to the mezzanine, the Court's intervention is needed to interpret what constitutes Utilized Development Rights under New York regulation and the ZLDA agreement…"

As to the counterclaim for breach of contract, the defendant "failed to allege how the violation has damaged its interests or that of the Developer Parcel." The defendant was granted leave to replead this cause of action. Harmit Realties LLC v. 835 Avenue of the Americas, L.P., decided June 2, 2015, is posted at http://www.courts.state.ny.us/reporter/pdfs/2015/2015_30931.pdf

Michael J. Berey

Senior Underwriting Counsel

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mberey@firstam.com