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NATIONAL COMMERCIAL SERVICES

Current Developments

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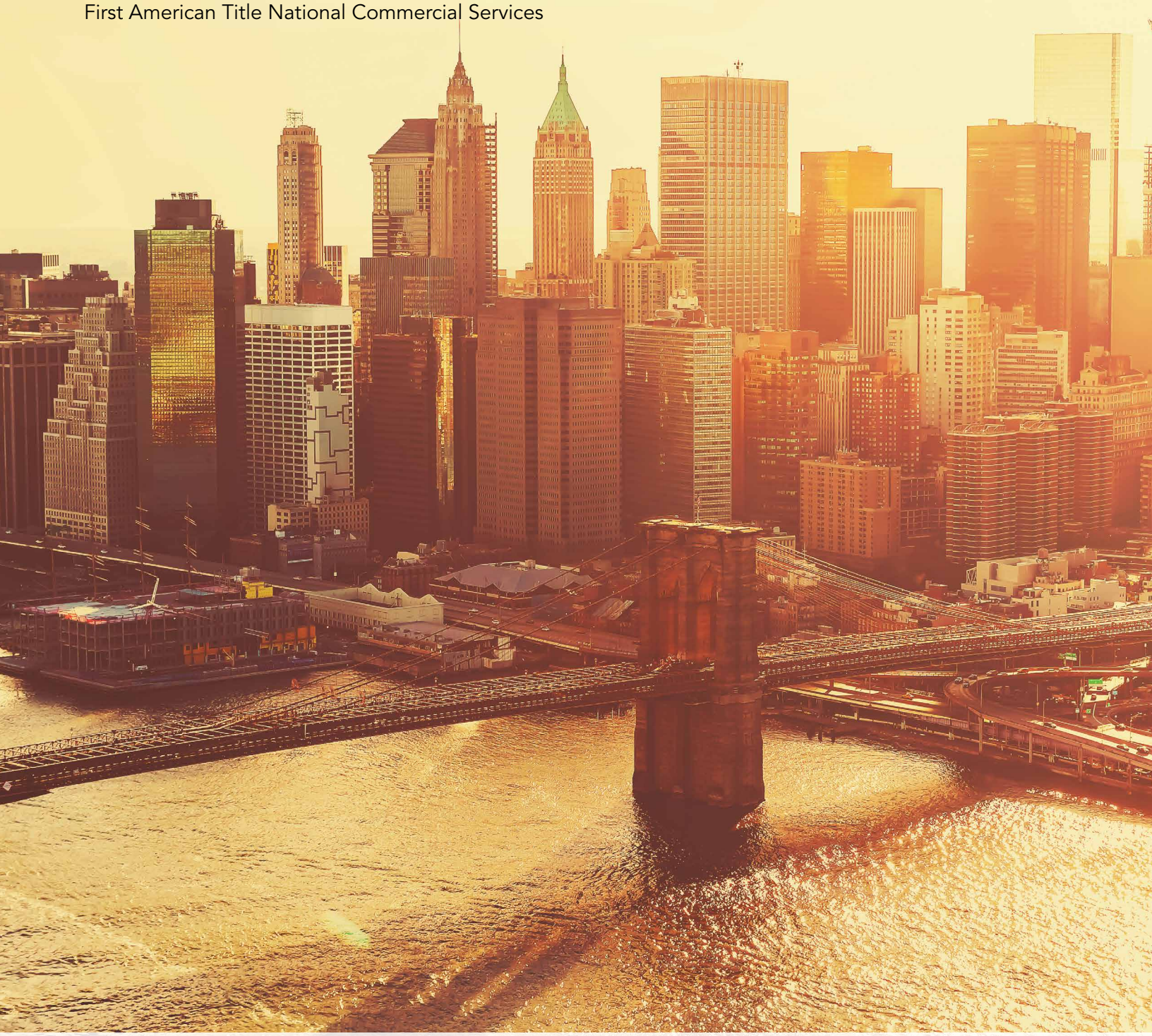

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Adverse Possession

When he died in 1970, William S. Midgley, Sr. left a farm, in equal parts, to his son William S. Midgley, Jr. and to Robert E. Sayre, Sr. The son commenced an Action in 2009, claiming that he had become the sole owner of the property by adverse possession and seeking a judgment barring any claims to title by the heirs of Robert S. Sayre, Sr. Under Real Property Actions and Proceedings Law ("RPAPL") Section 541 ("Adverse possession, how affected by relation of tenants in common") the statutory period required for a claim of adverse possession as between tenants in common is twenty years. The Supreme Court, Suffolk County, granted the Plaintiff's motion for summary judgment.

The Appellate Division, Second Department, affirmed the lower court's Order, holding that William S. Midgley, Jr. had demonstrated "by clear and convincing evidence, that his possession of the premises during the period between 1971 to 1991 was actual, open and notorious, exclusive and continuous". Although RPAPL Section 501 ("Adverse possession; defined"), as amended in 2008, requires that the person claiming adverse possession have a "claim of right", "a reasonable basis for the belief that the property belongs to the adverse possessor, "[u]nder the law existing at the time title allegedly vested here, in the absence of an overt acknowledgment during the statutory period that ownership rested with another party, actual knowledge of the true owner, or co-owner as is the case here, did not destroy the element of claim of right [citations omitted]." Midgley v. Phillips, 2016 NY Slip Op 06688, decided October 12, 2016, is posted at http://nycourts.gov/reporter/3dseries/2016/2016_06688.htm.

Attachment

The Plaintiff, seeking to recover an "Advisory Fee" for its services in arranging mortgage financing for real property owned by the Defendant, moved for an Order granting an attachment in the proceeds of the sale of the property, claiming that on the sale the Defendant would leave New York and even possibly return to Italy. Civil Practice Law and Rules Section 6201 allows for an order of attachment to be granted where the Plaintiff would be entitled to a money judgment against a defendant and "the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property or removed it from the state or is about to do any of these acts".

The Supreme Court, New York County, denied the motion because there was insufficient evidentiary support for the allegations that the Defendant had a fraudulent intent. "[A]ffidavits submitted in support of an attachment that contain allegations raising a mere suspicion of an intent to defraud are insufficient; it must appear that such fraudulent intent really existed in the defendant's mind." Red Oak Capital Advisors, LLC v 524 West 19th Street Corp., 2016 NY Slip Op 31800, decided September 30, 2016, is posted at http://nycourts.gov/reporter/pdfs/2016/2016_31800.pdf.

Contracts of Sale

A contract of sale provided that on a default by the Seller the Purchaser could either terminate the contract or bring an action for specific performance. The contract also provided that the Purchaser "shall be deemed to have elected to terminate" the contract if an action for specific performance was not commenced within 120 days after the contract's "Schedule Closing Date". The Seller failed to obtain a release of the property from a blanket mortgage and defaulted. The Purchaser commenced an Action for specific performance and damages for breach of contract. The Supreme Court, Queens County, granted the Defendant-Seller's motion for summary judgment dismissing the complaint. The Appellate Division, Second Department, affirmed the lower court's ruling, holding that "[a]s the plaintiff failed to commence this action until...approximately eight months after the 120-day period ended, its action was untimely, and it was entitled only to terminate the agreement and receive its deposit back, plus interest." SDK Property One, LLC v. QPI-XXXII, LLC, 2016 NY Slip Op 06696, decided October 12, 2016, is posted at http://nycourts.gov/reporter/3dseries/2016/2016_06696.htm.

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Escrow

$62,000 from the sale of property by Robert and Len, tenants in common, was escrowed with a title agency until a mortgage satisfaction was delivered for recording. A few months after closing, an attorney retained by Robert informed the agent that it had a copy of the satisfaction which would be forwarded for recording and requested that the escrow be sent to his law firm. The next day, the agent sent the attorney a check for $62,000; over a five month period, without Len's knowledge or consent, the attorney disbursed the entire amount to Robert. Len sued to recover his portion of the escrow. The Supreme Court, Suffolk County, granted Len's motion for summary judgment. According to the Court, "the defendant [law firm] took over the responsibilities of an escrow agent…" and "the firm now had a duty to all persons that have an interest in those funds…and as such had a duty to properly distribute the proceeds from the sale of the premises…in an equal distribution of $31,000 each". Brassell v. Harbourview Abstract, Inc., 2016 NY Slip Op 31817, decided March 21, 2016, was posted on October 5, 2016 at http://nycourts.gov/reporter/pdfs/2016/2016_31817.pdf.

Foreclosure/Action on the Note

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, specified in 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". Under subdivision 4 of Section 1304, [t]he notice and the ninety day period…need only be provided once in a twelve month period…"

The Plaintiff, the holder of a mortgage securing a note, elected to recover on the note and seek a money judgment, instead of foreclosing on the mortgage. The Defendant asserted, as an affirmative defense, the failure of the Plaintiff to comply with the notice requirements of Section 1304. He asserted that the notice expired one year after it was sent, which was before the Action was commenced. The Plaintiff countered that RPAPL Section 1304 only applied to a mortgage foreclosure. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment on the issue of liability and denied the Defendant's cross-motion for summary judgment dismissing the complaint. The Appellate Division, Second Department, held that the Supreme Court properly denied the Defendant's cross-motion and that the Court should have denied the Plaintiff's motion for summary judgment; there was a triable issue of fact as to whether the Plaintiff had possession of the original note when the Action was commenced and had standing to sue.

The Appellate Division held that the notice requirements of Section 1304 apply to "all legal actions involving home loans commenced against the borrower", including an action to recover on a note secured by a mortgage. In addition, according to the Court,

> "…RPAPL Section 1304(4) stands for the proposition that where there are multiple defaults in the 12-month period, only one RPAPL 1304 notice is required [citation omitted]. The statutory language does not state that the action must be commenced within 12 months of the RPAPL 1304 notice. Thus, contrary to the defendant's contention, the plaintiff did not fail to comply with the statute by not sending [the] RPAPL notice within 12 months prior to commencing the action."

Deutsche Bank National Trust Company, as Trustee v. Webster, 2016 NY Slip Op 05846, decided August 24, 2016, is reported at 37 N.Y.S.3d 283 and 142 A.D.3d 636, and posted at http://nycourts.gov/reporter/3dseries/2016/2016_05846.htm.

Indian Land Claims/Shinnecocks

As reported in Current Developments dated November 16, 2016, a lawsuit was filed in the United States District Court for the Eastern District of New York by the Shinnecock Indian Nation (the "Nation"), alleging that property owned by the Nation in the Town of Southampton was unlawfully conveyed in 1859 to the Trustees of the Proprietors of the Common and Undivided Lands and Marshes in the Town of Southampton in violation of the

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federal Indian Non-Intercourse Act. The Action sought a declaration that the Nation has possessory rights in the lands in question (the "Subject Lands"), that the Subject Lands were conveyed in violation of federal law, that the interests of the Trustees of the Commonality of the Town of Southampton and the other Defendants in the Subject Lands are null and void, an Order restoring the Nation to possession of those portions of the Subject Lands to which the Defendants claim title, and damages.

Shinnecock Indian Nation v. New York, reported at 2006 WL 3501099, was dismissed by the District Court, which held that the Plaintiff's claims were barred by equitable considerations, including the defense of laches. That ruling was affirmed by the United States Court of Appeals, Second Circuit, in a decision dated October 27, 2015 reported at 2015 WL 6457789. The United States Supreme Court denied a petition for a writ of certiorari on June 27, 2016, as reported at 136 S. CT. 2512.

Lien Law

A mechanic's lien was filed by a subcontractor which has been hired by the general contractor engaged by the Petitioner, the lessee of certain real property. The notice of lien was filed against the fee owner of the property, the contractor, and a mortgagee, but not against the Petitioner, which commenced an Action to cancel the lien. The Respondent moved, by order to show cause, to dismiss the petition on the ground that the Petitioner lacked standing. The Supreme Court, New York County, granted the Respondent's motion and dismissed the proceeding. According to the Court, "[a]s petitioner is not named in the notice of lien, the lien in no way implicates its ownership interest, and petitioner therefore lacks standing to seek its cancelation."

Although Lien Law Section 9 ("Contents of notice of lien") requires that a notice of lien contain "[t]he name of the owner of real property against whose interest the lien is claimed" and Lien Law Section 2 ("Definitions") defines an "owner" to include a "lessee for a term of years", a mechanic's lien need not be filed against everyone at a property included within the definition of an Owner. Matter of Eden Ballroom, LLC v. Maspeth Contracting Corp., 2016 NY Slip Op 31902, decided October 5, 2016, is posted at http://nycourts.gov/reporter/pdfs/2016/2016_31902.pdf.

Lien Law

Mechanics liens were filed in connection with two construction projects in Manhattan. The Plaintiffs sought an accounting, declaratory relief, damages for the costs of labor, materials and services furnished, and alleged a diversion of trust funds The Plaintiffs also sought a holding that the Plaintiffs' mechanics' liens had priority over the liens of building loan and project loan mortgages held by Bank Leumi USA.
The Plaintiffs asserted that their liens had priority over the building loan mortgages because there were errors in a Notice of Lending filed under Lien Law Section 73 by Bank Leumi. The Supreme Court, New York County, dismissed this cause of action without leave to re-plead. According to the Court, "…nothing in the Lien Law itself, or by any case cited to by plaintiffs stands for the proposition that this defect provides for a subordination of priority for a building loan".

The Plaintiffs also asserted that its liens had priority over the building loan mortgages because the lender's waiver of defaults under the building loan agreements were material modifications requiring the filing of amended Section 22 affidavits. The Court dismissed this cause of action without leave to re-plead. According to the Court, "[a] lender's decision to enforce or not enforce loan covenants which do not impact the amounts available to pay for improvements to real property do not require any public filings under Lien Law Section 22". Further, the building loan agreements provide that "third parties shall not have any claims against the lender or the borrower" and, therefore,

> "[u]nder the agreement, plaintiffs are not third party beneficiaries of loan covenants as between the Lender and the Borrower. As a result, it is the bank's decision to exercise or refrain from exercising its rights under the agreement, and is not a modification within the meaning of the lien law. Therefore, plaintiffs cannot claim material modification based upon a failure to enforce loan covenants".

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The Defendants moved to dismiss, counterclaiming that the relative priority of the liens had to be determined in a lien foreclosure action. The Court denied the motion. The Court of Appeals in Altshuler Shaham Provident Funds, Ltd. V. GML Tower, LLC, 21 NY3d 352 (2013) "did not hold…that the exclusive means of determining the relative priority of mechanic's liens over building loans and project loans is through a lien foreclosure action"; Lien Law "Article 2 ["Mechanics' liens"] lien foreclosure and Article 3-A ["Definition and enforcement of trusts"] class action remedies may be pursued simultaneously". Notwithstanding, the Court granted the Plaintiffs' motion to consolidate the Actions.

The Court granted the Plaintiffs' cross-motion for an interim accounting. MLF3 Airitan LLC v. 2338 Second Avenue Mazal LLC, 2016 NY Slip Op 31847, decided September 30, 2016, is posted at http://nycourts.gov/reporter/pdfs/2016/2016_31847.pdf.

Mortgage Foreclosure/Service of Process

In an Action to foreclose tax liens, a Defendant appealed the denial of her motion to vacate a judgment of foreclosure and sale, claiming that her default was an "excusable default" under Civil Practice Law and Rules Rule 5015 ("Relief from judgment or order") because she was not served with the summons and complaint. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Nassau County. According to the Appellate Division, "…the process server's affidavit of service constituted prima facie evidence of service… and the appellant's bare and unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service…"Sass Muni IV DTR v. Braxter, 2016 NY Slip Op 06695, decided October 12, 2016, is posted at http://nycourts.gov/reporter/3dseries/2016/2016_06695.htm and reported at 2016 WL 5928747.

Mortgage Foreclosures/Town of Hempstead

As reported in Current Developments dated July 25, 2016, Local Law 46-2016 was enacted by the Town Board of the Town of Hempstead to add Section 128-61.1 ("Foreclosures; Undertaking") to the Town's Code which requires a lender foreclosing a mortgage on vacant property improved by a single-family, a two-family or a multiple-family residence 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 discontinued. Fines may be imposed by the Town for the failure to comply with the requirements of Section 128-61-1. The Local Law was effective on June 6, 2016; it applies to all foreclosures within this Section commenced after that date. See Bergman, "Legislative Assaults on Mortgage Holders", New York Law Journal, June 29, 2016. Section 128-61.1 and Section 128-61.2, discussed below, are posted at http://ecode360.com/print/HE0207?guid=15515810&children=true.

Local Law 55-2016 added Section 128-61.2 ("Nonresidential foreclosures; undertaking") to the Town of Hempstead's Code requiring a lender foreclosing a mortgage on any vacant property not subject to the provisions of Section 128-61.1 to provide the Town, within forty-five calendar days from the date on which the foreclosure is commenced, an undertaking of $35,000 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. Section 128-61.2 is similar to Section 128-61.1. Differences between the Sections are the amount of the required undertaking, the effective date, and the penalties for the failure to post or replenish the undertaking, Under Section 128-61.1, fines are imposed; under Section 128-61.2, fines and/or imprisonment for not more than 15 days may be imposed. Local Law 55-2016 was effective on June 28, 2016; it applies to all foreclosures within this Section commenced after that date.

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 January 1, 2017 – March 31, 2017 on late payments and assessments of Mortgage Recording Tax and the State's

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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 https://www.tax.ny.gov/pay/all/interest_rates/int0117.htm.

Notice of Pendency

The Plaintiff sought a declaration that it had an ownership interest in an entity alleged to be the owner of the properties listed in the notices of pendency. The Supreme Court, Queens County, denied the Defendants' motion to cancel the notices of pendency. The Appellate Division, Second Department, reversed, holding that the notices of pendency were improperly filed because the judgment demanded in the complaint would not affect the title to, or the possession, use, or enjoyment of, any real property. According to the Appellate Division,

> "[t]he plaintiff's conduct in improperly filing the notices of pendency in the first instance, and then refusing to cancel them in response to the defendants' demand, was 'completely without merit in law and could not be supported by a reasonable argument for an extension, modification, or reversal of existing law," and therefore, was 'frivolous' within the meaning of 22 NYCRR 130-1.1 [("Costs; sanctions",] [citations omitted]".

The Appellate Division remitted the case to the Supreme Court, Queens County, to determine "the amounts of costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys' fees to be awarded resulting from the plaintiff's improper filing of the notices of pendency". Delidimitropoulous v. Karantinidis, 2016 NY Slip Op 06057, decided September 21, 2016, is reported at 143 AD3d 10381 and posted at http://nycourts.gov/reporter/3dseries/2016/2016_06057.htm.

Notice of Pendency

Under subdivision (c) of CPLR Section 6516 ("Successive notices of pendency"), "[e]xcept as provided in subdivision (a) of this section [allowing for the successive filing of a notice of pendency in a mortgage foreclosure], a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective".

An Action commenced by the Plaintiff in 2012 for specific performance of a contract of sale was discontinued without prejudice; the notice of pendency was canceled. The Defendant-property owner then entered into a contract to sell the property to a third-party; a memorandum of that contract was recorded. In 2016, the Plaintiff commenced a new Action in which a third-party purchaser was also a Defendant, asserting causes of action for specific performance, for tortious interference with a contract, and to quiet title. The Supreme Court, New York County, denied the Defendant-property owner's motion to dismiss and to cancel the notice of pendency.

Generally, "[w]here a plaintiff cancels a notice of pendency upon discontinuing a prior action without prejudice, then commences a new action with an additional defendant and a new claim, the second filing of the notice of pendency is not permitted". However, "significant change in circumstances permits a successive filing". According to the Court,

> "…a successive Notice of Pendency filing is permitted here. Although Plaintiff has asserted the same cause of action for specific performance…Plaintiff also asserts a new cause of action, adding a new defendant to quiet title, and for tortious interference. At the outset, it appears that Plaintiff would not be entitled to file a successive Notice of Pendency. However, [the third-party Defendant] has recorded a memorandum of contract for the subject property, and this is a significant change in circumstances. Further, construing the case law where successive notice of pendencies are not permitted in subsequent actions, or where there is an addition of a defendant and new claims, these appear to all have been based on the party trying to circumvent their failure to comply with the strictures of the statutory filing requirements. That is not the case here…"

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Prime Homes LLC v. O'Reilly, 2016 NY Slip Op 31742, decided September 20, 2016, is posted at http://nycourts.gov/reporter/pdfs/2016/2016_31742.pdf.

Notice of Pendency

The Plaintiffs, the holders of a money judgment, sought to set aside the transfer of certain properties to enable the satisfaction of their judgment.

They claimed that the transfers were caused to be made by the judgment debtor to defraud his creditors. The record owner of the properties moved for an Order cancelling the notices of pendency, contending that if the transfers were set aside, the Plaintiffs' judgment would be subordinate to mortgages that would be reinstated and the amount due under the mortgages would exceed the value of the property. The Supreme Court, New York County, denied the motion because the moving party had not posted an undertaking. Under CPLR Section 6515 ("Undertaking for cancellation of notice of pendency; security by plaintiff"),

> "…the court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court, and if: 1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or 2. in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled".

Grinshpun v. Borokhovich, 2016 NY Slip Op 31873, decided October 6, 2016, is posted at http://nycourts.gov/reporter/pdfs/2016/2016_31873.pdf.

Recording Act

The seller represented in a contract of sale that a commercial lease at the property to be conveyed did not contain a right of first refusal to purchase ("ROFR"). The sale closed; the purchaser obtained loans from Signature Bank secured by two mortgages. The tenant, whose lease did include a ROFR, brought an Action to invalidate the sale and to obtain specific performance. The Supreme Court, Kings County, denied motions by the Defendant-purchaser and by Signature Bank for summary judgment. However, on re-argument, the Court granted Signature Bank's summary judgment motion. The Court found that the Bank was a bona fide purchaser for value whose interest was protected under the Recording Act (Real Property Law, Section 291, "Recording of conveyances"). According to the Court, "Plaintiff's failure to record her lease, Signature's initiation of a title search and [the purchaser's] assurances that the Plaintiff did not have a right of first refusal are facts which demonstrate that Signature was unaware that Plaintiff had any rights in the premises".

The Court, on re-argument, again denied the purchaser's motion for summary judgment. It concluded there were issues of fact as to whether the purchaser was deemed to have notice of the ROFR by reason of the Plaintiff's possession and because an estoppel certificate from the tenant, required by the contract, was not produced, whether the Plaintiff attempted to exercise the ROFR in a timely manner, and whether the Plaintiff was ready, willing and able to purchase the premises. Dahari v. Villafana, 2016 NY Slip Op 31859, decided October 3, 2016, is posted at http://nycourts.gov/reporter/pdfs/2016/2016_31859.pdf.

Restrictive Covenants

RPAPL Section 1951 ("Extinguishment of non-substantial restrictions on the use of land") provides that if a court finds that a restriction on the use of land, created by "any covenant, promise or negative easement", "is of no actual and substantial benefit…either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any other reason, it may adjudge that the restriction is not enforceable…"

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The Plaintiffs purchased land in the Town of Hempstead to construct waterfront condominium units. The Town approved a change in zoning to allow for the intended use but it also imposed a Declaration of Restrictions, paragraph seven of which, as later amended, permitted the Plaintiffs to lease for a designated period up to 17 of the 172 units to be constructed. In 2013, the Plaintiffs petitioned the Town for a further modification which would allow 140 units to remain as rentals; the Town denied the application. The Plaintiffs commenced an Action seeking, among other relief, a judgment holding that paragraph seven of the Declaration was invalid. On that cause of action, the Supreme Court, Nassau County, denied the Town's motion to dismiss and the Plaintiffs' cross-motion for summary judgment. The Appellate Division, Second Department, remitted the matter to the lower court for entry of a judgment declaring that paragraph seven of the Declaration is invalid and unenforceable. The Plaintiffs met the "prima facie burden of showing that paragraph seven of the Declaration is of no actual and substantial benefit to the Town". The Town offered no explanation in opposition. Blue Island Development, LLC v. Town of Hempstead, 2016 NY Slip Op 06465, decided October 5, 2016, is posted at http://nycourts.gov/reporter/3dseries/2016/2016_06465.htm.

Right of First Refusal

A contract to sell real property within a homeowner's association stated that the transaction was subject to the association waiving its ROFR, as required by the association's Declaration and Restrictive Covenants. The association exercised its ROFR and the contract down payment was returned. The seller and the association entered into a contract of sale, and the association assigned its rights under the contract to a third party who purchased the property. The Plaintiffs, the initial contract vendee and its sole shareholder, commenced an Action for specific performance, alleging that the exercise of the right of first refusal and the assignment of the contract by the association was void and unenforceable. The Supreme Court, Westchester County, denied the Plaintiffs' motion for summary judgment and awarded summary judgment to the seller, the ultimate purchaser and the association, dismissing the complaint as to them.

The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Court, "[i]n reviewing the actions of a homeowners' association, a court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the association". In this case, the "defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the board's actions were authorized and lawful pursuant to the association's governing documents and were in furtherance of a legitimate interest of the association". 19 Pond, Inc. v. Goldens Bridge Community Association, Inc., 2016 NY Slip Op 05979, decided September 14, 2016, is reported at 142 AD3d 969 and posted at http://nycourts.gov/reporter/3dseries/2016/2016_05979.htm.

Best wishes for the Holiday Season!

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