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NATIONAL COMMERCIAL SERVICES

Current Developments

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Easements

An easement recorded in 1988 granted the use of a driveway over the Plaintiff's parcel to enable access to garages at the rear of an adjoining property. However, the instrument granting the easement included a metes and bounds description locating the easement on another parcel. The Plaintiff, who acquired the property in 2001, constructed a retaining wall which allegedly made the driveway more difficult to use for the Defendants, the holders of a life estate and of remainder interests in the benefitted property. The Plaintiff sought a declaration either that the right-of-way was invalid or that he had not impermissibly interfered with it. The Supreme Court, Ulster County, held that the 1988 conveyance established an enforceable easement and that the Plaintiff had not impaired the Defendant's rights. The Court fixed the right-of-way as the location of the driveway, as it had been altered by the Plaintiff. The Appellate Division, Third Department, affirmed. According to the Appellate Division,

> "…inasmuch as [the right-of-way] lacks a specific metes and bounds description or other expression to the contrary, plaintiff is free to unilaterally relocate it 'so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way'" [citations omitted]

Based on the evidence submitted, the Supreme Court held that the Defendants' right of access had not been impaired. The Appellate Division found that there was "no reason to disturb the determination that plaintiff was free to alter the driveway as he did". Anzalone v. Constantino, 2016 NY Slip Op 08277, decided December 8, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_08277.htm.

Foreclosures/Surplus Monies

Fidelity National Title Insurance Company ("Fidelity") issued a Policy of title insurance insuring the purchaser of a condominium unit out of a foreclosure sale stemming from an Action commenced by the Board of Managers to recover unpaid common charges. In its Policy, Fidelity failed to report a first mortgage of record which, under New York law, survived the foreclosure. To protect its Insured, Fidelity purchased the mortgage. Fidelity moved for an Order directing that the surplus money from the foreclosure sale should be paid to it as the holder of the mortgage. The Supreme Court, New York County, denied the motion. According to the Court,

> "[the Insured] purchased the premises subject to the mortgage now owned by Fidelity and that Fidelity's mortgage was not extinguished by the foreclosure sale. Therefore, Fidelity is not entitled to share in the surplus because the mortgage remains on the Premises. Fidelity provided no case law to support its position that as holder of a senior lien, it is entitled to surplus money. The case law cited above suggests that surplus money is available to junior lien holders whose liens are extinguished by the foreclosure".

Board of Managers of the Coronado Condominium v. Silva, 2016 NY Slip OP 26377, decided November 14, 2016 and reported at 2016 WL 6816527, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_26377.htm.

Mortgage Foreclosures

The Supreme Court, New York County, in the foreclosure of a mortgage on a condominium unit, granted the motion of the Defendant-Board of Managers of the Condominium, to which common charges were owed, to reduce the Plaintiff's recovery of accrued interest from $98,472.23 to $25,110.42. The foreclosure, although uncontested, had been ongoing for seven years. According to the Court,

> "[t]he record in this matter evidences a plaintiff unconcerned with prosecuting its case. Whether this inaction was due to a desire to accrue substantial interest on a valuable property or for more benign reasons, the fact is that plaintiff has spent over seven years prosecuting a case which had no opposition. Plaintiff provides no evidence that the borrower opposed any of the plaintiff's motions, that the borrower sought a settlement or even that the borrower ever communicated at all with the plaintiff in seven years. In fact, plaintiff is unable to provide a single reason or excuse for its delay. Plaintiff would have this Court allow it to delay as long as

plaintiff wishes while collecting the accumulated interest as the case sits on the court docket".

The Board of Managers contended that the Plaintiff's delay made it less likely that the Board would recover the unpaid common charges. Citimortgage, Inc. v. Gueye, 2016 NY Slip Op 50972, decided June 21, 2016, is reported at 38 N.Y.S.3d 830 and is posted at http://nycourts.gov/reporter/3dseries/2016/2016_50972.htm.

Mortgage Foreclosures/Erroneous Satisfaction of Mortgage

Mortgage loans made by Countrywide Home Loans, Inc. ("Countrywide") in 2002 and 2003 were assigned to American Home Mortgage ("AHM") on January 23, 2007 by an assignment recorded on March 30, 2007. A new mortgage loan was made by AHM and a consolidated note and mortgage were executed. However, on November 1, 2006 Countrywide had discharged the 2002 and 2003 mortgages by a Satisfaction recorded on January 26, 2007. On February 27, 2014, AHM purportedly assigned the three mortgages, as consolidated, to Countrywide; that assignment was lost and not recorded. On March 11, 2014, Countrywide assigned the mortgages, as consolidated, to Citimortgage, Inc.

Citimortgage, Inc., by its loan servicer, sought to foreclose the lien of the consolidated mortgages. It also sought the cancelation of the mortgage satisfaction and an Order directing the Suffolk County Clerk to record a copy of the lost February 27, 2014 assignment. Its motion for a default judgment was denied by the Supreme Court, Suffolk County.

The Court noted that the cancellation of the mortgage satisfaction was a condition precedent to foreclosing on the three consolidated mortgages. According to the Court, "where, as here, the balances of prior mortgage loans are increased by new monies lent on a subsequent mortgage loan and a CEMA is executed to consolidate all of the mortgages into single liens, the prior notes and mortgages still exist and retain an independent nature…"

Reviewing the allegations in the complaint and in the affidavit submitted on behalf of the loan servicer for Citmortgage, the Court held that a viable claim was not presented for the cancellation of the Satisfaction of the mortgages. According to the Court,

> "Facts constituting the elements of such a claim, including the nature and circumstances of the mistaken and erroneous issuance of the subject satisfaction piece and the absence of any concomitant discharge or satisfaction of the debt purportedly released therein, are not discernible from the complaint or the affidavit of merit attached to the moving papers. Nor are there any allegations regarding the existence or non-existence of persons or entities who lent monies or otherwise relied upon the recorded satisfaction piece. All such persons would be necessary party defendants, absent the effectiveness of a duly indexed notice of pendency as to that claim which binds all such persons as if they were joined as party defendants, because the 2006 CEMA cannot effect the rights of other non-party lienholders who may have relied on the 2007 recorded discharge of the 2002 and 2003 mortgage debts".

The Court also denied the request for an Order directing the County Clerk to record a copy of the February 27, 2014 mortgage assignment because there was "no pleaded claim for the recording of the purportedly lost assignment, only counsel's brief and casual request for such relief that is advanced in his supporting affirmation and it is without mention of the elements necessary [to] state a viable claim for this relief". No allegations were pleaded and no proof was provided of the due execution of the lost assignment and of its contents. Alternatively, there was no allegation the County Clerk was presented with the assignment and the proper fee for recording and refused to record. Countrywide Home Loans, Inc. v. Sanvitale, 2016 NY Slip OP 32549, decided October 28, 2015, is posted at http://www.nycourts.gov/reporter/pdfs/2016/2016_32549.pdf.

Mortgage Recording Tax

As reported in Current Developments dated November 3, 2016, Chapter 394 of the Laws of 2016, enacted and effective on September 30, 2016, amended Sections of New York State's General Municipal Law, Public Authorities Law and Tax Law to require that the portion of the mortgage recording tax known as the "Additional

Tax" be paid on recording a mortgage to which an Industrial Development Agency is a party in in a county in which the Additional Tax applies. Mortgages executed by Industrial Development Agencies have been exempt from the payment of any portion of the mortgage recording tax so long as the Agency covenants in the mortgage that it will record the mortgage. The Governor's Memorandum of Approval indicated that the effective date of the Chapter would be extended:

> "As drafted, however, the legislation's immediate effective date may interfere with the completion of several pending projects and necessitate changes to contractual arrangements. To address that concern, the Legislature has agreed to a chapter amendment that would change the effective date of the legislation to July 1, 2017. On this basis, I am signing this bill."

Legislation (Senate Bill 979/Assembly Bill 374) changing the effective date to July 1, 2017 was approved by the state legislature and delivered to the Governor for signature on January 24, 2017.

Mortgages

A mortgage loan in the amount of $559,000 was modified to provide for monthly payments on the reduced principal amount of $396,870.92 and a balloon payment of $162,129.08 on maturity of the loan. As required by the loan servicer's payoff letter issued when the borrower was selling the property, $390,785.62 was paid and a satisfaction of the $559,000 mortgage was recorded. The Plaintiff, alleged to be the assignee of the balloon obligation, commenced an Action to recover the remaining amount allegedly owed. The Supreme Court, Kings County, granted the Defendant's motion for summary judgment dismissing the complaint. According to the Court, applying the doctrine of estoppel, "…defendant relied on the payoff letter she received from [the loan servicer]. Defendant's reliance was justifiable and defendant prejudicially changed her position by selling the subject premises, relocating and purchasing another home…" Further, the Plaintiff had not met its burden of showing "'that there had been fraud, duress or some other fact which will be sufficient to void the release'" [Citation omitted]. Dovenmuehle Mortgage, Inc. v. Mobley, 2016 NY Slip Op 26430, decided December 21, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_26430.htm.

Nassau County and Suffolk County/Charges for Recording

In Nassau and Suffolk Counties, each tax lot affected by a document being submitted for recording is required to be verified. Nassau County has increased the Tax Map Verification Fee from $225 to $355 per document effective January 1, 2017. In Suffolk County, a fee of $200 per tax lot, not to exceed $5,000 per document, is imposed for verifying the tax map numbers on instruments presented for recording or filing. However, in addition, in Suffolk County, effective January 1, 2017, a "separate and additional fee of $300 per instrument" will be charged "for the verification of Tax Map numbers on all mortgage instruments".

Party Walls

Property now owned by the Plaintiff, located at 211 West 61st Street in Manhattan, had been improved by a building (the "211 West Building"). Property now owned by the Defendant, located at 205 West 61st Street, also had been improved by a building (the "205 West Building"). The buildings had shared a party wall used for their mutual support. In 1927, the 211 West Building was replaced by the current seven-story building which incorporates the party wall into its façade but does not use the party wall for support. In 1934, the 205 West Building was torn down; the portion of 205 West 61st Street adjoining the Plaintiff's property is used as a parking lot. The Plaintiff alleged that the Defendant is required to maintain the wall as a party wall.

The Appellate Division, First Department, affirmed the dismissal of the Complaint by the Supreme Court, New York County. According to the Appellate Division, "once the wall stopped providing support for the structures on the adjacent lots, its status as a party wall and all attendant easements ceased". 211 West 61st Street Condominium, Inc. v. New York City Housing Authority, 2017 NY Slip Op 00116, decided January 10, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_00116.htm.

Recording Act

The Plaintiff and his wife (the "Coopers") leased a home under an unrecorded lease executed in 1999. The lease contained an option to purchase. In 2003, the property was sold and the purchaser obtained a mortgage loan from Defendant First Niagara Bank, N.A. In 2011, the mortgage was foreclosed. The Coopers, named as Defendants in the action, neither appeared nor answered, and a judgment of foreclosure and sale was granted. The Plaintiff then commenced an Action to have the mortgage declared null and void. The Supreme Court, Rensselaer County, granted the mortgagee's motion for summary judgment, which ruling was affirmed by the Appellate Division, Third Department.

The issue was whether the Defendant-mortgagee, when its mortgage loan was made, was charged with a duty to inquire as to whether the Coopers, being in possession, had any other interest in the property. According to the Appellate Division, "[p]laintiff's mere possession and occupancy of the property with his family did not give defendant notice of any conflicting interest that plaintiff had in the property…[citations omitted] Under these circumstances, no basis exists to void defendant's mortgage…" Cooper v. Pullar, 2016 NY Slip Op 08283, decided December 8, 2016, is reported at 2016 WL 7129568 and is posted at http://nycourts.gov/reporter/3dseries/2016/2016_08283.htm.

Receivers

The Plaintiff-Board of Managers filed a common charge lien against a unit in the condominium. After an Action was commenced to foreclose a second mortgage on the unit, the Board of Managers sought the appointment of a receiver to collect the rent from the tenant of the unit to enable the payment of common charges, meter charges and real estate taxes, as they became due. Under Civil Practice Law and Rules Section 6401 ("Appointment and powers of temporary receiver"), a Court may appoint a temporary receiver of real and personal property "where there is danger that the property will be removed from the state, or lost, materially injured or destroyed".

The Supreme Court, New York County, denied the Plaintiff's motion for the appointment of a temporary receiver. According to the Court, "[t]he Unit is sufficient security for the Board's lien and there is no claim made that the apartment will deteriorate. The apartment is currently being leased for $3,300.00 a month and plaintiff does not make a clear evidentiary showing that there is danger of or irreparable loss or damage". Board of Managers of Central Park Place Condominium v. Potoschnig, 2010 NY Slip Op 34034, decided July 27, 2010, was posted on December 28, 2016 at http://nycourts.gov/reporter/pdfs/2010/2010_34034.pdf.

Restrictive Covenants

The Plaintiff leased premises on Southern Boulevard, in the Bronx, from Corner View Residence LLC ("Corner View") to use as a pharmacy. A covenant in the lease restricted Corner View from permitting other properties it owned on Southern Boulevard from being used "as a pharmacy or for any retail pharmacy related services…nor any other use which could conflict or compete with the business of Tenant…" The Plaintiff commenced an Action against Corner View and 548 Grocery Deli Inc. ("548 Grocery"), a tenant of Corner View at another property on Southern Boulevard. The Plaintiff alleged that 548 Grocery was selling items prohibited by the restrictive covenant and sought injunctive relief. The Supreme Court, Bronx County, denied the Plaintiff's motion for a preliminary injunction.

According to the Court, "[t]he party seeking a preliminary injunction must demonstrate [by clear and convincing evidence] probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor…" [Citations omitted]. In this case, Plaintiff did not demonstrate, by clear and convincing evidence, that the Defendants breached the restrictive covenant; therefore, the Plaintiff failed to demonstrate a probability of success on the merits. The Plaintiff also did not demonstrate, by clear and convincing evidence, that it would suffer irreparable injury absent the issuance of a preliminary injunction. Further, "[b]ased on the evidence on the motion, the harm to defendants (particularly defendant 548 Grocery) if the preliminary injunction is granted will be greater than the harm to plaintiff without the injunction". R.B. Williamson Inc. v. Corner View Residence LLC, 2016 NY Slip Op 32324, decided October 17, 2016, is reported at 2016 WL 7014726 and posted at http://www.nycourts.gov/reporter/pdfs/2016/2016_32324.pdf.

Statute of Limitations

Under CPLR Section 213 ("Actions to be commenced within six years…"), "an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein" must be commenced within six years. If, however, "after accrual of a right of action to foreclose the mortgage" a promise to pay the mortgage debt is made in writing, but "subject to any conditions expressed in the writing", "the time limited for commencement of the action run[s] from the date" of the promise to pay. (General Obligations Law Section 17-105 ("Promises and waivers affecting the time limited for actions to foreclose a mortgage").

In 2008, The Bank of New York Mellon, as Trustee, alleging that the borrower had defaulted in a mortgage loan payment, called due the entire unpaid amount secured and commenced a foreclosure. The Action was discontinued and, in 2016, nearly two years after expiration of CPLR Section 213's six-year statute of limitations, the lender commenced another Action to foreclose the mortgage based on an alleged default in a payment due in 2008. The Plaintiff alleged that a payment on the loan was made in 2010; the Supreme Court, Queens County, held that because the payment was made before the statute of limitations had expired the statute of limitations did not run from 2010.

The Plaintiff also argued that the Defendant re-acknowledged the mortgage debt, resetting the statute of limitations such that it began to run on October 29, 2010, when the Defendant submitted a letter to the loan servicer requesting a modification of the loan to allow an interest rate of four percent. The Court, finding that "[a]ny promise to pay was conditional and, therefore, ineffectual to run the limitations period anew", granted the Defendant's motion to dismiss the complaint. The Bank of New York Mellon v. Bissessar, 2016 NY Slip OP 32245, decided October 31, 2016, is posted at http://www.nycourts.gov/reporter/pdfs/2016/2016_32245.pdf.

Title Insurance

A mortgage lender wired the loan proceeds and closing instructions to the attorney for the borrowers. The attorney misappropriated funds which were to be applied to pay off a prior mortgage. The mortgagee sued the Defendant title insurer, which had issued a loan Policy, to recover damages for breach of contract. The Supreme Court, Nassau County, granted the Defendant's cross-motion for summary judgment and dismissed the Complaint. The Appellate Division, Second Department affirmed the lower court's ruling, holding that the mortgagee's loss under the Policy was excluded as a loss "created, suffered, assumed or agreed to by the Insured Claimant." According to the Appellate Division,

> "[t]he plaintiff wired the funds for the mortgage loans to the escrow account of the attorney for the borrower with closing instructions to perform certain duties on its behalf as the settlement agent, thereby designating that attorney as its agent. Therefore, the act of the settlement agent in misappropriating the funds he had been directed to use to pay off a prior mortgage was properly imputed to the plaintiff, and therefore, the plaintiff created the loss at issue. [Citation omitted]"

Plaza Home Mortgage, Inc. v. Fidelity National Title Insurance Company, 2016 NY Slip Op 08890, decided December 28, 2016, is reported at 2016 WL 7444886 and posted at http://nycourts.gov/reporter/3dseries/2016/2016_08890.htm.

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