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NATIONAL COMMERCIAL SERVICES

Current Developments

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Bankruptcy/Chapter 13

Under Subsection (a)(5)(C) of Bankruptcy Code Section 1325 ("Confirmation of plan"), a Chapter 13 plan shall be confirmed by the Court if, "with respect to each allowed secured claim provided for the plan…(C) the debtor surrenders the property securing such claim to such holder." Further, under Subsection (b)(9) of Bankruptcy Code Section 1322 ("Contents of plan"), "the plan may - provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity."

The United States Bankruptcy Court for the Eastern District of New York confirmed a Chapter 13 plan providing that certain real property of the debtors, securing a mortgage made to HSBC Bank USA, N.A., would be surrendered to HSBC in satisfaction of its secured claim. Further, and over HSBC's objection, title to the property would vest in HSBC. The United States District Court, Eastern District of New York, reversed, vacated the confirmation order, and remanded the matter for further proceedings. The District Court held that "a secured creditor's rights under Section 1325(a)(5) are impermissibly compromised by a Chapter 13 plan that provides for non-consensual vesting under Section 1322(b)(9)." HSBC Bank USA, N.A. v. Zair, decided on April 12, 2016, is posted at 2016 WL 1448647.

Contracts of Sale/Anticipatory Breach

The Supreme Court, Kings County, dismissed a cause of action for specific performance and directed the cancellation of the notice of pendency. The Appellate Division, Second Department, reversed and directed the Kings County Clerk to reinstate the notice of pendency. According to the Appellate Division, "[w]here, as here, the plaintiffs allege that the defendants committed an anticipatory breach of the contract, the plaintiffs were not required to allege that they tendered performance prior to commencing an action for specific performance of the contract." Malekan v. 701-709 Chester St, LLC, 2016 NY Slip Op 03857, decided May 18, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_03857.htm.

Contracts of Sale/Statute of Frauds

It was alleged by the Plaintiff-purchaser that emails between the attorneys for the seller and the purchaser had agreed upon material terms of a contract and therefore satisfied the requirements of the statute of frauds. General Obligations Law Section 5-703(2) requires that "[a] contract…for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized in writing."

In an Action brought by the purchaser for breach of contract, the Supreme Court, Queens County, granted the seller's motion to dismiss the complaint and cancel the notice of pendency. The Appellate Division, Second Department affirmed. Not only did the emails establish that the parties were not to be bound until a contract of sale was executed, "there was no allegation in the complaint, and there was no evidence, that the defendant's attorney had been authorized in writing to bind the defendant to the contract of sale." 42nd Avenue Commons, LLC v. Barracuda, LLC, 2016 NY Slip Op 04906, decided June 22, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_04906.htm.

Easements

Property in Brooklyn (the "School Property"), used as a school by the City University of New York, is owned by The Dormitory Authority of the State of New York. The adjoining property (the "Development Property"), owned by the Roman Catholic Church of Saint Ignatius, is leased to a developer which is building a new building. The parcels share a common property line and were in common ownership until 1927. There are windows in and a cornice on the west wall of the School Building that extend onto the Development Property. A door in the west wall of the School Building opens onto the Development Property. There are no express easements over the Development Parcel benefitting the School Property.

The Dormitory Authority and CUNY commenced an Action pursuant to Real Property Actions and Proceedings

Law Article 15 ("Actions to compel the determination of a claim to real property"), seeking a declaratory judgment holding that the School Property is benefitted by easements by implication over so much of the Development Property as necessary to permit the continuance of the cornice, the continued use of the egress door, and an easement by implication as necessary to enable the School Property to continue to enjoy light and air through the windows in the building on the School Property. The Plaintiffs also sought to enjoin the Defendants from blocking the access door.

The Supreme Court, Kings County, denied the Plaintiffs' motion for a preliminary injunction and granted the Defendants' cross-motion to dismiss the causes of action seeking an easement by implication for the cornice and school windows. To establish an easement by implication based on a pre-existing use, the claimed easement must have existed when the parcels were in common ownership and have been "so long continued and obvious or manifest as to show that it was meant to be permanent", and the use must be necessary for the beneficial enjoyment of the land claiming the easement. However, according to the Court, the Plaintiffs had submitted "no dispositive evidence that the implied easements over defendants' property existed prior to the separation of the lots on June 30, 1927, and had so long continued before that period and been so obvious to be permanent, or that the use of said easements is necessary for the beneficial use of plaintiffs' property." Further, "easements for light, air and view cannot be acquired by implication, but must be expressly granted." The Court did not, however, dismiss the cause of action seeking an easement by implication for the door on the westerly wall of the School Building and the right of way. Dormitory Authority of the State of New York v. Roman Catholic Church of St. Ignatius, 2016 NY Slip Op 31116, decided January 5, 2016, was posted June 21, 2016 at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_31116.pdf.

Equitable Mortgages/Deeds-in-Lieu of Foreclosure

In 2006, the Plaintiffs defaulted on the consolidated mortgage; additional time to repay the loan was afforded. In February 2009, the time to pay the debt secured by the consolidated mortgage was further extended, an additional loan was made, and the Plaintiffs executed a deed to be held in escrow and released on a default in payment. The Plaintiffs defaulted; the deed was released from escrow and recorded on December 23, 2009. The Plaintiffs commenced an Action alleging that the recording of the deed without foreclosing under RPL Article 13 violated Real Property Law Section 320 ("Certain deeds deemed mortgages"). Under Section 320, "[a] deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage…"

The Supreme Court, New York County, denied the Plaintiffs' motion for summary judgment on their cause of action to vacate the deed. The Appellate Division, First Department, modified the lower court's ruling and vacated the deed; the deed was given as security for an extension of the consolidated mortgage loan and for the additional loan. The Plaintiffs "are and have been the sole owners of the subject property since December 23, 2009." Patmos Fifth Real Estate, Inc. v. Mazl Building, LLC, 2016 NY Slip Op 04804, decided June 16, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_04804.htm.

Estate Taxes

For application of New York's Estate Tax, the value of a condominium unit and of a cooperative unit owned by a decedent is not reduced by life estates granted in the decedent's Will. Matter of Cleary, 2016 NY Slip Op 04410, decided June 8, 2016, is posted at 2016 WL 3177130.

Mansion Tax

The Office of Counsel of New York State's Department of Taxation and Finance issued an Advisory Opinion on the application of the Additional Tax (Tax Law Section 1402-a), a tax payable by the grantee on the transfer of real property for consideration of $1,000,000 or more, also known as the Mansion Tax, to the conveyance between the same parties by separate deeds pursuant to two separate contracts of sale of two parcels of land directly across the road from each other. Parcel A, improved by a single-family residence, was sold for $2,000,000; Parcel B, vacant land except for a two-car garage located near the road, was sold for $450,000. The Advisory Opinion

concluded that the consideration for both transfers was to be aggregated for application of the Mansion Tax. According to the Department,

> "…this Petitioner's purchase of the two properties was in substance the transfer of a single property. The tax map for the town of Shelter Island shows that Parcel A and Parcel B are located directly across a 2-lane road from each other and, therefore, they are contiguous or adjacent. The properties also were used in conjunction with each other or for a common or related purpose. Real estate listings of the Parcel A represent that the property has a detached two-car garage. Aerial views of the house do not show a garage on Parcel A, but they do show a two-car garage near the road on Parcel B. Although the properties were conveyed by separate deeds, the Residential Contract of Sale for Parcel A contained a cross-default clause…Thus, we conclude that the parcels, which were contiguous or adjacent and used for a common purpose, were in substance a transfer of an interest in a single property. Accordingly, the consideration for Petitioner's purchase of Parcel B must be aggregated with the consideration for his purchase of Parcel A to determine the amount of consideration subject to the additional tax."

TSB-A-16(1)M (Petition No. M141215A), dated April 25, 2016, is posted at https://www.tax.ny.gov/pdf/advisory_opinions/misc/a16_1m.pdf.

Mortgage Foreclosures

The Appellate Division, Second Department, issued two separate rulings dated May 18, 2016 in South Point, Inc. v. Rana. In one ruling, the Appellate Division affirmed the Order of the Supreme Court, Queens County, granting the Plaintiff's motion to amend the judgment of foreclosure and sale nunc pro tunc to direct that notice of the sale be published in Newsday and validate the foreclosure sale. Although the notice of sale was published in Newsday instead of in the Daily News as directed in the judgment of foreclosure and sale, "[t]here was no showing that the defect in notice prejudiced a substantial right of the defendant."

In the other decision, the Appellate Division affirmed the Supreme Court's granting of the Plaintiff's motion for summary judgment and denied the defendant's cross-motion for leave to serve an amended answer to raise the defense of standing. The Defendant had not raised the Plaintiff's standing in his answer or in a pre-answer motion to dismiss for lack of standing. Further, the Plaintiff's motion for summary judgment was granted in 2009 and the issue of standing was raised five years later. "…]T]he defendant's delay in seeking to raise the defense that he had waived by failing to raise it in his answer would have resulted in unfair surprise to the plaintiff…[citation omitted]" The decision on standing is reported at 30 N.Y.S.3d 710. The ruling on publication of the notice of sale, 2016 NY Slip Op 03871, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_03871.htm.

Mortgage Foreclosures/Town of Hempstead

A Local Law enacted by the Town Board of the Town of Hempstead adds Section 128-61-1 ("Foreclosures; Undertaking") to the Town's Code requiring a lender foreclosing a mortgage on vacant, residential property to provide the Town, within forty-five calendar days from the date on which the foreclosure is commenced, an undertaking of $25,000 to enable the Commissioner of Sanitation to eliminate violations of Code Section 128-61 ("Accumulation of garbage, litter, refuse or rubble; height of lawns, weeds or brush") at the property. Funds utilized for such purposes are to be replenished on notice from the Town. An undertaking may be in the form of cash, a cash bond, or a letter of credit. Unused funds are to be returned once the foreclosure is finally discontinued. Fines may be imposed by the Town for the failure to comply with the requirements of Section 128-61-1. The Local Law is effective when it is filed with New York's Department of State. See Bergman, "Legislative Assaults on Mortgage Holders", New York Law Journal, June 29, 2016.

Mortgage Foreclosures/Bidding

The Plaintiff moved to set aside the foreclosure sale, alleging that because of a mistake in the bidding instructions for the foreclosure sale the successful bid was inadequate and the sale was, therefore, commercially unreasonable. The Supreme Court, Suffolk County, denied the motion, finding that the Plaintiff's mistake was

unilateral and the sales price was not so inadequate as to shock the conscience of the court. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division, "the plaintiff did not establish any fraud, collusion, mistake, or misconduct in connection with the foreclosure sale that warranted setting it aside. Indeed, the unilateral mistake of the plaintiff's counsel does not provide a sufficient basis for setting aside the foreclosure sale." Further, assuming, as alleged by the Plaintiff, that the fair market value of the property was $399,999, the winning bid of $208,133.69 "was not so inadequate as to shock the court's conscience, and thus, did not warrant setting aside the sale." U.S. Bank. N.A. v. Testa, 2016 NY Slip Op 04404, decided June 8, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_04404.htm.

Mortgage Foreclosures/Tax Lots

The notice of pendency, the judgment of foreclosure and sale and other documents relating to a mortgage foreclosure described the property as tax lot 121 when it should have been identified as tax lots 121 and 123. The Plaintiff's motion to amend the documents, nunc pro tunc, to correct the legal description of the proposed property was denied by the Supreme Court, Nassau County. The Appellate Division, Second Department, reversed. Under Civil Practice Law and Rules Section 2001 ("Mistakes, omissions, defects and irregularities"), "[a]t any stage of an action…the court may permit a mistake…to be corrected…if a substantial right of a party is not prejudiced…" In this case, according to the Appellate Division, "given the respondents' actual knowledge of the notice of pendency and the foreclosure proceeding, they cannot claim that they would be prejudiced by disregarding the omission of lot 123 from the description of the property on the documents." Beltway Capital, LLC v. Gutierrez, 2016 NY Slip Op 04898, decided June 22, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_04898.htm.

Mortgage Foreclosure/Standing

A deed to property subject to foreclosure was executed after the notice of pendency was filed. After the deed was recorded, the property was sold pursuant to a judgment of foreclosure and sale. The grantee's motion for leave to intervene and to have all proceedings, including the sale of the property, vacated was denied by the Supreme Court, Suffolk County. The Court also noted that the movant lacked standing to assert a claim that the bid price paid for the property was unconscionably low since the movant was not subject to a deficiency judgment; it was not an obligor under the note secured by the mortgage and it was not served with process in the foreclosure. Bank of America v. Riccardi, 2016 NY Slip Op 50817, decided May 24, 2016, is reported at 51 Misc.3d 1225.

Mortgages/Abandoned Residential Property

On June 23, 2016, Governor Cuomo signed into law Chapter 73 of the Laws of 2016. Part Q of Chapter 73 has been referred to as the "Zombie Property Remediation Act of 2016". Part 73 includes new Real Property Actions and Proceedings Law ("RPAPL") Section 1308 ("Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property"), requiring a servicer authorized to accept payments on a first lien mortgage loan on a one-to-four family residential property to secure and maintain the property when the loan is delinquent and the servicer has a reasonable basis to believe that the property is "vacant and abandoned". A civil penalty of up to $500 per day, for each day a violation of a requirement of Section 1308 by a mortgagee or its agent persists, may be issued by a hearing officer or a court of competent jurisdiction. The State's Department of Financial Services is authorized to adopt rules and regulations for the effective implementation, administration, operations and enforcement of Section 1308. In certain instances, the requirements may not apply to a state or federally chartered bank, a savings bank, a savings and loan association or a credit union.

The new law also adds RPAPL Section 1309 ("Expedited application for judgment of foreclosure and sale for vacant and abandoned property") and RPAPL Section 1310 ("Vacant and abandoned property; statewide vacant and abandoned property electronic registry') and amends Civil Practice Law and Rules Rule 3408 ("Mandatory settlement conference in residential foreclosure actions"), RPAPL Section 1303 ("Foreclosures; required notices"), RPAPL Section 1304 ("Required prior notices"), RPAPL Section 1351 ("Judgment of sale") and RPAPL Section

1353 ("Conveyance"). The Chief Administrative Judge of New York's courts is required to adopt rules for the implementation of the RPAPL Section 1309. The State's Department of Financial Services is authorized and empowered to adopt rules and regulations "necessary for the effective administration and operation" of the Registry under RPAPL Section 1310.

Under amended RPAPL Section 1351, a judgment of foreclosure and sale shall direct that mortgaged premises being foreclosed be sold by the sheriff or the referee within ninety days of the date of the judgment. When the property is sold to the foreclosing Plaintiff or its affiliate, amended RPAPL Section 1353 requires that the property be placed on the market for sale or other occupancy "(A) within one hundred eighty days of the execution of the deed of sale, or (B) within ninety days of completion of construction, renovation or rehabilitation of the property, provided that such construction, renovation, or rehabilitation proceeded diligently to completion, provided, however, that a court of competent jurisdiction may grant an extension for good cause."

Part Q of Chapter 73 is effective on December 20, 2016, 180 days after the date on which it became a law. Chapter 73 can be located at https://www.nysenate.gov/legislation/bills/2015/S8159.

Recording/Fraudulent Deeds

In June of 2014, Plaintiff Jennifer Merin was issued letters of administration for the Estate of the record owner of a home in Queens County. She executed a deed to herself as the sole heir of the Estate. However, in March 2014 a fraudulent deed to the property from an Edith Moore to Darrell Beatty was recorded by the New York City Register. After obtaining Orders declaring the deed to Beatty null and void and evicting him from the premises, the Plaintiff commenced an Action against The City of New York, its Department of Finance, the Office of the City Register, and the City Register asserting that the deed to Beatty was negligently recorded and that procedures should have been implemented to ensure the authenticity of deeds being recorded to protect her property rights and to ensure that she was not deprived of her Constitutional right not to be deprived of property without due process. The Supreme Court, New York County, granted the City's motion to dismiss the complaint for the failure to state a cause of action. According to the Court,

> "The recording of a deed is a purely ministerial function, and the recording clerk must accept a deed for filing that meets the minimal requirements of the recoding statute, which requirements are only that the deed be acknowledged and that the recording fees be paid [citations omitted]. The recording clerk has no authority to look beyond the instrument that is being presented for recording. Thus, as a matter of law, the City Register…owed no duty to plaintiff, and indeed had no authority, to investigate the authenticity of the underlying transaction reflected in the instrument being recorded and thus whether or not the deed was fraudulent as a condition to accepting the instrument for recording."

Merin v. City of New York, 2016 NY Slip Op 31161, decided May 9, 2016, is posted at http://www.nycourts.gov/reporter/pdfs/2016/2016_31161.pdf.

Streets

Under Village Law Section 6=626 ("Streets by prescription"), "[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". In a proceeding brought under Civil Practice Law and Rules Article 78 ("Proceeding against body or officer") to review a determination of the Village of Goshen Zoning Board of Appeals affirming the issuance of a building permit, the Supreme Court, Orange County, denied the petition and dismissed the proceeding. The Appellate Division, Second Department, affirmed and, in doing so, indicated that the Zoning Board of Appeals was authorized to determine that a street is a public street under Village Law Section 6-626. Matter of Sherwin v. Village of Goshen Zoning Board of Appeals, 2016 NY Slip Op 03890, decided May 18, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_03890.htm.

Tenancy by the Entirety/Leases

Petitioner and his wife reside in a single family home which they own as tenants by the entirety. Also living in the home, paying rent as the wife's tenant, is the wife's sister, the Respondent. Petitioner commenced a summary proceeding to evict the Respondent. The District Court of Nassau County, Fifth District, dismissed the proceeding. The wife, as a tenant by the entirety, could lease her interest in the property; the Petitioner was entitled to joint possession with the tenant. According to the Court, "…the best result that Petitioner can achieve is to terminate any exclusive occupancy of the Respondent…Since Petitioner currently resides at the Premises, there is no relief available to Petitioner in this summary proceeding." Bernadotte v. Woolford, 2016 NY Slip Op 26193, decided June 20, 2015, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_26193.htm.

Title Insurance/Endorsements

New York State's Department of Financial Services has approved the issuance by the Title Insurance Rate Service Association ("TIRSA") of a TIRSA Policy Authentication Endorsement. The endorsement recites, in part, that "[w]hen the policy is issued by the Company with a policy number and Date of Policy, the Company will not deny liability under the policy or any endorsements issued with the policy, solely on the ground that the policy or endorsements were issued electronically or lack signatures in accordance with the Conditions." There is no charge for the issuance of this Endorsement.

Transfer Tax

GKK2 Herald LLC ("GKK2") and SLG 2 Herald LLC ("SLG"), the owners of 45% and 55% tenant-in-common interests, respectively, in real property located at 2 Herald Square in Manhattan, conveyed their interests to 2 Herald Owner LLC ("Herald LLC"). GKK2 received a 45% member interest in Herald LLC and SLG received a 55% interest in Herald LLC. On the same date as the conveyance to Herald LLC, GKK2 transferred its 45% member interest to SLG. In a Determination dated April 1, 2015, an Administrative Law Judge of the New York City Tax Appeals Tribunal, applying the "step transaction" doctrine, ruled that the transfer of the 45% member interest from Herald to SLG was taxable as a change in beneficial ownership. TAT(H) 13-25(RP) is posted at http://www.nyc.gov/html/tat/downloads/pdf/1325DET0415.pdf. See Berey, "Step Transaction Doctrine Applied to New York City Transfer Tax", New York Law Journal, June 9, 2015.

In a Determination dated May 26, 2016, an Administrative Law Judge of the State of New York's Division of Tax Appeals ruled that for the application of the State's Real Estate Transfer Tax, the transfer of the 45% member interest from GKK2 to SLG did not constitute the transfer of a controlling interest in an entity having an interest in real property. According to the Judge, the transfer of the 45% member interest to SLG "cannot be considered a transfer or acquisition of a controlling interest in an entity with an interest in real property", and 20 NYCRR Section 575.6(d), providing for the aggregation of transfers or acquisitions of interest in the same entity, "does not authorize adding a nontaxable mere change in form of ownership transaction [here the transfer of all interests in the property to Herald LLC] with a transfer of a minority, noncontrolling interest in order to achieve a taxable transaction." In the Matter of the Petition of GKK 2 Herald LLC (DTA No. 826402) is posted at http://www.dta.ny.gov/pdf/determinations/826402.det.pdf?_ga=1.130242575.121383479.1435423055.

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