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NATIONAL COMMERCIAL SERVICES

Current Developments

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Adverse Possession

A community garden, being used as such for thirty years on a parcel of land owned at different times by the various Defendants, is known as the Children's Magical Garden. The Garden was run by an unincorporated association of community activists until 2012 when they incorporated the Children's Magical Garden, Inc., a not-for-profit corporation, the Plaintiff in the Action. The Plaintiff sought, among other relief, a declaratory judgment that it had acquired title by adverse possession. The Defendants moved for summary judgment dismissing the complaint. The Defendants asserted that the Plaintiff did not adequately plead the necessary elements of adverse possession and that the Plaintiff did not have standing to bring the action. They further argued that the Plaintiff did not occupy the property for the period required to claim title by adverse possession and could not apply the "tacking" doctrine because the unincorporated association, in possession of the Garden before the Plaintiff was incorporated, could not acquire title.

The Supreme Court, New York County, denied the Defendants' motion, holding that the Plaintiff had standing and had adequately pled a cause of action for adverse possession. In addition, although the unincorporated association could not have acquired title, "[t]he Court of Appeals has held that an unincorporated association can adversely possess a parcel and then incorporate and take title to that property if the requisite requirements are met…" Children's Magical Garden, Inc. v. Norfolk Street Development, LLC, decided November 23, 2015, is posted at http://www.courts.state.ny.us/Reporter/pdfs/2015/2015_32227.pdf.

Condominiums

Among the Defendants were a Homeowners Association and the President of a Condominium. The Association moved to have the complaint dismissed, asserting that the condominium was a necessary party that had not been joined. Under Rule 3211(a)(10) of the Civil Practice Laws and Rules, a party may move for dismissal "in the absence of a person who should be a party." The Order of the Supreme Court, Richmond County granting the motion to dismiss was reversed by the Appellate Division, Second Department. According to the Appellate Division, "by commencing the action against…the president of the Condominium, the plaintiffs joined the Condominium", which is an unincorporated association that cannot sue or be sued in its name. Under General Associations Law Section 13 ("Action or proceeding against unincorporated association"), "[a]n action or special proceeding may be maintained, against the president or treasurer of such an association…" Pascual v. Rustic Woods Homeowners Association Inc., dated December 23, 2015, 2015 NY Slip Op 09415, is posted at http://www.courts.state.ny.us/reporter/3dseries/2015/2015_09415.htm.

Condominiums/Common Charge Liens

In the foreclosure of a lien for outstanding common charges and fees owed by the Defendant to the Condominium in which her unit is located, the Supreme Court, New York County, denied the Defendant's motion to dismiss. The Appellate Division, First Department, modified the lower court's order by granting the Defendant's motion to dismiss the cause of action claiming late fees for unpaid common charges, holding that the By-Laws of the Condominium do not provide for the charging of late fees for unpaid common charges. However, although the Defendant "recently" paid the common charges for which the lien had been filed, that was not sufficient to dismiss the action. According to the Appellate Division, "plaintiff is entitled to not only the amount claimed in the lien, but also the amount of unpaid common charges and fees that have accrued since the filing of the lien." Board of Managers of the Netherlands Condominium v. Trencher, decided May 7, 2015, is reported at 9 N.Y.S.3d 213.

Condominiums & Cooperatives

The New York State Department of Law's Real Estate Finance Bureau issued a "guidance document" dated January 8, 2016 regarding "Small Residential Building No-Action Letters". The Memorandum recites that it was issued "to clarify the procedures for Small Residential Building transactions giving rise to no-action treatment pursuant to the regulations." A Small Residential Building is "[a]ny building containing five or fewer units, with one or more of the units being zoned and designated for residential use." The Memorandum sets forth requirements when applying for no-action letters for "De Facto Condominiums" and "Tenant Sponsored Condominiums". The new procedures apply immediately and affect new

and pending applications before the Department. The Memorandum is posted at http://www.ag.ny.gov/pdfs/ref/Small_Residential_Building_No-Action_Letters.pdf.

In addition, 13 N.Y.C.R.R. Parts 18, 20, 21, 22, 23, 24 and 25 have been revised effective February 1, 2016 to, as stated in a guidance document issued December 9, 2015 by the Department of Law and updated on December 16, 2015, "require sponsors of cooperative interests in realty to submit to the Department of Law fewer Paper Copies of their Offering Plans and the Amendments and Exhibits thereto. Instead, sponsors must now submit one Paper Copy and one Digital Copy (defined below) of these documents." The Memorandum is posted at http://www.ag.ny.gov/pdfs/ref/12.16.15_Digital_Submission_Requirements_Guidance_Document.pdf.

Constructive Trusts

The Supreme Court, Queens County, in an action for ejectment, awarded judgment to the Defendant on her counterclaim to impose a constructive trust. The Appellate Division, Second Department, affirmed the Order of the lower court. The Defendant contributed money for the purchase of the property and for the making of mortgage payments in reliance on the Plaintiff's implied promise that the Defendant had an interest in the property.

The elements of a constructive trust are the existence of a fiduciary or confidential relationship, a transfer in reliance on an express or implied promise, and unjust enrichment. The Plaintiff contended that a constructive trust should not be imposed because the Defendant never had an interest in the property. However, according to the Appellate Division, "the constructive trust doctrine is not rigidly limited" and "a constructive trust is necessary in this case to satisfy the demands of justice." Liu v. Chen, decided November 12, 2015, is reported at 19 N.Y.S.3d 565.

Financial Crimes Enforcement Network ("FinCEN")

A FinCEN news release on January 13, 2016 announced that FinCEN had "issued Geographic Targeting Orders (GTO) that will temporarily require certain U.S. title insurance companies to identify the natural persons behind companies used to pay 'all cash' for high-end residential real estate in the Borough of Manhattan in New York City, New York, and Miami-Dade County, Florida." The GTOs will be effective March 1, 2016 and will expire on August 27, 2016. The news release is posted at https://www.fincen.gov/news_room/nr/pdf/20160113.pdf.

Lien Law

A notice of pendency for the foreclosure of a mechanic's lien was filed on October 13, 2009. Mechanics' liens filed by Defendants in the Action, which would have expired one year after their respective filing dates, were continued under Lien Law Section 17 ("Duration of lien") by the Plaintiff's notice of pendency. The Plaintiff's notice of pendency, however, was not renewed and it expired. The Defendant-property owners sought an Order to remove the Defendants-mechanics' lienors from the Action, and to direct the County Clerk to remove from the land records the notice of pendency filed by the Plaintiff, expired notices of pendency filed by certain of the Defendants-mechanics' lienors, and the Defendants' mechanics' liens. The Supreme Court, Nassau County, denied the motion but its ruling was reversed by the Appellate Division, Second Department. According to the Appellate Division, "…while some of the liens filed by the defendant [mechanics'] lienors were continued by the commencement of the subject action [to foreclose a mechanic's lien] and the plaintiff's filing of a notice of pendency in October 2009, the plaintiff did not seek to extend that notice of pendency within three years from the date of filing, and, thus, the plaintiff's notice of pendency expired in October 2012. [citation omitted] Consequently, any liens filed by the defendant [mechanic's] lienors that were continued by the commencement of this action and the plaintiff's filing of a notice of pendency in October 2009 expired together with that notice of pendency in October 2012." The Plaintiffs requested an extension of the notice of pendency after it had expired, but "the plaintiff could not revive the lapsed notice of pendency." Thompson Brothers Pile Corp. v. Rosenblum, decided December 23, 2015, 2015 NY Slip Op 09424, is posted at http://www.courts.state.ny.us/reporter/3dseries/2015/2015_09424.htm.

Recording/Nassau and Suffolk Counties

Nassau County Local Law 8-2015 increased the tax block fee charged for recording and indexing each instrument in the Nassau County Clerk's office from $150 to $300 for each tax block. In addition, Nassau County Local Law 9-2015

authorizes the County Assessor to charge $225 to verify the tax section, block and lot information on each instrument being submitted for recording in Nassau County. These changes took effect on January 4, 2015.

Suffolk County Local Law 34-2015 increased the fee charged to verify the tax map numbers on each instrument presented for recording or filing in the Suffolk County Clerk's office from $60 to $200 per parcel, effective December 18, 2015.

Recording Act

Before a mortgage was recorded, the mortgagor deeded the property. Her grantee re-conveyed the property and, four months after the mortgage was recorded, the property was further transferred to Christine Sotomayor and another person. Sotomayor was not named as a defendant in an action to foreclose the mortgage and she was not served with a copy of the summons and complaint. After issuance of the judgment of foreclosure and sale, Sotomayor moved for leave to intervene, to vacate the judgment of foreclosure and sale, and to compel the foreclosing plaintiff to accept her answer. The Supreme Court, Suffolk County, granted her leave to intervene but denied those parts of the motion seeking to vacate the judgment and to compel the plaintiff to accept her answer. The Appellate Division, Second Department, reversed the lower court's Order to the extent it had denied Sotomayor's motion and vacated the foreclosure judgment.

According to the Appellate Division, Sotomayor had "a potentially meritorious defense in this action, despite the fact that the plaintiff's mortgage was recorded before the deed conveying the property to her was recorded, if she can establish that [either or both of the interim grantees] were bona fide purchasers for value who did not have notice of the plaintiff's mortgage when the property was conveyed to them [citation omitted]. This is because a bona fide purchaser for value who acquires title without notice of an unrecorded and unsatisfied mortgage is then able to confer title to a third party, notwithstanding the fact that the third party has notice of facts which would have prevented him or her from acquiring good title from the original grantor." Wachovia Bank, N.A. v. Swenton, decided November 25, 2015, is reported at 20 N.Y.S.3d 405.

Reverse Mortgages

The owner of property subject to a reverse mortgage known as a home equity conversion mortgage failed to pay hazard insurance premiums as required under the loan documents. As a result, the Plaintiff-mortgagee declared a default and commenced an action to foreclose the mortgage. The Supreme Court, Ulster County, holding that 24 CFR 206.205(c) precluded the Plaintiff from seeking foreclosure, granted the Defendant's motion for summary judgment. Under Section 206.205(c), "[i]f the mortgagor fails to pay the property charges in a timely manner, and has not elected to have the mortgagee make the payments, the mortgagee may make the payment for the mortgagor and charge the mortgagor's account." (Emphasis added)

The Appellate Division, Third Department, reversed the Order of the lower court. According to the Appellate Division, the goal of facilitating the offering of reverse mortgages "runs against an interpretation of the regulation that would prevent a mortgagee from pursuing whatever permissible remedy it deems appropriate to recover unpaid carrying costs and, indeed, adopting that reading could well have a chilling effect on the willingness of lenders to offer reverse mortgages, We therefore read 24 CFR 206.205(c) as allowing, but not requiring plaintiff to pay carrying charges owed by defendant rather than resorting to foreclosure." Onewest Bank, FSB v. Smith, dated January 7, 2016, is reported at 2016 WL 71508.

Statute of Limitations

A deed executed in 2005 by Defendant Serafin Lopez on behalf of 4330 New Utrecht Ave. Corp. ("4330 Corp") purported to convey property actually owned of record by 4326 New Utrecht Ave. Corp. ("4326 Corp.") to Defendant Lopez and his son, the Plaintiff. In 2012, Defendant Lopez executed a deed to himself of the same property on behalf of 4326 Corp. The Plaintiff sought a judgment reforming the 2005 deed, voiding the 2012 deed, and holding that he had a one-half interest in the property on the grounds that the recital of 4330 Corp. in the 2005 deed was a scrivener's error. The Defendants moved for a judgment dismissing the complaint as time-barred by Civil Practice Law and Rules

Section 213(6), which provides that "an action based on mistake" must be commenced within six years. The Supreme Court, Kings County, granted the Defendants' motion, declaring that the 2005 deed was not reformed and the 2012 deed was not void.

According to the Appellate Division, Second Department, while the six-year statute of limitations runs from the date on which the mistake was made, under case law in New York, as to a person "in possession of real property under an instrument of title" the statute of limitations runs from the date on which that person has notice of an adverse claim or the date on which his or her possession of the real property is otherwise disturbed. However, the Plaintiff not having raised this exception to the application of the statute of limitations it ran from the date of the execution of the 2005 deed. The Appellate Division affirmed the Supreme Court's grant of the Defendants' motion for summary judgment dismissing the complaint. However, absent a determination on the merits, the lower court should not have found that the 2005 deed "is not reformed" and that the 2012 deed "is not void". Lopez v. Lopez, decided November 18, 2015, is reported at 20 N.Y.S.3d 134.

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"Mortgage Recording Tax and Revolving Credit Mortgages in New York" and "Transfer Taxes in New York State", authored by Michael J. Berey, and other articles of interest, are posted to First American's National Commercial Services Blog. Access http://blog.firstam.com/commercial to view those articles and to subscribe and receive by email further postings to the Blog.

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Reporting Current Developments since 1997
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