First American Title™
NATIONAL COMMERCIAL SERVICES

# Current Developments

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

**No. 175 | June 1, 2016**

## Adjoining Owners

Under RPAPL Section 881 ("Access to adjoining property to make improvements or repairs"), "[w]hen an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or its lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license to enter...[t]he licensee shall be liable to the adjoining owner or his lessee for actual damages accruing as a result of the entry." The Respondents' request that a fee be paid to them for the license granted to an adjoining owner was denied by the Supreme Court. The Appellate Division, First Department, modifying the lower court's Order, granted the Respondents' application for a contemporaneous monthly license fee and remanded the case to the Supreme Court to determine the appropriate amount of the fee. According to the Appellate Division,

> "…the grant of licenses pursuant to RPAPL 881 often warrants the award of contemporaneous license fees….In the circumstances presented here, where the granted license will entail substantial interference with the use and enjoyment of the neighboring property during the planned 30-month period, thus decreasing the value of the property during that time, it was an improper exercise of discretion to postpone until the end of the three-year license period the matter of the fees to which the respondents must be entitled." [Citations omitted]

DDG Warren LLC v. Assouline Ritz 1, LLC, 2016 NY Slip Op 02926, decided April 19, 2016, is posted at 2016 WL 1563188.

## Bankruptcy

The Defendant in a mortgage foreclosure, who did not timely answer the complaint or appear in the Action, moved to vacate the judgment of foreclosure and sale for the lack of personal jurisdiction. He claimed that he was served while an automatic stay arising from the bankruptcy filing of Lancaster Mortgage Bankers, LLC, a co-Defendant, was effective. The Supreme Court, Nassau County, denied the motion, and the Appellate Division, Second Department, affirmed. The protection of the automatic stay under 11 U.S.C. Section 362 ("Automatic stay") is typically afforded only the debtor in the bankruptcy proceeding. Deutsche Bank National Trust Company v. Karlis, 2016 NY Slip Op 02958, decided April 20, 2016, is posted at 2016 WL 1577136.

## Common Charges

A Board of Managers, which was the Plaintiff in an Action to foreclose a lien for unpaid common charges, moved for the appointment of a temporary receiver to collect rent for the payment of common charges becoming due during the litigation. Under Real Property Law Section 339-aa ("Lien for common charges; duration; foreclosure"), "the unit owner shall be required to pay a reasonable rental for the unit for any period prior to sale pursuant to the judgment of foreclosure and sale, if so provided in the by-laws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same." The Supreme Court, New York County, denied the motion, finding that the Condominium's By-Laws did not permit the collection of rent during the period prior to the foreclosure sale. Further, no authority was presented to support the appointment of a temporary receiver under Civil Practice Law and Rules Section 6401 ("Appointment and powers of temporary receiver") when the collection of rent during a common charge lien foreclosure was not provided for in the Condominium's By-Laws. Board of Managers of 41 North Moore Street Condominium v. Violet Purchasing Corp., 2014 NY Slip Op 33718, decided April 10, 2014, was posted on May 2, 2016 at http://www.courts.state.ny.us/reporter/pdfs/2014/2014_33718.pdf.

## Easements

The Plaintiff sought to enjoin construction of "barriers, fencing, walls or the like" within a 2.4 acre parcel burdened by an easement for ingress and egress benefitting the Plaintiff's property. The Plaintiff asserted that any structure built on the easement area would prevent customers from entering his property. The Supreme Court,

Erie County, granted the Plaintiff's motion for summary judgment. The Appellate Division, Fourth Department, reversed, holding that improvements could be made which did not unreasonably interfere with ingress and egress to the Plaintiff's property.

The deed reserving the easement contained a restriction prohibiting the erection of any structure or the operation of a business on the burdened parcel "that sold or dispensed liquid vehicle fuel". According to the Appellate Division, "the fact that the deed specifically prohibited the erection of one particular type of structure and the operation of one particular type of business compels us to conclude that the erection of other types of structures and the operation of other types of business are not so precluded…The issue whether…[the] proposed development will impair plaintiff's right of passage must be determined at trial." Hasselback v. 2055 Walden Avenue, Inc., 2016 NY Slip Op 03631, decided May 6, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_03631.htm.

## Mechanic's Liens

Under Lien law Section 17 ("Duration of lien"), a mechanic's lien is generally effective for one year unless an extension of the lien is filed with the county clerk before the year expires. If the property is or will be improved by a single-family dwelling, a court order extending the lien must be obtained. If not extended, a mechanic's lien not extended is deemed terminated. (Lien Law Section 19, "Discharge of lien for private improvement"). (A mechanic's lien is also extended if an Action is commenced before the lien expires to enforce the lien or to enforce a different lien where the mechanic's lienor is named as a party defendant.)

A mechanic's lien was filed against property improved by a single-family dwelling on or about November 21, 2014. An extension was filed on or about November 9, 2015; no court order was obtained. The property owners petitioned the Supreme Court, Nassau County, to vacate the lien; the mechanic's lienor cross-motioned for leave to file an extension of the mechanic's lien nunc pro tunc. The Court extended the mechanic's lien nunc pro tunc.

Civil Practice Law and Rules Section 2004 ("Extension of time generally") allows a court to "extend the time fixed by any statute…for doing any act, upon such terms as may be just and upon good cause shown…" Because the firm that filed the mechanic's lien did not advise the mechanic's lienor that a court order was required, good cause to grant the extension was shown. Extending the mechanic's lien would not prejudice the Petitioners. Matter of Shilian v. All Sons Electric Corp., 2016 NY Slip Op 50756, decided May 9, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_50756.htm.

## Mortgage Foreclosures/Common Charge Liens

Real Property Law 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." New York State's Court of Appeals, affirming the ruling of the Appellate Division, Second Department, in Plotch v. Citibank, N.A., reported at 992 N.Y.S.2d 114 and in Current Developments dated July 20, 2015, held that mortgages on a condominium unit consolidated by an agreement recorded before a common charge lien against the unit was filed constitutes a first mortgage of record under Section 339-z. According to the Court of Appeals,

> "…there was no intervening lien at the time the loans were consolidated. Indeed, the board did not file its lien until approximately seven years after the consolidation agreement was recorded. The consolidation agreement in this case did not interfere with any rights of the condominium board….If this Court were to hold that the consolidation agreement did not qualify as the first mortgage of record, banks and condominium owners would simply take additional steps to satisfy the original mortgage…To hold otherwise places form over substance."

Plotch v. Citibank, N.A., 2016 NY Slip Op 03648, decided May 10, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_03648.htm.

## Mortgage Foreclosures/Condominiums

The Plaintiff in the foreclosure of a mortgage on a residential condominium unit moved for entry of a judgment of foreclosure and sale. The Board of Managers of the Condominium sought an Order under Real Property Actions and Proceedings Law Section 1307 ("Duty to maintain foreclosed property") directing the Plaintiff to pay the common charges and assessments from June 19, 2015 (presumably the date on which the foreclosure was commenced) through the date on which the Referee's deed would be delivered to the purchaser at the foreclosure sale. Under Subdivision 1 of Section 1307,

> "[a] plaintiff in a mortgage foreclosure action who obtains a judgment of foreclosure and sale…involving residential real property…that is vacant, or becomes vacant after the issuance of such judgment, or is abandoned by the mortgagor but occupied by a tenant…shall maintain such property until such time as ownership has been transferred through the closing of title in foreclosure, or other disposition, and the deed for such property has been duly recorded…"

The Supreme Court, Westchester County, granted the Plaintiff's motion for a judgment of foreclosure and sale but denied the Defendant's request for relief under Section 1307. The obligations recoverable under Section 1307 arise after entry of a judgment of foreclosure and sale; whether the Plaintiff would be charged with any future obligations was "premature and speculative."

The Court noted that the Board of Managers had not established that any of the obligations it sought to recover from the Plaintiff were amounts to "maintain" such property, as defined in subdivision "5" of Section 1307. In addition, the Court did not address whether requiring a foreclosing first mortgagee to pay common charges or special assessments violates Real Property Law Section 339-z ("Lien for common charges"), which subordinates a common charge lien to a first mortgage of record. Wells Fargo Bank, N.A. v. Vuksanovic, 2016 NY Slip Op 30741, decided April 25, 2016, is posted at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_30741.pdf.

## Mortgage Foreclosures/Deeds-in-Lieu

The Defendant in an Action to foreclose a mortgage on its property claimed that a mortgage had been extinguished and the obligation ceased to accrue interest when a deed was delivered out of escrow to the mortgage lender's designee. The Supreme Court, New York County, held that the mortgage remained a valid lien and continued to accrue interest because the deed had previously been ruled to be null and void. The Appellate Division, First Department, affirmed the ruling of the lower court. According to the Appellate Division, the Defendant "is judicially estopped from now contesting such nullification [of the deed] simply because it suits its current litigation posture, to wit, that the mortgage was extinguished and ceased to accrue interest upon the delivery of the deed." Centech LLC v. Yippie Holdings, LLC, decided April 21, 2016, is reported at 28 N.Y.S.3d 598.

## Mortgage Foreclosures/"eNotes"

A note and mortgage being foreclosed were executed to AmTrust Bank. The note was an electronically signed "eNote". The FDIC, as Receiver for AmTrust Bank, assigned to the Plaintiff all "qualified financial contracts to which AmTrust was a party".

The Supreme Court, Kings County, held that the Plaintiff lacked standing to foreclose because it had not been assigned the note. The Appellate Division, Second Department, reversed. According to the Appellate Division, a foreclosing Plaintiff must be either the holder or the assignee of the note; a "holder" is defined in New York's Uniform Commercial Code Section 1-201(b)(21)(c) to include "the person in control of a negotiable electronic document of title," and the Court found that the Plaintiff controlled the eNote.

Further, an "eNote is a "transferable record" under the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 1 et seq.) and "…a person having control of a transferrable record is the

holder" (15 U.S.C. Section 7021(d)), Under 15 U.S.C. Section 7021(d) "[d]elivery, possession, and endorsement are not required to obtain or exercise any of the rights.." of a holder of an e-Note, which is a transferrable record. New York Community Bank v. McClendon, 2016 NY Slip Op 02790, decided April 13, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_02790.htm.

## Mortgage Foreclosures/Erroneous Satisfaction

A mortgage satisfaction issued in 2009 was recorded in 2012. The Plaintiff commenced an Action in 2010 to vacate the satisfaction and to foreclose the mortgage. The Defendants, who in 2013 acquired interests in the property. moved to dismiss the complaint, claiming that they were good faith purchasers and encumbrancers for value who acquired their interests relying on a duly recorded satisfaction of the mortgage. The Supreme Court, Queens County, denied the Defendants' motion, and the Appellate Division, Second Department, affirmed. An erroneous satisfaction of a mortgage can be vacated and "'the mortgage reinstated where there has not been detrimental reliance on the erroneous recording'" [citation omitted]. In this case, however, according to the Appellate Division, "…the defendants were put on notice that the satisfaction of mortgage should not be reasonably relied on, since the satisfaction of mortgage was issued in 2009, but a foreclosure action relating to the subject property was commenced in 2010…" Wells Fargo Bank, N.A. v. E & G Development Corp., 2016 NY Slip Op 02988, decided April 20, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_02988.htm.

## Mortgage Foreclosures/UCC

The Defendant in a mortgage foreclosure alleged that the Plaintiff, the assignee of the mortgage being foreclosed, lacked standing because the endorsement in blank of the note was on a separate, undated page following the note. Under Subsection 2 of Uniform Commercial Code Section 3-202 ("Negotiation"), "[a]n indorsement [to an instrument] must be…on the instrument or on a paper so firmly affixed thereto as to become a part thereof." The Supreme Court, Queens County, denied the Plaintiff's motion for summary judgment. Although the affidavit of the Plaintiff's loan servicer asserted that the servicer, as Plaintiff's agent, has physical possession of the original note endorsed in blank, there was no evidence that the endorsement was "firmly attached" to the note. HSBC Bank USA v. Murphy, 2016 NY Slip Op 30850, decided May 3, 2016, is posted at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_30850.pdf.

## 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), holding 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 Plaintiffs, 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." Current Developments dated March 2, 2015 reported that the Appellate Division, Third Department, affirmed the ruling of the lower court. Friends of Thayer Lake LLC v Brown, decided January 15, 2015, is reported at 1 N.Y.S. 3d 504.

New York State's Court of Appeals, in a decision dated May 10, 2016, posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_03647.htm, modified the Appellate Division's Order and denied the Defendants' motion for summary judgment. It held that "sufficient issues of fact exist to preclude the issuance of summary judgment." According to the Court,

> "…[a] waterway's navigability is a highly fact-specific determination that cannot always be resolved as a

matter of law…Contrary to their claim, the parties have presented conflicting or inconclusive evidence… The record is not conclusive with regard to, for instance, the Waterway's historical and prospective commercial utility, the Waterway's historical accessibility to the public, the relative ease of passage by canoe, the volume of historical travel, and the volume of prospective commercial and recreational use."

## New Rochelle

Sections 81-8 ("Police review of false alarms") and 81-16 ("Tax lien for unpaid fees and charges") of the New Rochelle Code authorizes the City of New Rochelle to charge for three or more alarm system "false alarms" within a consecutive twenty-four month period. Under Section 81-8, the assessment(s) "shall be in an amount of (a) One hundred dollars per false alarm upon the third false alarm and; and (b) An increase of an additional fifty dollars for each subsequent false alarm. (c) For false fire alarms: An additional $500 per false alarm originating in a building 75 or more feet tall." Under Section 81-16, "if any charges, fees or assessments under this chapter are not paid within 30 days of notice, the City [of New Rochelle] may…add such unpaid charges, fees or assessments to the subsequent City property tax levy for the property on which such alarm system is located, to be collected, bear interest, and be enforced as provided by law for other City taxes." The New York State Land Title Association has reported that it "has recently learned of several instances where these provisions of the Code were enforced."

## Options

The Defendants, the owners of unimproved property in the Adirondacks, granted the Plaintiff an exclusive, one-year option to purchase. The Defendants could retain the $200,000 consideration paid for the option grant if the option was not exercised within the one-year option period. The period in which to exercise the option expired; the Defendants entered into a contract to sell the property to a third party. Before the option period expired, the parties discussed modifying the agreement to reflect an anticipated reduction in the number of residential building lots due to the existence of wetlands and the property's topography. The Plaintiff's lawsuit claimed, among other causes of action, that there was a breach of contract.

A jury found that the parties had agreed to extend the option period and awarded the Plaintiff $200,000 damages. However, the Supreme Court, Essex County, set aside the verdict, holding that the evidence was insufficient to establish that the parties agreed to an extension. The Appellate Division, Third Department, affirmed. Although there were efforts to renegotiate, "the record is – as Supreme Court aptly observed – devoid of proof that defendants actually agreed…to extend the option agreement or otherwise modify the terms of the option agreement or the related purchase and sale contract." There being no extension of the option agreement, neither the Supreme Court nor the Appellate Division had to consider the application of the statute of frauds. WFE Ventures, Inc. v. Mills, 2016 NY Slip Op 03574, decided May 5, 2016, is reported at 2016 WL 2351518.

## Restrictive Covenants

The Plaintiff is a neighborhood historic preservation association with members whom it alleged are the owners of lands benefitted by an 1869 restrictive covenant prohibiting the erection of a "tenement house" (as defined in Chapter 908 of the Laws of 1867) on the Defendant's property. The Plaintiff sought a declaratory judgment prohibiting the Defendant from building a luxury condominium and ruling that the Defendant violated Buildings Department guidelines, and it also sought a preliminary injunction enjoining the Defendant from further construction pending the disposition of the case. The Supreme Court, New York County, denied the motion for a preliminary injunction, finding that the Plaintiff had failed to establish a likelihood of success on the merits, that it would incur irreparable harm absent the injunction, or that the equities were in its favor.

According to the Court, while a "tenement house" is defined in the 1867 statute to include "any house or building, or portion thereof, which is rented, leased, let or hired out…", the condominium units in the Defendant's building are to be owned in fee by unit purchasers. As to the alleged violations of Buildings Department guidelines, in the first instance "[t]he DOB is the appropriate forum for the resolution of disputes as to whether a person or entity has failed to comply with the New York City Building Code." Further, the Plaintiff would not be harmed by the commencement

of construction. The new building "could be altered or removed should the plaintiff ultimately prevail in this litigation." East 62nd Street Association, Inc. v. 163-165 East 62nd Street Associates, LLC, 2016 NY Slip Op 30746, decided April 14, 2016, is posted at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_30746.pdf.

## Sheriff Sales

A money judgment, entered against the Defendant in a New York court in 2011, was filed with a New Hampshire court in 2013. The judgment was executed against real property in New Hampshire in 2014. The Defendant moved by an order to show cause for an order vacating the Sheriff's sale, claiming that she did not have notice of the sale and that the price paid for the property was "inadequate". The motion was denied by the Supreme Court, New York County. According to the Court, "[t]his Court does not have jurisdiction to vacate a Sheriff's sale conducted by a Carroll County, New Hampshire Sheriff pursuant to an execution of judgment from the New Hampshire Court." VNB New York Corp. v. Lewitin, 2016 NY Slip Op 30782, decided April 27, 2016, is posted at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_30782.pdf.

## Streets

The Supreme Court, Westchester County, held that a paved strip of land located within a tax lot owned by the Village of Scarsdale, at the easterly end of a public street known as Farragut Road, is a public road by prescription to the same width as Farragut Road. Village Law Section 6-626 ("Streets by prescription") states that "[a]ll lands within the village which have been used by the public as a street for ten years or more continuously, shall be a street with the same force and effect as if it had been duly laid out and recorded as such." The Appellate Division, Second Department, affirmed, finding that the paved area within the tax lot is indistinguishable from the pavement constituting Farragut Road, that the paved area and Farragut Road were, together, paved more than ten years ago, that the public used the paved area in a manner indistinguishable from the surrounding roadway, and that the subject area was maintained in the same manner as Farragut Road. Further, according to the Appellate Division, the public road by prescription included an area beyond the pavement within the extension of the line of Farragut Road. "The defendants offer no legitimate reason why the prescriptive portion of Farragut Road should not carry with it the public right-of-way that extends with the paved section of the rest of Farragut Road." Matter of Soldatenko v. Village of Scarsdale Zoning Board of Appeals, 2016 NY Slip Op 03002, decided April 20, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_03002.htm.

## Streets/Subdivison Maps

The filing of a subdivision map constitutes a continuing offer to dedicate the streets shown thereon to public use, effective on the acceptance by the municipality of that offer of dedication. A subdivision map filed in the Westchester County Clerk's Office in 1937 noted that a fifty foot strip of land within filed map lot 405 was reserved for a public right of way. The offer of dedication had not been accepted by the Village of Scarsdale.

In 2012, the owners of filed map lot 405 informed the Village that they were revoking the offer of dedication and commenced an Action pursuant to Real Property Actions and Proceedings Law Article 15 ("Action to compel the determination of a claim to real property") to obtain a judgment that the Village has no rights with respect to the right-of-way. The Supreme Court, Westchester County, granted the Village's motion to dismiss the complaint, finding that the offer of dedication had to be revoked by the other residents of the subdivision who had purchased their parcels relying on the offer of dedication. The Appellate Division, Second Department, affirmed, finding that the purported revocation "was invalid because it was not made by all interested parties". The matter was remitted to the Supreme Court for entry of a judgment holding that the attempted revocation of the offer of dedication was not effective.

That the Village rejected the offer of dedication in 1966, and that the Village did not have the right to use the right-of-way until the offer was accepted, were questions first raised on appeal and were therefore not considered. Soldatenko v. Village of Scarsdale, 2016 NY Slip Op 02983, decided April 20, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_02983.htm.

## Title Insurance

In 1999, the Plaintiff entered into a long-term lease for an apartment in a building in Manhattan and purchased shares of stock in the corporation owning the property. The title insurer issued a Leasehold Owners title insurance policy that mistakenly included a Cooperative Endorsement instead of a Leasehold Endorsement. A Cooperative Endorsement insures, in part, against loss or damage incurred by the Insured if the premises is not part of a validly created cooperative regime and is not owned by an entity formed for the purpose of cooperative ownership. In 2012, the Plaintiff filed a claim under the Policy, asserting that she was unaware that the apartment was not part of a cooperative regime, and she sought to recover the full value of the Title Policy. On receipt of the notice of claim, the title insurer denied the claim as an "act of the insured" and rescinded the Cooperative Endorsement which, it asserted, was mistakenly issued. The Plaintiff commenced an Action for breach of contract.

The Supreme Court, New York County, granted the title insurer's motion for summary judgment and dismissed the complaint. The Court found that the parties knew that the apartment was not part of a cooperative and that the Cooperative Endorsement was issued as the result of a mutual mistake. The Purchaser had acknowledged, in a Rider to the contract pursuant to which the lease was granted and the stock was purchased, that the premises was not "subjected to a cooperative apartment regime", that an offering plan for the sale of cooperative units had not been accepted for filing and a no-action letter had not been issued by New York State's Attorney General. Further, evidence was presented that the Plaintiff's attorney had explained to the Plaintiff that the apartment was not part of a valid cooperative and, "even assuming that [the Plaintiff] did not have direct knowledge of the structure of the deal, the knowledge of [her attorney] is imputed to her." Yano v. Old Republic National Title Insurance Company, 2016 NY Slip Op 30788, decided April 25, 2015, is posted at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_30788.pdf.

**Michael J. Berey**
Senior Underwriting Counsel

Reporting Current Developments since 1997
No. 175; June 1, 2016
mberey@firstam.com