



First American Title™
NATIONAL COMMERCIAL SERVICES

Current Developments

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Adverse Possession

A one-story building on land owned by the Defendant has since at least 1986 encroached upon the Plaintiff's property. The Appellate Division, First Department, held that the Defendants had acquired the title to the land under the encroachment by adverse possession. Under Section 522 of the Real Property Actions and Proceedings Law ("RPAPL"), captioned "essentials of adverse possession under claim of title not written", as it read prior to being amended in 2008, the land was "usually cultivated or improved" or "has been protected by a substantial enclosure." Since the Defendant had title to that land by adverse possession, the addition of a second story which did not further encroach onto the Plaintiff's property was permitted. *Hudson Square Hotel, LLC v. Stathis Enterprises, LLC*, 2016 WL Slip Op 05232, dated June 30, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_05232.htm.

Condominiums and Cooperatives

The Department of Law has adopted revisions, effective September 1, 2016, to 13 NYCRR Part 18 ("Occupied Cooperatives") and Part 23 ("Occupied Condominiums") which changes, as stated in the Notice of Adoption dated August 16, 2016, "clarify the Martin Act's non-purchasing tenant protection for eligible senior citizens and eligible disabled persons." The "Text of Revised Regulations" and the Real Estate Finance Bureau's guidance document are posted at the following links:
http://www.ag.ny.gov/sites/default/files/text_of_revised_regulations_8.31.16.pdf
http://www.ag.ny.gov/sites/default/files/protections_for_eligible_senior_and_disabled_tenants.pdf

Easements/Conservation Easement

A conservation easement entered into in 2004 stated that it was intended "to conserve productive agricultural and forestry lands and natural resources associated with the property...and also to conserve the scenic character of the Property..." The owner of the property benefitted by the easement sought a judgment declaring that the construction of a barn and an access road on the burdened parcel violated the easement. The Supreme Court, Orange County, dismissed the Action and the Appellate Division, Second Department, affirmed. The easement was entered into to enhance the burdened property's agricultural use; construction of the barn was consistent with the easement's agricultural purpose, and the access road was for farm purposes. *Orange County Land Trust, Inc. v. Tamira Amelia Farm, LLC*, dated July 20, 2016, is reported at 34 N.Y.S.3d 618.

Equitable Mortgages

As reported in Current Developments dated March 2, 2015, the Appellate Division, First Department, in *Patmos Fifth Real Estate Inc. v. Mazl Building LLC*, decided January 8, 2015 and reported at 124 A.D.3d 422, held that the recording of a deed purporting to transfer title to a condominium unit to the mortgagee, which deed was released from escrow on the borrower's default, violated Real Property Law Section 320 ("Certain deeds deemed mortgages") and was not effective to convey title. The Appellate Division, in a decision dated June 6, 2016 (2016 NY Slip Op 04804) has further ruled that the Plaintiffs, the grantors, notwithstanding the recording of the deed, "are and have been the sole owners of the subject property". The Court also held that the Plaintiffs were not entitled to summary judgment dismissing the foreclosure "because the filing of the deed was not equivalent to a judgment of foreclosure..." Following the Appellate Division's decision, the Supreme Court, New York County, issued an Opinion on June 21, 2016, 2016 (NY Slip Op 31173) holding that "[g]iven the Appellate Division's determination that plaintiffs are the sole owners of the condominium and that the deed was given as security [citation omitted], movants must proceed by foreclosure". The decisions issued in 2016 are posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_04804.htm and http://www.nycourts.gov/reporter/pdfs/2016/2016_31173.pdf.

Financial Crimes Enforcement Network

As reported in Current Developments dated July 28, 2016, the United States Treasury Department's Financial Crimes Enforcement Network ("FinCEN") has issued Geographic Targeting Orders extending the scope of prior Orders requiring "certain U.S. title insurance companies to identify the natural persons

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behind companies used to pay 'all cash' for high-end residential real estate" in New York City and in certain other counties within the United States. The New York State Department of Law's Real Estate Finance Bureau has issued a guidance document clarifying "how the July 22, 2016 Geographic Targeting Order... affects disclosure requirements for sponsors and prospective purchasers of residential real property located in all boroughs of New York City." The Memorandum ("Disclosure Requirements Regarding FinCEN's Geographic Targeting Order"), dated August 25, 2016, is posted at <http://www.ag.ny.gov/pdfs/ref/DisclosureRequirementsFinCEN%E2%80%99sGeographicTargetingOrder-8-25-2016.pdf>.

Mortgage Foreclosures/Election of Remedies

Under RPAPL Section 1301 ("Separate action for mortgage debt"), "[w]here final judgment for the plaintiff has been rendered 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 issued upon the judgment...and has been returned wholly or partly unsatisfied". Section 1301(3) further states that "[w]hile an action is pending or after final judgment for the plaintiff therein, 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."

A judgment of foreclosure and sale was entered in an Action commenced in 2008 (the "2008 Action"). The Plaintiff moved to discontinue the 2008 Action and, before there was a ruling on the motion, the Plaintiff commenced a second Action to foreclose the same mortgage (the "2013 Action"). The 2008 Action was then discontinued and the judgment of foreclosure and sale was vacated. The Supreme Court, Nassau County, applying RPAPL Section 1301(3), granted a Defendant's motion to dismiss the complaint in the 2013 Action as against him. The Appellate Division, Second Department, reversed the ruling of the lower court. According to the Appellate Division,

"...the plaintiff violated RPAPL Section 1301(3) by, without leave of the Supreme Court, commencing the 2013 action prior to the court granting its motion to discontinue the 2008 Action. However, by the time the defendant moved to dismiss the complaint in the 2013 Action based on the plaintiff's violation of RPAPL 1301(3), the court had already granted the plaintiff's motion to discontinue the 2008 action. Under the unique circumstances of this case, where the defendant was not prejudiced by the plaintiff's failure to comply with RPAPL 1301(3) since he was not in the position of having to defend against more than one lawsuit to recover the same mortgage debt, granting dismissal of the complaint in the 2013 action after the 2008 action had already been discontinued afforded the defendant more relief than is contemplated by RPAPL 1301(3). The plaintiff's failure to comply with RPAPL 1301(3) should have been disregarded as a mere irregularity which did not prejudice a substantial right of any party..."

Wells Fargo Bank, N.A. v. Irizarry, 2016 NY Slip Op 05808, decided August 17, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_05808.htm.

Mortgage Foreclosures/Federal Regulations

The Defendant in an Action to foreclose a mortgage asserted as an affirmative defense the Plaintiff's failure to comply with the Federal Consumer Financial Protection Bureau's Regulation X ("Real Estate Settlement and Procedures Act"). The Supreme Court, Suffolk County, granted the Plaintiff's motion for summary judgment, holding that "a federal regulation may not be employed as a defense to any facet of a New York mortgage foreclosure action". According to the Court,

"[w]hile regulatory provisions, particularly those referred to as Regulation X, obligate some mortgage foreclosure plaintiffs to conform to review standards and to seek stays or adjournments of the prosecution of their foreclosure claims...they do not provide defendant mortgagors with any viable defense to a New York foreclosure action or any right to obtain a stay of proceedings in such actions or to obtain a vacatur of orders or judgments obtained in such actions. Instead, the regulations merely provide a federal

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monetary remedy in favor of a mortgage borrower against a bank, note holder or other entity subject to such federal regulations, upon proof of their violation of one or more of the regulations. (see 12 C.F.R 1024.41; RESPA at 12 U.S.C. 2605[f]).”

Federal National Mortgage Association v. Karastamatis, decided June 29, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_26209.htm.

Mortgage Foreclosures/Notices

RPAPL Section 1304 (“Required prior notices”) requires “a lender, an assignee or a mortgage loan servicer [commencing] legal action against the borrower, including [a] mortgage foreclosure”, to send a notice required by Section 1304 to the borrower at least ninety days before an action on a “home loan” is commenced. The notice is captioned “You Could Lose Your Home. Please Read the Following Notice Carefully.” The Supreme Court, Westchester County, noting that there was no Appellate Division case on point, held that Section 1304’s notice requirement does not apply when the borrower is deceased. In this case, the borrower died ninety days before the foreclosure was commenced. US Bank N.A. v. Levine, 2016 NY Slip Op 26218, decided July 11, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_26218.htm.

Mortgage Foreclosures/Notices/Standing

The Plaintiff, the holder of a note secured by a mortgage, elected to recover on the note and obtain a money judgment. Two copies of the note were presented in the Action. One note was endorsed in blank; the other note was endorsed to IndyMac Bank, FSB and endorsed by IndyMac Bank to the Plaintiff and included an allonge endorsed by the Plaintiff in blank. The Defendant asserted that the two versions of the note evidenced fraud and that the Plaintiff lacked standing. The Defendant also alleged that the Plaintiff failed to comply with the 90-day notice requirements of RPAPL Section 1304 because the notice expired one year after it was sent and before the Action was commenced. Under Section 1304, “[t]he notice...need only be provided once in a twelve month period to the same borrower in connection with the same loan”.

The Plaintiff asserted that Section 1304 did not apply to an Action to enforce only a note. The Supreme Court, Kings County, denied the Defendant’s cross-motion for summary judgment dismissing the complaint and granted the Plaintiff’s motion for summary judgment. The Court held that the Plaintiff had standing and that RPAPL Section 1304 did not apply to an action to recover on a note.

The Appellate Division, Second Department, affirmed the Supreme Court’s denial of the Defendant’s motion for summary judgment; but the Appellate Division, modifying the lower court’s Order, denied the Plaintiff’s motion for summary judgment. According to the Appellate Division, since there were two different copies of the note with different endorsements, there was a triable issue of fact as to whether the Plaintiff possessed the original note when the Action was commenced. The Appellate Division further held that RPAPL Section 1304 applies “to all legal actions involving home loans commenced against the borrower, including “an action to recover on a note secured by a mortgage” and that RPAPL Section 1304 “does not state that the action must be commenced within 12 months of the RPAPL 1304 notice”. Deutsche Bank National Trust Company v. Webster, 2016 NY Slip Op 05846, decided August 24, 2016, is reported at 2016 WL 4443729 and posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_05846.htm.

Mortgage Foreclosures/Sale

Under Subsection 6 of RPAPL Section 231 (“Sale, notice of, when and how conducted”) “[a]t any time within one year after the sale, but not thereafter, the court, upon such terms as may be just, may set the sale aside for failure to comply with the provisions of this section as to the notice, time or manner of such sale if a substantial right of a party was prejudiced by the defect.” The Supreme Court, Kings County, granted the Defendants’ motion to set aside a foreclosure sale and vacate the referee’s deed because the referee announced at the sale an upset price higher than the amount stated in the referee’s report. The Appellate Division, Second Department, reversed; the mistake by the referee was a mere irregularity which did “not affect a substantial right of a party.” No evidence

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was submitted that there were other bidders at the sale or “that any bidders objected to the sale or were impeded by the referee’s conduct”. *Clinton Hill Holding I, LLC v. Kathy & Tania, Inc.*, 2016 NY Slip Op 05844, decided August 24, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_05844.htm.

Mortgage Recording Tax/New York State Transfer Tax

New York’s Department of Taxation and Finance announced that the interest rate to be charged for the period October 1, 2016 – December 31, 2016 on late payments and assessments of Mortgage Recording Tax and the State’s Real Estate Transfer Tax will be 8% per annum, compounded daily. The interest rate to be paid on refunds will be 3% per annum, compounded daily. The notice issued by the Department is posted at http://www.tax.ny.gov/pay/all/int_curr.htm.

Mortgage Recording Tax/New York State Transfer Tax

New York State’s Department of Taxation and Finance has posted its Annual Statistical Report of New York State Tax Collections for the State’s fiscal year 2015-2016 (April 1, 2015-March 31, 2016). According to the Report, the Real Estate Transfer Tax collected in FY 2015-2016 was \$1,163,059,805, up from \$1,037,880,453 collected in FY 2014-2015. Mortgage recording tax collected statewide in FY 2015-2016 was \$2,148,937,051, the mortgage recording tax collected in New York City being \$1,657,539,988. As reported in the Annual Statistical Report issued for FY 2014-2015, for that fiscal year the mortgage recording tax collected statewide was \$1,971,878.465; the mortgage tax collected in New York City was \$1,465,427,230. The Report for Fiscal Year 2015-2016 is posted at https://www.tax.ny.gov/research/collections/fy_collections_stat_report/2015_2016_annual_statistical_report_of_ny_state_tax_collections.htm.

NYC/“Forgiving Fines: The NYC Amnesty Program”

New York City’s Department of Finance has announced that it will forgo the collection of interest and penalties charged on unpaid violations issued by the Department of Sanitation, the Department of Buildings and other City agencies, not including parking tickets, which were in judgment before June 12, 2016, provided that all such violations are paid before December 12, 2016. Information on this program is posted at http://www1.nyc.gov/site/finance/taxes/forgiving-fines-the-nyc-amnesty-program.page?utm_source=AdaptiveMailer&utm_medium=email&utm_campaign=Industry%20Bulletins&org=743&lvl=100&ite=247&lea=23652&ctr=0&par=1&trk=.

NYC Recordings/UCC Financing Statements

The New York State Land Title Association reported that it had received the following information from the New York City Register: “Beginning August 1, 2016, fees paid to the New York City Department of Finance, Office of the City Register, for filing Uniform Commercial Code Documents will cover only one filing. If a document is rejected or is not recorded, the fee cannot be applied to a future recording, and the fee will not be refunded. Re-submission of a rejected UCC document will require repayment of the filing fee.”

Partnerships

In a decision dealing with the authority of the partners of a partnership to appoint the manager to conduct its day-to-day business, the Appellate Division First Department, also considered whether either the consent of a majority of partners or of all of the partners is required to sell a partnership’s remaining, unsold condominium units. Under Partnership Law Section 20 (“Partner agent of partnership as to partnership business”), the agreement of all of the partners of a partnership is required to “do any other act which would make it impossible to carry on the ordinary business of the partnership.” Under Partnership Law Section 40 (“Rules determining rights and duties of partners”), “[a]ny difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners.”

The partnership in question was formed to construct and manage a condominium. Since the partnership would not be able to conduct its business if there was a “bulk sale” of the remaining units, such a sale requires the approval of all of the partners of the partnership. The sale of a single unit is in the ordinary course of business

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and requires the approval of only a majority of the partners. *Cara Associates, L.L.C. v. Milstein*, 2016 NY Slip Op 05224, decided June 30, 2016, is reported at 140 A.D. 3d 657.

Recording/Lost Mortgage

The original of an unrecorded mortgage executed on March 15, 2005 to Washington Mutual Bank, N.A. (“WAMU”) was lost. Deutsche Bank National Trust Company (“Deutsche Bank”), as Trustee, claiming to be the holder of the mortgage, sought an Order compelling execution of a duplicate original mortgage, directing the Register to record a duplicate copy of the mortgage, declaring that all other interests are subordinate to the Plaintiff’s interest, declaring that the Plaintiff holds an equitable mortgage, and directing the Register to record any ruling issued by the Court. The Supreme Court, Kings County, denied the Plaintiff’s motion for summary judgment and granted the Defendant-borrower’s cross-motion to dismiss the complaint.

In 2004, WAMU entered into an agreement to sell Greenwich Capital Finance Products (“Greenwich”) residential home mortgages made to WAMU. On or about August 1, 2005, Greenwich entered into an agreement with Deutsche Bank, as Trustee under a newly formed REMIC Trust. The Defendant’s mortgage was purportedly included in the mortgages sold by Greenwich to Deutsche Bank. Plaintiff submitted a copy of a note executed by the Defendant to WAMU endorsed in blank by WAMU. According to the Court,

“[p]laintiff failed to submit any evidence to indicate that the mortgage in dispute was included in those that were taken over by Greenwich or bundled into [the Trust]. Plaintiff did not submit any assignments of mortgage that could demonstrate the chain of title of the mortgage in dispute. Additionally, [an affidavit submitted on behalf of Deutsche Bank] did not set forth any facts as to when or how the note came into Deutsche’s possession.”

Deutsche Bank National Trust Company, as Trustee v. Tlatelpa, 2016 NY Slip Op 31157, decided February 9, 2016, was posted on June 23, 2016 at http://www.nycourts.gov/reporter/pdfs/2016/2016_31157.pdf.

Recording Act

On August 5, 2014, the Defendant entered into a contract to sell certain real property to the Plaintiff. On November 21, 2014, the Defendant entered into a contract of sale with Craig Bolender. A deed was delivered to Bolender on November 21, 2014 and recorded on December 27, 2014. The Plaintiff commenced an Action for specific performance on December 11, 2014 and filed a notice of pendency. The Supreme Court, Kings County, held that Bolender was a bona fide purchaser protected by New York’s Recording Act (Real Property Law Section 29, “Recording of conveyances”) because he purchased the property “for a valuable consideration, without prior notice of plaintiff’s alleged interest in the property and without facts that would lead a reasonable prudent purchaser to make such an inquiry.” The Court granted Bolender’s motion for summary judgment dismissing the cause of action for specific performance and dismissed the complaint as against Bolender. *139 Lefferts LLC v. Melendez*, 2016 NY Slip Op 31562, decided July 26, 2016, is posted at http://www.nycourts.gov/reporter/pdfs/2016/2016_31562.pdf.

Real Property Transfer Tax/Housing Development Fund Company (“HDFC”)

A mortgage made by an HDFC is exempt from mortgage recording tax under Section 577 (“Tax exemptions”) of Private Housing Finance Law Article XI (“Housing development fund companies”). However, no law has specifically provided an exemption from New York City’s Real Property Transfer Tax (“RPTT”) for a transfer to or from an HDFC.

Chapter 264 of the Laws of 2016, effective August 19, 2016, adds new paragraph 9 to New York City Administrative Code Section 11-2106 (“Exemptions”), allowing an exemption from the RPTT when real property or an economic interest in an entity owning real property is transferred by or to an HDFC and when real property is transferred to an entity in which a controlling interest is held by an HDFC. To obtain an exemption, a regulatory agreement

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meeting certain requirements set forth in Chapter 264 must be entered into with the State of New York, a municipal corporation or any other public corporation “created by or [organized] pursuant to any law of the State of New York”. Depending on the scope of the regulatory agreement, only a partial exemption may be allowed.

A refund of RPTT paid may be allowed when a regulatory agreement is executed within two years of the date of the transfer. Chapter 264 applies retroactively to transfers made on or after January 1, 2010. Assembly Bill A10512A/Senate Bill 08088, signed into law as Chapter 264, can be obtained at <http://assembly.state.ny.us/leg/?bn=A10512&term=2015>.

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