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NATIONAL COMMERCIAL SERVICES

Current Developments

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Adverse Possession

Plaintiff, the owner of real property in Amagansett, claimed title by adverse possession to a strip of land along the easterly border of its property. It commenced an Action against the adjoining owner seeking a declaration of ownership pursuant to Real Property Actions and Proceedings Law Articles 5 ("Adverse possession") and 15 ("Action to compel a determination of a claim to real property"), and for damages for alleged removal of plantings on the strip of land. The Supreme Court, Suffolk County, granted the Defendants' motion for summary judgment and dismissed the complaint in its entirety.

In 2007, the Plaintiff's principals sent a letter to the principals of the Defendant stating that their intent "has always been to pay you $150,000 for the use of the parcel". According to the Court, "[h]ere, where plaintiff's principals acknowledged in a letter…that they were and had been willing to pay defendant for the 'use of the parcel' in contention, their claim fails, as an essential element of the adverse possession claim is that they continued to possess the property under a claim of right during the statutory period [of ten years for a claim of adverse possession]. Plaintiff's offer to pay for the use of the parcel constitutes an acknowledgment that the ownership rested in defendant and not in itself [citations omitted]". Birch Tree Partners LLC v. Windsor Digital Studio, LLC, 2013 NY Slip Op 34146, decided April 29, 2013, was posted on April 27, 2017 at http://nycourts.gov/reporter/pdfs/2013/2013_34146.pdf.

Contracts of Sale

Plaintiffs, lessees of a cooperative unit, sought on an Order to Show Cause a preliminary injunction enjoining the Defendants, the owners of the unit, from transferring the shares of stock for the unit and from terminating their tenancy. Their lease, dated February 15, 2016, granted the Plaintiffs the option to purchase the unit for $475,000, exercisable only if the closing occurred by September 15, 2016. On March 22, the Plaintiffs exercised the option and on June 22, 2016 forwarded an executed contract to the Defendants. The Defendants did not sign and return the contract to the Plaintiffs until August 2. The Plaintiffs obtained their loan commitment on August 31; the bank required a copy of the cooperative corporations' articles of incorporation, which counsel for the Defendants did not provide. Further, the Defendant-Seller implied in an email that it was willing to extend the date of the closing. However, the Seller returned the down payment on September 22 and sought to cancel the contract.

The Supreme Court, Kings County, issued a preliminary injunction restraining the Defendants during the pendency of the Action from selling, contracting to sell or transferring the shares allocated to the unit and enjoined them from terminating the Plaintiffs' tenancy, provided that the Plaintiffs posted an undertaking of $20,000. According to the Court, the equities in the case favored the Plaintiffs and they would be irreparably harmed if the injunction was not granted. Meredith v. BRG Celtic, LLC, 2017 NY Slip Op 30525, decided February 15, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_30525.pdf.

Contracts of Sale

The Supreme Court, New York County, granting the Plaintiff-purchaser's motion for summary judgment on its claim for specific performance, noted that the contract of sale was not invalid because it was only signed by Plaintiff's counsel. According to the Court, "…there is no dispute that [Plaintiff's counsel] signed the contract on behalf of Plaintiff…and that [he] was granted such authority by Plaintiff". Yerushalmi Holdings, LLC v. Olumo Real Estate Corp., 2017 NY Slip Op 30855, decided April 24, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_30855.pdf.

Contracts of Sale

The sellers under a contract of sale were not "required to perfect any defects in the title…" except municipal liens for which the sellers' liability to pay was limited to $2,500. The contract further provided that "[i]f same exceeds $2,500 and Seller refuses to pay the excess, Purchaser may cancel the contract…or close title with seller's limit of $2,500 liability". A title search reported that there were multiple judgments including environmental control board violations, state tax warrants and federal tax liens exceeding, in the aggregate, $95,000. On review of the

title report, the sellers canceled the contract and returned the down payment and the net cost of the title search to the purchaser. The purchaser returned the down payment to counsel for the sellers and commenced an Action for specific performance.

The Supreme Court, Kings County, granted the Defendant-sellers' motion for summary judgment dismissing the complaint and ordered that the plaintiff accept the sellers' return of the contact deposit and the net cost of the title report. According to the Court, the sellers' obligation to clear liens on the property was limited to $2,500 and the sellers were within their rights to cancel the contract because the Plaintiff had not shown that he was ready, willing and able to purchase the property subject to the liens. "[H]e makes no showing that he is willing to do so, or ever offered to do so, subject to the liens disclosed by the title search". Weinberger v. Escort, 2017 NY Slip Op 30639, decided March 21, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_30639.pdf.

Corporations

In 1993, a New York corporation was dissolved by proclamation for its failure to pay State franchise taxes. In 2000, the corporation transferred its real property, and the property was re-conveyed several times. In 2010, the corporation and the Estate of its sole shareholder commenced an Action to quiet title, claiming that the 2000 deed was forged. The Supreme Court, New York County, granted a Defendant's motion to dismiss, because the corporation was dissolved and therefore it lacked the capacity to sue. After entry of that Order, the corporation received notice from the Department of Taxation and Finance that it had been reinstated. The Plaintiffs moved for renewal under Civil Practice Law and Rules Section 2221 ("Motion affecting prior order"), claiming that its reinstatement revived the corporation as if the dissolution had not occurred. The Appellate Division, Second Department, held that the Plaintiffs' motion to set aside the deeds and mortgages should have been granted because the Plaintiffs had presented, as required by Section 2221(e), "…new facts unavailable at the time of the initial motion [citation omitted]". The Appellate Division noted that the Court of Appeals, in Faison v. Lewis, reported at 25 N&3d 220, had ruled that a forged deed is not subject to the statute of limitations. Fan-Dorf Properties, Inc. v. Classic Brownstones Unlimited, LLC, 2017 NY Slip Op 02877, decided April 13, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_02877.htm.

Cooperatives

New York State's Department of Law issued a Memorandum dated May 9, 2017 on the "Clarification of Procedure for Changes to Sponsor Entities and/or Principal(s) Thereof in Cooperative Interests in Realty with CPS-5 [Cooperative Policy Statement #5] Exemption". CPS-5 provides an exemption from filing an amendment to an offering plan if certain requirements are met. This "guidance document" is posted at https://ag.ny.gov/sites/default/files/clarification_of_procedure_for_changes_to_sponsor_entities_or_principals_thereof_in_cooperative_interests_in_realty_with_cps-5_exemption.pdf.

Deeds/Forgery

A deed to property in Queens County was purportedly executed in 2005 by Diana Deramo and Nicholas Deramo, the record owners. The property was re-conveyed twice, and it was mortgaged. However, Nicholas had died in 2003 and Diana alleged that her signature was also forged. Diana, individually and as the proposed executrix of the Estate of her husband, sought to set aside the 2005 deed, and the subsequent deeds and mortgages executed by the grantees under those deeds. Wells Fargo, Bank N.A., as Trustee, moved for summary judgment dismissing the complaint, asserting that a judgment entered in the foreclosure of the mortgage it held could only be vacated by the grant of a motion to vacate the judgment. The Supreme Court, Queens County, granted that motion and denied the Plaintiff's cross-motion for summary judgment. The Appellate Division, Second Department, modifying the lower court's Order, denied Wells Fargo's motion and granted the Plaintiff's motion.

According to the Appellate Division, "[a] deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid". Therefore, the court held that the 2005 deed was null and void, and it set aside that deed, the subsequent deeds, and the mortgages executed by the grantees of those deeds. No triable issue of fact was presented in support of the validity of the 2005 deed, and neither the Plaintiff nor the decedent was named in the mortgage foreclosure. Deramo v. Laffey, 2017 NY Slip Op 02772,

decided April 12, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_02772.htm.

Deeds/Recording

When the plaintiff sold a 15.94 acre parcel of vacant land in 2005, the buyer granted the plaintiff a 10-year option for the re-conveyance of a 3.5 acre portion of the land. The option agreement was recorded. In 2005, the entire parcel was conveyed to defendants Ronald and Linda LaPorte, who in 2011 transferred the property to Roustabout Resources, LLC ("Roustabout"). Upon learning of the 2011 transfer, the Plaintiff advised the LaPortes and Roustabout that it was exercising its option and commenced an Action for specific performance. The Supreme Court, Rensselaer County, granted the Plaintiff's cross-motion to the extent of directing Defendant Roustabout to execute a deed to the Plaintiff within thirty days. The Appellate Division, Third Department, affirmed the ruling of the lower court.

Roustabout asserted that it could not convey the option parcel because the State's Real Property Transfer Report (RP-5217), the completion of which necessitated a subdivision which had not been obtained, and the State's transfer tax form (TP-584) were not available. However, there were no conditions to performance under the option agreement, such as a requirement to obtain subdivision approval; all that was required was a written notice of the exercise of the option within the option period. Further, according to the Appellate Division, "…title to property vests upon the execution and delivery of the deed…, and the fact that the deed may not be recorded until a later date-or at all- does not affect the validity of the conveyance [citations omitted]." Tomhannock, LLC v. Roustabout Resources, LLC, 2017 NY Slip Op 02712, decided April 6, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_02712.htm.

Deeds/Reversion of Title

Under Real Property Law Section 345 ("Recording of a declaration of intention to preserve certain restrictions on the use of land"), "a condition subsequent or special limitation restricting the use of land and the right of entry or possibility of reverter created thereby shall be extinguished and become unenforceable, either at law or in equity, and if the condition has been broken or the reverter has occurred the right of entry therefor shall become unenforceable and the possessory estate resulting from the occurrence of the reverter shall be extinguished, unless within the time specified in [Section 345] a declaration of intention to preserve it is recorded as provided in this section…"

In 1976, the Plaintiff and the Defendant entered into an agreement requiring that the Defendant "shall maintain and operate a Catholic high school in and upon the entire premises…" Further, under the agreement, the Defendant was "to have and to hold the same so long as the [Defendant] continues the operation of a Roman Catholic high school upon the premises, ...upon the cessation of which all rights, title and interest herein conveyed shall revert to the [Plaintiff]". In 2013, the Plaintiff commenced an Action for a declaratory judgment that the covenant was valid and enforceable and that the Defendant was required to re-convey the property to the Plaintiff if the property was not used as a Catholic high school, that the covenant prevented the Defendant from using any portion of the property for any other purpose, and for damages for breach of contract. The Supreme Court, Queens County, granted the Defendant's motion to dismiss the cause of action for a ruling that the provision for the reversion of title was enforceable, and denied the Defendant's motion to dismiss the cause of action seeking a ruling that the restriction on use is enforceable. The Appellate Division, Second Department, affirmed.

According to the Appellate Division, the provision for the reversion of title "was extinguished pursuant to Real Property Law Section 345 as the result of the plaintiff's undisputed failure to comply with the recording requirements…" However, "[t]he provision in the 1976 Agreement restricting the defendant from using any portion of the property for any purpose other than the operation of a Catholic high school created a restriction on use without a reversionary right". There remained questions of fact as to whether the Plaintiff waived its right to enforce the use restriction or was estopped by its failure to object to prior violations. Roman Catholic Diocese of Brooklyn, New York v. Christ the King Regional High School, 2017 NY Slip Op 03029, decided April 19, 2017, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_03029.htm.

Fraudulent Transfers

Defendant Song Yan Zhuo ("Zhuo") transferred his real property in Queens County for no consideration. The Plaintiff, a judgment creditor, commenced an Action against Zhou and those persons to whom the property was conveyed, seeking a judgment setting aside the conveyance as fraudulent to the extent necessary to satisfy his judgment. Under Debtor and Creditor Law Section 273 ("Conveyances by insolvent"), "[e]very conveyance made…by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his [or her] actual intent if the conveyance is made…without a fair consideration".

Although a referee found in favor of the Defendants, finding that the Plaintiff had not established that Zhou was insolvent at the time of the conveyance, the Supreme Court, Queens County, granted the Plaintiff's motion to reject portions of the referee's report and to set aside as fraudulent the transfer to the extent necessary to satisfy the Plaintiff's judgment. The Appellate Division, Second Department, affirmed.

According to the Appellate Division, "…the burden of proving insolvency is on the party challenging the conveyance [citation omitted]. However, when a transfer is made without fair consideration [as in this case], a presumption of insolvency and fraudulent transfer arises, and the burden shifts to the transferee to rebut that presumption [citations omitted]". The evidence presented at the trial established that after his transfer of the real property, Zhuo's assets were less than his liabilities and he was left with an unreasonably small amount of capital. Battlefield Freedom Wash, LLC v. Zheng, 2017 NY Slip Op 02011, decided March 22, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_02011.htm.

Guarantors

The members of an LLC selling its real property guaranteed the performance of certain post-closing obligations. Further, under their guarantees, the members were to be severally liable, based on their "respective percentages" set forth in schedules accompanying the guarantees, to pay legal fees incurred by the Plaintiff in enforcing the guarantees. The Plaintiff commenced an Action for the alleged nonperformance of certain post-closing obligations. The Plaintiff also sought a judgment against the guarantors for the Plaintiff's expenses and for the recovery of the proceeds of the sale, which it alleged were fraudulently distributed to them after closing, pursuant to Debtor and Creditor Law Sections 273 ("Conveyances by defendants") and 274 ("Conveyances by persons in business"). The Supreme Court, Suffolk County, granted the Plaintiff's motion for summary judgment, holding the guarantors jointly and severally liable. The Court also denied the guarantors' cross-motion to dismiss the causes of action under the Debtor and Creditor Law.

The Appellate Division, Second Department, affirmed the ruling of the lower court but held it was improper for the court to impose joint and several liability on the guarantors. Under the guarantees, there being no evidence of an intention to defraud, the liability of each guarantor was to be determined based on each guarantor's "respective share" as provided in the schedules to the guarantees. As to the claims under the Debtor and Creditor Law, evidence was submitted that the distribution of sale proceeds to the guarantors was made without fair consideration and rendered the seller insolvent. Medical Arts-Huntington Realty, LLC v. Meltzer Rosenberg Development, LLC, 2017 NY Slip Op 02783, decided April 12, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_02783.htm.

Lien Law

Under Lien Law Section 39 ("Lien willfully exaggerated is void"), "…if the court shall find that a lienor has willfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void…" In an Action to recover sums alleged to be unpaid for which mechanics' liens were filed, the Defendant property owner asserted claims of willful exaggeration against officers of the mechanics, claiming the liens they had verified added amounts for work that was not performed. The Supreme Court, New York County, denied motions to dismiss the claims against the officers, holding that a claim had been stated based on the "commission of a tort" doctrine. "Courts have specifically held that corporate officers may be held personally liable if they participated in the tortious conduct of filing a willfully exaggerated mechanic's lien…on behalf of the

corporation". Power Air Conditioning Corp. v. Batirest 229 LLC, 2017 NY Slip Op 30750, decided April 13, 2017, is posted at http://nycourts.gov/reporter/pdfs/2017/2017_30750.pdf.

Lien Law/Public Improvement Liens

The Supreme Court, New York County, granted a petition to discharge a mechanic's lien filed against a lessee's interest in land owned by the Port Authority of New York and New Jersey. According to the Appellate Division, which affirmed the lower court's ruling, "[i]t is well-settled that a private mechanic's lien may not attach to privately-leased, but publicly-owned, land". The only exception is as to property owned by Industrial Development Agencies under Lien Law Section 2, subsection 7; the Port Authority is not an Industrial Development Agency. In re George Washington Bridge Bus Station Development Venture, LLC v. Associated Specialty Contracting, Inc., 2017 NY Slip Op 02913, decided April 13, 2017, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_02913.htm.

Mortgage Foreclosures/Statute of Limitations

A mortgagee accelerated the entire indebtedness secured by its mortgage and commenced a foreclosure of its mortgage in 2007. That Action was dismissed in 2010 for the lack of personal service on the Defendant-homeowner; the mortgagee commenced a second foreclosure in 2014. The Supreme Court, Suffolk County, granted the Defendant-homeowner's motion for summary judgment dismissing the complaint as being time-barred under the statute of limitations and canceled the notice of pendency. Under Civil Practice Law and Rules Section 213 ("Actions to be commenced within six years…"), an Action to foreclose a mortgage "must be commenced within six years". The Appellate Division, Second Department, affirmed. "[T]he fact that the 2007 action was dismissed as against the defendant homeowner for failure to effectuate personal service does not invalidate the plaintiff's election to exercise its right to accelerate the maturity of debt". The Appellate Division noted that "[t]he plaintiff's contention that it revoked its election to accelerate the mortgage debt in 2012 [sic] by voluntarily discontinuing the action [was] improperly raised for the first time on appeal". Beneficial Homeowner Service Corp. v. Tovar, 2017 NY Slip Op 03471, decided May 3, 2017, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_03471.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 July 1, 2017 – September 30, 2017 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 https://www.tax.ny.gov/pay/all/int_curr.htm.

NYC Real Property Transfer Tax Return ("NYC-RPT")

New York City's Department of Finance has revised form NYC-RPT effective March 24, 2017, adding Schedule L for the "Transfer to an HDFC or an entity controlled by an HDFC". As reported in Current Developments, Chapter 264 of the Laws of 2016, effective August 19, 2016, added paragraph 9 to New York City Administrative Code Section 11-2106 ("Exemptions"), allowing for a full or a partial exemption from New York City's transfer tax 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. The revised form is posted at http://www1.nyc.gov/assets/finance/downloads/pdf/08pdf/nyc-rpt.pdf.

Recording Act

When Aubrey and Brian Smith purchased their home in the City of Yonkers in 2014, a search of the real estate tax records revealed that prior tax liens filed in 2003 and 2004 had been satisfied. In 2015, the assignee of 2003 and 2004 tax liens from the City commenced to foreclose the tax liens. The Smiths' motion for summary judgment dismissing the complaint and cancelling the notice of pendency in the foreclosure was granted by the Supreme Court, Westchester County; the tax liens were mistakenly marked satisfied and cancelled by a City of Yonkers employee in 2011 and the records were corrected in 2014 after the Smiths purchased the property. The Smiths

were bona fide purchasers for value without notice that the liens were satisfied.

The Plaintiff's motion for summary judgment against the City of Yonkers for damages was also granted. According to the Court, "the plaintiff justifiably relied on the City's affirmative undertaking of selling what should have been valid and enforceable tax liens. Inasmuch as the tax liens are cancelled and not enforceable against the Smiths, who are bona fide purchasers, the City of Yonkers is not entitled to a windfall due to its own error in marking the tax liens as satisfied and cancelled". Equity Investment & Mortgage Company v. Smith, 2017 NY Slip Op 27088, decided March 21, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_27088.htm.

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