First American Title™
NATIONAL COMMERCIAL SERVICES

Current Developments

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

No. 170; November 16, 2015

Condominiums/Common Charge Lien Foreclosures

Summary judgment was granted to a Board of Managers which was foreclosing the condominium's lien for allegedly unpaid common charges, assessments, electric charges, late fees and attorneys' fees. The By-Laws of the condominium authorized the Board to collect late fees of $0.04 per dollar for sums unpaid for more than ten days and to set alternative late fees without amending the condominium's By-Laws. The Board passed a resolution authorizing the imposition of a late fee of up to $800 per month and, pursuant to that resolution, the Defendant was charged late fees of between $200 and $800 per month on common charges as much as $1,217.20 per month. The Supreme Court, New York County, held that some of the late fees charged "significantly exceeded the usury rate, they are unreasonable and confiscatory in nature, and cannot be enforced." The referee was directed by the Court to limit late fees to $0.04 per dollar owed when computing amounts due. The Board of Managers of the Park Avenue Court Condominium v. Sandler, decided September 11, 2015, is reported at 48 Misc.3d 1230 and 2015 WL 5313757.

Condominiums & Cooperatives

The New York State Department of Law's Real Estate Finance Bureau has issued the following Memoranda: "Procedure for Submitting a Price Change Only Amendment for Consideration Prior to Acceptance of a Pending Substantive Amendment" (September 16, 2015); "Certificates of Occupancy and Part 20 Offering Plans" (October 13, 2015), "Information for Submitters of Descriptions of Property" (Part 20.7, "Description of Property and Specifications of Building Condition"), (October 14, 2015); and "Information for Submitters of Descriptions of Property" (Part 23.7, "Description of Property and Building Condition"), (October 14, 2015). The Memoranda are posted at http://www.ag.ny.gov/real-estate-finance-bureau/hot-topics.

Contracts of Sale

Property was conveyed pursuant to a contract of sale under which Purchaser was required to seek local Planning Board approval to subdivide the property and transfer part of the land designated as the "Mayer Homestead" back to the Seller. A lease to the Seller afforded the Seller the option to create a separate lot consisting of the Mayer Homestead if the Purchaser failed to obtain subdivision approval; if approval was obtained the Purchaser would convey the Mayer Homestead to the Seller for one dollar. The Town enacted a temporary moratorium on subdivisions and the local Zoning Code was thereafter amended in a manner which did not allow for the Purchaser's original subdivision plan. The Purchaser proposed an alternative plan, unacceptable to the Seller, which would have impacted part of the Mayer Homestead.

The Purchaser commenced an Action to rescind the contract on the basis of impossibility of performance. The Seller counterclaimed that the Seller was entitled to specific performance, and sought a ruling that it was entitled to subdivide the property to create a separate lot consisting of the Mayer Homestead and exercise its right to acquire title under the lease. The Supreme Court, Orange County, denied motions by the parties for summary judgment. The Appellate Division, Second Department, remitted the case for entry of a judgment that the Purchaser was entitled to exercise its option to have the property subdivided as provided in the lease.

According to the Appellate Division, "…a party seeking to rescind a contract [on the grounds of the impossibility of performance] must show that the intervening act was unforeseeable, even if the intervening act consisted of the actions of a governmental entity or the passage of new legislation. [Citation omitted] Here, [the Purchaser] did not show that it was unforeseeable that a change in the Town's Zoning Code would render it impossible to subdivide the property as originally planned, and did not raise a triable issue of fact in opposition to the [Seller's] showing that such a change was foreseeable." [Citations omitted] RW Holdings, LLC v. Mayer, dated September 30, 2015, is reported at 17 N.Y.S.3d 171.

Contracts of Sale

After the contract of sale was executed, the contract vendees learned that the property was subject to the Rent Stabilization Law ("RSL"). They alleged that the seller had advised them before the contact was entered into that they could evict the

tenants on the expiration of their leases and that the seller's real estate broker misrepresented or failed to disclose that the property was subject to the RSL They asserted that they would not have signed the contract of sale if they knew the property was subject to the RSL. They commenced an Action to recover their down payment and their attorney's fees.

The Supreme Court, Queens County, granted the Defendants' motion for summary judgment dismissing the complaint. According to the Court,

> "[the real estate broker] did not have a duty to disclose the rent stabilized status of the property under the doctrine of caveat emptor…Moreover, although defendants allegedly did not respond truthfully when questioned by plaintiffs about the rent stabilization status of the current tenants or leases, such status was a matter of public record, as established by the Registration Rent Rolls and copies of the existing leases annexed to the Additional Rider to the Contract…and was not information exclusively within the knowledge of defendants. [Citations omitted] Defendants thus established that they did not actively conceal such status from plaintiffs or otherwise thwart them from fulfilling their responsibilities in due diligence."

Verma v. Vanegas, decided September 18, 2015, 2015 NY Slip Op 31878, is posted at http://www.courts.state.ny.us/reporter/pdfs/2015/2015_31878.pdf.

Foreclosures/Cooperative Units

Under Civil Practice Law and Rules ("CPLR") Rule 3408 ("Mandatory settlement conference in residential foreclosure actions"), "[i]n any residential foreclosure action involving a home loan as defined in section 1304 of the Real Property Actions and Proceedings Law ["RPAPL"], in which the defendant is a resident of the property subject to foreclosure… the court shall hold a mandatory conference...for the purpose of holding settlement discussions…" A "home loan" is defined in RPAPL Section 1304 as being a loan to a natural person primarily for personal, family or household purposes "…secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling or a condominium unit, in either case, used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling."

The Plaintiff sought an Order staying the Defendants from foreclosing on the loan secured by her cooperative unit. She claimed that she did not receive notice of the foreclosure sale as required by Uniform Commercial Code Section 9-611(f) ("Additional pre-disposition notice for cooperative interests"), and that a mandatory settlement conference had not be held as required by CPLR Rule 3408. The Supreme Court, Nassau County, stayed any sale pending service of a notice complying with Section 9-611(f) but denied that part of the Plaintiff's motion to direct the holding of a settlement conference. The Appellate Division, Second Department, affirmed the ruling of the lower court.

According to the Appellate Division, "RPAPL 1304 does not include, in its definition of 'home loan', a loan secured by shares of stock and a proprietary lease from a corporation formed for the purpose of cooperative ownership in real estate…Accordingly, because the subject loan is not a home loan within the meaning of RPAPL 1304, the plaintiff is not entitled to a mandatory settlement conference pursuant to CPLR 3408." DaCosta-Harris v. Aurora Bank, FSB, decided September 23, 2015, is reported at 17 N.Y.S.3d 156.

Indian Land Claims/Shinnecocks

As previously reported in Current Developments, a lawsuit was filed in the United States District Court for the Eastern District of New York by the Shinnecock Indian Nation (the "Nation") against the State of New York, George E. Pataki, individually and as Governor, the County of Suffolk, the Town of Southampton, the Trustees of the Proprietors of the Common and Undivided Lands of the Town of Southampton in the Town of Southampton (the "Trustees"), the Trustees of the Freeholders and Commonality of the Town of Southampton, and eleven other corporate Defendants. The Nation alleged that property owned by the Nation in the Town of Southampton was unlawfully conveyed in 1859 to the Trustees in violation of the federal Indian Non-Intercourse Act then in effect. The Action sought a declaration that the Nation has possessory rights in the lands in question (the "Subject Lands"), a declaration that the Subject

Lands were conveyed in violation of federal law, a declaration that the interests of the Defendants in the Subject Lands are null and void, an Order restoring the Nation to possession of those portions of the Subject Lands to which the Defendants claim title, and damages.

The case was dismissed by the District Court in Shinnecock Indian Nation v. The State of New York, reported at 2006 WL 3501099. Relying on the holdings of the United States Supreme Court in City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) and of the Second Circuit Court of Appeals in Cayuga Indian Nation of New York v. Pataki, 413 F. 3d 206 (2005), the Court held that the Plaintiff's claims were barred by equitable considerations, including the defense of laches. According to the Court, "…the wrongs about which the Shinnecocks complain are grave, but they are also not of recent vintage, and the disruptive nature of the claims that seek to redress these wrongs tips the equity scale in favor of dismissal". The decision of the District Court has been affirmed by the United States Court of Appeals, Second Circuit, in a decision dated October 27, 2015 and reported at 2015 WL 6457789.

Lien Law

The Plaintiff commenced an Action to foreclose its mechanic's lien. The Supreme Court, Suffolk County, dismissed the complaint because the notice of pendency for the Action had expired. The Appellate Division, Second Department, reversed the ruling of the lower court. According to the Appellate Division, under the Lien Law "the Supreme Court had the authority to retain the action and award a money judgment even though the lien had expired." Under Lien Law Section 17 ("Duration of Lien"), "[t]he failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person." Aluminum House Corp. v. Demetriou, decided September 16, 2015, is reported at 16 N.Y.S.3d 303. "

Mortgage Foreclosures

In October 2009, a mortgage foreclosure was commenced to enforce a mortgage on property owned by two joint tenants. One of the joint tenants, the obligor on the note secured by the mortgage, died in 2010; the Supreme Court, Kings County, stayed all proceedings pursuant to CPLR Section 1015(a) ("Substitution upon death") which provides that "[i]f a party dies and the claim for or against him is not thereby extinguished the court shall order substitution of proper parties." The Plaintiff's motion to vacate the Court's Order was denied. The Appellate Division, Second Department, affirmed.

According to the Appellate Division, if the "plaintiff [had] either discontinued the action as against the deceased defendant or elected not to seek a deficiency judgment against the deceased defendant's estate, the deceased defendant would not be a necessary party to the action" because his interest had passed to the joint tenant. Here, however, the Plaintiff did not move to substitute a representative for the decedent's Estate, discontinue the action as against the decedent or represent that it would not seek a deficiency judgment against the Estate. U.S. Bank National Association v. Esses, decided October 21, 2015, is reported at 2015 WL 6160224.

Mortgage Foreclosures/Election of Remedies

A proceeding to recover on a note secured by a mortgage was brought before the commencement of an Action was commenced to foreclose the mortgage. The Supreme Court, Kings County, dismissed the complaint in the mortgage foreclosure for the failure to comply with RPAPL Section 1301.

Under RPAPL Section 1301(1) ("Separate action for mortgage debt"), "[w]here final judgment for the plaintiff has been tendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant…has been returned wholly or partially unsatisfied." Under Section 1301(3), an action at law to recover any part of the mortgage debt may not be commenced without leave of court while a foreclosure is pending.

The Appellate Division, Second Department, reversed and remitted the case to the Supreme Court for further consideration of the Plaintiff's motion for summary judgment. According to the Court, "the plaintiff commenced an action,

inter alia, for replevin first and, thereafter, commenced this foreclosure action. As such, RPAPL 1301(1) and not RPAPL 1301(3), applies to this matter. However, since no final judgment has been entered in the replevin action, RPAPL 1301(1), by its own terms, does not preclude the commencement of this foreclosure action against the defendants." VNB New York Corp. v. Paskesz, decided September 30, 2015, is reported at 131 AD.3d 1235 and 2015 WL 5706942.

Mortgage Foreclosures/Standing

A condominium unit on which a mortgage was being foreclosed was acquired by the condominium's Board of Managers. The foreclosing Plaintiff's motion for summary judgment was denied and the Board's motion for summary judgment dismissing the case for lack of standing was granted without prejudice. The Appellate Division, First Department, affirmed. According to the Appellate Division, the assignment of the note and mortgage to the Plaintiff by New Century Mortgage Corporation took place after the effective date of New Century's bankruptcy plan which terminated its officers and placed its assets into a liquidating trust. The Board of Managers, as the owner of the Unit, had standing to challenge any element of the Plaintiff's claims. Deutsche Bank National Trust Company v. Tanibajeva, decided October 6, 2015, is reported at 2015 WL 5794050.

Recording/Ulster County

The New York State Land Title Association reported the following information received from the Office of the Ulster County Clerk: "Beginning January 1, 2016, we [the Ulster County Clerk's Office] will ONLY be accepting the electronic version of the RP-5217 form [the Office of Real Property Tax Services Real Property Transfer Report] for filing with any deed transaction and we will no longer be accepting the hand written or typed carbon copy forms." For further information see https://www.tax.ny.gov/research/property/assess/rp5217/index.htm.

Right of First Offer

An amendment to a lease between the Zionist Organization of American ("ZOA"), as landlord, and B. Boman & Co., Inc. ("Boman"), as tenant, granted Boman a right of first offer ("ROFO") to purchase the property "if [ZOA] desires to sell the Premises." The ROFO expired on expiration of the lease, provided that a mortgage loan made to ZOA by an affiliate of Boman had been satisfied. The loan was satisfied, and the lease as extended expired on January 31, 2014. Bowman remained in possession as a month-to-month tenant until September 30, 2014.

In December 2013, ZOA requested an appraisal to value the property and the property was marketed for sale on February 12, 2014. On August 6, 2014, ZOA's Board of Directors by resolution authorized the sale of the building. On August 6, 2014, ZOA entered into a contract to sell the building to a third-party purchaser. On October 3, 2014, Boman commenced an Action seeking a judgment that its ROFO was enforceable and enjoining ZOA from selling the property. ZOA moved to dismiss the complaint, arguing that the ROFO expired when Boman's lease expired. The Supreme Court, New York County, granted the motion to dismiss.

The Court held that the right of first offer terminated when the lease expired. According to the Court, a ROFO (as well as a right of first refusal) in a lease only continues to benefit a tenant remaining in possession after the expiration of its lease as a month-to-month tenant only if the ROFO is "expressly reaffirmed in a month-to-month tenancy." In obtaining the appraisal, ZOA was only investigating the property's value for a potential sale; ZOA did not decide to sell the property until its Board of Directors passed a resolution authorizing the sale, which was after the lease expired. B. Boman & Co., Inc. v. Zionist Organization of America, decided September 25, 2015, 2015 NY Slip Op 31809, is posted at: http://www.courts.state.ny.us/reporter/pdfs/2015/2015_31809.pdf.

Right of First Refusal

A contract for the sale of real property executed in 1979 provided that the contract vendee "shall have the right of first refusal to purchase" 29 acres of land adjoining the property to be conveyed. Under the contract of sale the right of first refusal bound "the heirs, executors, and assigns" of the parties. The deed executed in 1980 by the seller, a Mr. Gilmore, set forth that the grantee had the right of first refusal to purchase the adjoining land. Mr. Gilmore died and left all of his real property to his wife, who was selling the adjoining land to a third party. She commenced an Action under RPAPL

Article 15 ("Action to compel the determination of a claim to real property") for a determination of whether the right of first refusal was still enforceable. She asserted that the right of first refusal was extinguished on the death of Mr. Gilmore because the deed did not expressly bind his heirs and assigns. The Supreme Court, Cayuga County, ruled that the Plaintiff owned the property in fee simple absolute and the Appellate Division, Fourth Department, affirmed.

According to the Appellate Division, the right of first refusal set forth in the 1979 contract of sale merged into the deed and the right of first refusal in the deed was extinguished on the death of Mr. Gilmore. The 1980 deed "did not purport to bind Mr. Gilmore's heirs and assigns." [Citations omitted] Gilmore v. Jordan, decided October 9, 2015, is reported at 2015 WL 5894541.

Usury

An Action was brought to recover on a promissory note for $52,900 "plus further additional sums" made by a Professional Limited Liability Company and guaranteed by certain individuals. The note charged an annualized interest rate of 60%, which is criminally usurious under Penal Law Section 190.40 ("Criminal usury in the second degree") and void under General Obligations Law Section 5-511 ("Usurious contracts void"). Accordingly, the Supreme Court, Suffolk County, dismissed the complaint. The Appellate Division, Second Department, affirmed, further holding that "a clause in the subject promissory note purporting to reduce the rate of interest to a non-usurious rate if the rate originally imposed was found to be usurious could not save the note from being usurious." [Citation omitted] Fred Schutzman Company v. Park Slope Advanced Medical, PLLC, decided May 27, 2015, is reported at 9 N.Y.S.3d 687.

In another case applying the defense of usury, the Supreme Court, Appellate Term, Second Department, in Russkaya Reklama, Inc. v. Milman, an Action to enforce a promissory note charging a usurious rate of interest, held that the "plaintiff was [not] entitled to recover the balance of the principal amount on the note based on its willingness, stated at oral argument, to waive interest on the loan." According to the Court, "the note, which [depending on its construction charged an annual interest rate of either 24% or 30%] was usurious on its face, was void and unenforceable from its inception." The case, decided March 30, 2015 is reported at 9 N.Y.S.3d 759.

Best wishes for the Holiday Season!

Michael J. Berey
Senior Underwriting Counsel

Reporting Current Developments since 1997
No. 170; November 16, 2015
mberey@firstam.com