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NATIONAL COMMERCIAL SERVICES

# Current Developments

By *Michael J. Berey*
Senior Underwriting Counsel

**First American Title**
**National Commercial Services**


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## Acknowledgments

Emily, acting as attorney-in-fact for her husband, Nikolaos, obtained a mortgage loan and then transferred title to the property to Nikolaos' company. Emily later obtaining an interest in the company. Alleging that his wife forged his signature on the power of attorney, Nikolaos sought a judgment declaring that the power of attorney, the note and the mortgage were null and void. The Supreme Court, Queens County, holding that the power of attorney was null and void and that the Plaintiff is the "present and sole" owner of the property, directed the City Register, Queens County, to vacate the deed. The Appellate Division, Second Department, reversed and remitted the case to the Supreme Court to enter an amended judgment dismissing the complaint, declaring that the power of attorney was not null and void and that the Plaintiff is not the present and sole owner of the property. According to the Appellate Division, "…the plaintiff failed to rebut the presumption of validity of the acknowledged power of attorney" and "…the plaintiff failed to prove to a moral certainty that the 2002 power of attorney was forged". Kanterakis v. Minos Realty I, LLC, 2017 NY Slip Op 05074, decided June 21, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_05074.htm.

In Tribeca Lending Corp. v. Huseinovic, also decided by the Appellate Division, Second Department, the Appellant claimed that he did not execute the mortgage being foreclosed. The Appellate Division, held that the foreclosing mortgagee "made a prima facie showing of entitlement to judgment as a matter of law by submitting, inter alia, the certificate of acknowledgement which was attached to the executed and duly notarized Tribeca mortgage, bearing the signature of the appellant. In opposition thereto, the appellant failed to rebut the presumption created by the certificate of acknowledgement that he duly executed Tribeca's mortgage". The decision, at 2017 NY Slip Op 04875, decided June 14, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_04875.htm.

## Adverse Possession

Plaintiff sought a declaration that she had title by adverse possession to a strip of land on the Defendant's property between the location of a fence erected by the Plaintiff on the Defendant's land and the Plaintiff's property. The Supreme Court, Monroe County, granted the Plaintiff's cross-motion for summary judgment. The Appellate Division, Fourth Department affirmed.

Defendant argued that the Plaintiff was required to commence an Action to quiet title after 1996, when the running of the ten-years for a claim of adverse possession had been completed and before 2014. The Appellate Division held that the "plaintiff had no legal obligation to take any legal action to obtain title to the disputed land after 1996 inasmuch as title vested with her that year upon expiration of the ten-year period".

The Defendant also contended that the Plaintiff did not establish a "claim of right" because the survey given to the Plaintiff when she purchased her property showed the fence was beyond her property line. However, according to the Appellate Division, "[e]ven if plaintiff had read the survey and was aware of the encroachment, the [Supreme] court property determined that such would not defeat her claim of right". The Court of Appeals in Walling v. Przybylo (7 N.Y.3d 228) stated that "[c]onduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessor". Slacer v. Kearney, 2017 NY Slip Op 04589, decided June 9, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_04589.htm.

## Assignment of Rents

The owner of a rental property in Loudonville, New York defaulted on his mortgage. Hermann, the mortgagee, advised that tenants that he was entitled to rents at the property under the assignment of rents provision in the mortgage. The tenants engaged counsel and placed their rents in an escrow account. Hermann commenced a small claims action for the non-payment of rent and the case was transferred to the regular civil part of the Cohoes City Court, in Albany County.

According to the City Court, the law in New York is split between the application of a "lien theory" for rents

and a "title theory". "Generally speaking, an assignment clause may be a source of additional security for a mortgage loan, or, alternatively, it may create an absolute and unconditional assignment. When an assignment is for additional security, the lender has a lien on the rents, but title to the rents remains with the borrower. When an assignment is absolute, title to the rents vests as a property right with the mortgagee on default of the mortgagor". Absent a case on point from the Appellate Division, Third Department, the Court applied the lien theory, which it termed the majority view.

"This means that [an] assignment of rents becomes effective only upon the foreclosure or upon the appointment of a receiver of the rents of the mortgaged property….Since Hermann neither sought a receiver nor foreclosed... [the property owner] is entitled to the rents collected by her prior to foreclosure…Hermann has no claim for rent because his right to receive rent is not ripe. Therefore, the tenants owe Hermann nothing". Herrmann v. Coletti, 2017 NY Slip Op 27220, decided June 29, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_27220.htm.

## Contracts of Sale

In a contract for the sale of real property in Southampton, the sellers' represented that "the Premises is free and clear of any mold or evidence of any existing mold remediation". The purchasers' obligation to close depended on the accuracy "as of the date of closing" of the sellers' representations and warranties, but the sellers were given an opportunity to cure any defects.

Prior to the date of the closing, the purchasers canceled the contract and requested a return of their contract deposit, claiming that an inspection had revealed extensive evidence of mold. The sellers answered that the mold condition was not a material breach and the purchasers' cancelation constituted an anticipatory breach, for which the seller was entitled to retain the down payment as liquidated damages as provided in the contract on the purchasers' default. The sellers commended an Action alleging they were entitled to retain the down payment. The Supreme Court, Suffolk County, granted the Defendants' cross-motion for summary judgment, dismissed the complaint, and directed the Plaintiffs to return the down payment. The Appellate Division, Second Department, affirmed the lower court's ruling.

According to the Appellate Division, the sellers' representation was that "'the premises is free and clear of mold *or evidence of any existing mold remediation*' (emphasis added). Therefore, the condition is incurable inasmuch as any attempt to eradicate the existing mold will constitute evidence of existing mold remediation on the date of closing". Mineroff v. Lonergan, 2017 NY Slip Op 05430, decided July 5, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_05430.htm.

## Contracts of Sale/Statute of Frauds

The Plaintiff alleged that the Defendant, in emails exchanged with the Plaintiff, agreed to sell his apartment for $1,300,000 in cash. However, on being advised by a real estate broker that the apartment could sell for a significantly greater amount, the Defendant asked the Plaintiff to wait on signing a formal contract of sale. The Plaintiff, insisting that the parties were bound by an agreement reached in their emails, filed a notice of pendency and commenced an Action for specific performance. The Supreme Court, Kings County, denied the Defendant's motion to cancel the notice of pendency and dismiss the complaint, and to award costs and expenses, sanctions and attorney's fees. The Appellate Division, Second Department, modified the lower Court's Order to dismiss the complaint, to cancel the notice of pendency, to award costs and expenses which resulted from the filing of the lis pendens. However, the Action not being completely without merit, sanctions and attorney's fees were properly not awarded.

According to the Appellate Division, the emails "were insufficient to satisfy the statute of frauds, as they left for future negotiations essential terms of the contemplated contract, such as the down payment, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities, and were subject to the execution of a more formal contract of sale. [Citations omitted] Contrary to the plaintiff's contention, in the emails exchanged by and between the parties and the defendant's attorney, the parties

expressly anticipated the execution of a formal contract". Saul v. Vidokle, 2017 NY Slip Op 04485, decided June 7, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_04485.htm.

## Corporations

Make Realty Corporation ("Make Realty"), a New York corporation, was dissolved by proclamation in 1994 and not reinstated. The Plaintiff alleged that in 2013 Make Realty entered into a contract to sell property in Brooklyn to the Plaintiff and a right of first refusal agreement with the plaintiff for two adjacent properties. The corporate secretary of Make Realty executed the agreements. The Plaintiff alleged that Make Realty breached the contract by failing to convey the property. The Supreme Court, Kings County, granted Make Realty's motion for summary judgment.

The Appellate Division, Second Department, held that there was insufficient evidence in the pre-discovery record to determine, as a matter of law, the authority of Make Realty's corporate secretary. However, it also held that the Supreme Court erred in ruling that the agreements were unenforceable due to the failure to obtain a vote of shareholders under Business Corporation Law Section 909 ("Sale, lease exchange or other disposition of assets"). Under Business Corporation Law Section 1005 ("Procedure after dissolution"), a dissolved corporation's Board of Directors can wind-up a corporation's affairs without shareholder consent.

> "A dissolved corporation, in winding up its affairs, has the power, inter alias, to 'sell its assets for cash at public or private sale' (Business Corporation Law Section 1005 [a][2]. This can be done by a corporation's board of directors, without seeking authorization of the shareholders [citation omitted]. As it is undisputed that the subject transaction was entirely for cash, it follows that no shareholder authorization was required".

Heights Properties 1388, LLC v. Make Realty Corp., 2017 NY Slip Op 04882, decided June 14, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_04822.htm.

## Federal Crimes Enforcement Network (FinCEN)/NYS Department of Law

As reported in prior issues of Current Developments, FinCEN has issued Geographic Targeting Orders (collectively, the "Order") requiring "certain U.S. title insurance companies to identify the natural persons behind companies used to pay 'all cash' for high-end residential real estate" in, among other locations, The City of New York. On June 6, 2017, in furtherance of those Orders, New York State's Department of Law issued a Memorandum captioned "Disclosure Requirements Regarding FinCEN's Geographic Targeting Order". The Memorandum requires that plans for the offering of New York City real property, to be transferred on or after August 28, 2016 with a purchase price exceeding the applicable amount set forth in the Order, noted below, must disclose or be amended to disclose that title insurance companies are required "to report the personal identify of purchasers in residential real estate transactions in which:

> (1 the purchaser is a legal entity as defined in the Order:
> (2) the purchaser purchases residential real property located in [New York City];
> (3) the total purchase price is in excess of $3,000,000 in the Borough of Manhattan or the total purchase price is in excess of $1,500,000 in the Boroughs of Bronx, Brooklyn, Queens, or Staten Island;
> (4) such purchase is made without a bank loan or other similar form of external financing; and
> (5) the purchase is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, or a money order in any form".

The Memorandum is posted at
https://ag.ny.gov/sites/default/files/disclosure_requirements_regarding_fincens_geographic_targeting_order_6.6.17.pdf.

## Foreclosure

Real Property Actions and Proceedings Law 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". The notice is required to be sent by registered or certified mail and by first class mail to the last known address of the borrower.

The Supreme Court, Suffolk County, granted the foreclosing mortgagee's motion for summary judgment, to strike the Defendant's answer, and for an order of reference. The Appellate Division, Second Department, reversed the lower court's Order, holding that there was no proof that a first-class mailing of the notice was sent through the United States Postal Service. The affidavit of the Plaintiff's vice-president of loan documentation "did not aver that she was familiar with the plaintiff's mailing practices and procedure designed to ensure that items are properly addressed and mailed" and proof was not otherwise submitted to substantiate the affiant's assertion that the notice was mailed by first class mail. Wells Fargo Bank, N.A. v. Trupia, 2017 NY Slip Op 03986, decided May 17, 2017, reported at 150 AD3d 1049, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_03986.htm.

## Foreclosure

At a foreclose sale, Robert Nicholson, a bidder, objected to the court appointed referee submitting a bid on behalf of the foreclosing Plaintiff. A Justice of the Supreme Court, Oswego County, allowed the sale to proceed. Nicholson was the successful bidder with a bid for $90,000. The Plaintiff moved for an Order vacating the sale, arguing that the referee was not prohibited from submitting a bid, for $141,500, on behalf of the Plaintiff and, alternatively, that the difference between the Nicholson's bid and the fair market value of the property was so great that the Court should set aside the sale.

The Supreme Court, Oswego County, denied the Plaintiff's motion. The judgment's requirement that the Plaintiff's representative attend the sale, and the striking by the court from the judgment that "the said Referee shall accept a written bid from the Plaintiff or any other party", "forbade the Referee from accepting written bid or bids on behalf of the Plaintiff". Further, according to the Court, "it is clear that a referee is not an agent of any of the parties to an action in foreclosure…" The Court also held that the sale at auction for 64% of the amount bid by the Plaintiff "was not so inadequate to shock…[the] conscience" of the court. PHH Mortgage Corporation v. Hamer, 2016 NY Slip Op 26469, decided April 21, 2016, is posted at http://www.nycourts.gov/reporter/3dseries/2016/2016_26469.htm.

## Foreclosure

The Defendant in a mortgage foreclosure, who had failed to answer the complaint or to appear for a mandatory settlement conference, moved to vacate the judgment of foreclosure and sale on the grounds of newly discovered evidence and fraud. The Appellate Division, Second Department, affirmed the denial of the motion to vacate by the Supreme Court, Suffolk County. According to the Appellate Division,

> "[w]here a defendant seeks to vacate a default pursuant to CPLR 5015(a)(3) based on intrinsic fraud [the claim was that fraudulent documents were submitted], he or she must establish a reasonable excuse for the default and a potentially meritorious defense to the action. [Citations omitted] Here, since the defendant has presented no excuse for his default, the Supreme Court property denied that branch of his motion…, regardless of whether he presented a potentially meritorious defense to the action".

As to the claim of newly discovered evidence, "'[e]vidence which is a matter of public record is generally not deemed new evidence which could not have been discovered with due diligence before trial' [Citation omitted]" US Bank National Association v. Galloway, 2017 NY Slip Op 04163, decided May 24, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_04163.htm.

## Foreclosure/Acceleration of Indebtedness/Statute of Limitations

Under Civil Practice Law and Rules Section 213 ("Actions to be commenced within six years…"), "an action… upon a mortgage of real property…" "must be commenced within six years…"

In 2009, the Bank of America ("BOA") commenced an Action (the "2009 Action") to foreclose a mortgage. The Action was discontinued by stipulation in 2013 to allow the mortgagee to comply with the mortgage's notice requirements. In, 2014, U.S. Bank N.A. ("USBNA"), the assignee of the mortgage, commenced an Action (the "2014 Action") to foreclose the mortgage.

An owner of the property, a Defendant in the second foreclosure, moved to dismiss the complaint on the grounds that the mortgage debt was accelerated by the 2009 action; therefore, the six-year statute of limitations to foreclose the mortgage had expired. USBNA argued that the 2009 Action did not accelerate the mortgage debt because BOA could not accelerate the maturity of the debt until judgment was entered, the borrow could pay the arears and reinstate the mortgage, and, in any event, the acceleration of the mortgage debt was revoked within the six-year limitations period by the voluntary discontinuance of the 2009 Action.

The Supreme Court, Kings County, noting that "[t]he filing of the summons and complaint and notice of pendency constitutes a valid election to accelerate the maturity of the debt [citation omitted]", granted the Defendant's motion to dismiss the complaint, holding that "the subject note and mortgage debt was indeed accelerated on June 19, 2009 [the date on which the 2009 action was commenced] and that neither BOA nor USBNA revoked the acceleration through an affirmative act occurring within the limitations period". According to the Court, the "mere voluntary discontinuance of a foreclosure action does not constitute a revocation of an election to accelerate the mortgage debt,"

If a borrower' position has not change due to the acceleration of the indebtedness, a lender may revoke its acceleration by an affirmative act made within the six-year limitations period commencing, in this case, on the initiation of the 2009 action. However, US Bank did not claim if sent the borrower a written notice of its intention to revoke the acceleration of the mortgage debt, and US Bank did not allege that BOA sent any such notice.

U.S. Bank N.A., as Trustee v. Crockett, 2017 NY Slip Op 50741, decided June 5, 2017, reported at 55 Misc. 3d 1222, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_50741.htm.

## Foreclosure/Easements

The Supreme Court, Erie County, held that solar and wind energy easements granted over property subject o the mortgage being foreclosed, executed after the mortgages being enforced were recorded, were subject to being cut-off in the foreclosure. According to the Appellate Division, Fourth Department, affirming the lower court's ruling, the "defendant's easements constitute interests in the realty that are subject to foreclosure by plaintiff". Bank of Akron v. Spring Creek Athletic Club, Inc., 2017 NY Slip Op 05008, decided June 16, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_05008.htm.

## Foreclosure/Equitable Mortgages

The Plaintiff, foreclosing a consolidated mortgage under a consolidation, extension and modification agreement ("CEMA") which did not include a list of the complete mortgage chain, sought an Order reforming the CEMA to include the mortgage chain. In an earlier ruling, the Supreme Court, Westchester County, denied the Plaintiff's motion for summary judgment, holding that the applicable statute of limitations to reform the CEMA had expired. The Plaintiff again moved for an Order granting summary judgment and appointing a referee to compute, arguing that the "doctrine of equitable mortgages" should be applied to allow the foreclosure to proceed. The Court held that the doctrine of equitable mortgages should be applied and granted the Plaintiff's motion for summary judgment. According to the Court, quoting a decision of the Appellate Division, First Department,

> "'New York has long recognized that an equitable mortgage may be constituted from any writing from

> which intention so to do may be gathered, and any attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity [Citations omitted]'"

In this case, according to the Supreme Court,

> "[t]he consolidated mortgage merely continues already existing encumbrances on the property, and the consolidated note continues to entitle its holder to foreclose on the consolidated mortgage. There is no confusion or issue as to the exact nature and extent of the debt or the property securing the obligation. Nor was there ever any confusion or dispute as to the chain of the mortgages leading up to the consolidated loan documentation. The failure to include a list of the chain of mortgages leading up to the consolidated mortgages is merely a trivial defect in a single document that should not prevent foreclosure on the consolidated mortgage".

Capital One, N.A. v. Karp, 2017 NY Slip Op 27209, decided June 22, 2017, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_27209.htm.

## Foreclosure/Standing

An Action to foreclose a mortgage was commenced by Chase Home Finance, LLC. The note secured by the mortgage was endorsed to JPMorgan Chase Bank, N.A. which, according to the affidavit of note possession submitted in the foreclosure, was the custodian of the loan documents. The Supreme Court, Suffolk County, denied the motion to dismiss the Defendant's affirmative defense of the lack of standing. According to the Court,

> "[s]ince the note possession affiant fails to identify for whom JPMorgan Chase, N.A. serves as custodian, none of the factual averments demonstrate that the plaintiff, Chase Home Finance, LLC, who commenced this action in February of 2011, was in possession of the note at the time of such commencement actually, or constructively through a custodian".

Chase Home Finance, LLC v. Spiegel, 2017 NY Slip Op 31409, decided May 16, 2017, is posted at http://nycourts.gov/reporter/pdfs/2017/2017_31049.pdf.

## Mineral Rights

A 1917 deed conveyed "all minerals in, under and upon" the property being deeded, together with the rights to "dig, mine and remove" those minerals from the land. The Appellate Division, Third Department, concurring with the ruling of the Supreme Court, Clinton County, held that the mineral rights owned by the Plaintiff included the right to extract and remove sand and gravel. The Appellate Division, quoting the Court of Appeals' decision in White v. Miller, concurred.

> "The Court of Appeals has directly passed on the meaning of the term 'minerals' as used in a conveyance and concluded that the term 'will include all inorganic substances…[that] can be taken from the land' where the term's meaning is not restricted 'b[y] qualifying words, or language, evidencing that the parties contemplated something less general than all substances legally cognizable as minerals' (White v. Miller, 200 NY 29, 39 [1910]). Thus, unless qualifying and restrictive language related to the term minerals renders the term ambiguous in any particular conveyance, the meaning of minerals is determinable as a matter of law and is not subject to extrinsic proof… Accordingly, given that the 1917 deed does not qualify or restrict the term minerals, the Court of Appeals' interpretation controls. Therefore, as sand and gravel are 'inorganic substances…that can be taken from the land', they fall within the mineral rights conveyed by the 1917 deed".

Champlain Gas & Oil, LLC v. The People of the State of New York, 2017 NY Slip Op 01610, decided March 2, 2017, reported at 148 AD3d 1260, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_01610.htm.

## Party Walls

Plaintiff, the owner of a five-story residential building directly adjacent to the Defendant's newly constructed fourteen-story building, claimed that the easterly exterior wall of the Defendant's building cantilevered over the Plaintiff's building and prevented Plaintiff from extending an existing party wall to add additional floors to the Plaintiff's building. The Plaintiff asserted causes of action for, inter alia, conversion/encroachment, trespass and negligence, and framed the issue as "whether the owner of real property, which once contained a building that used a party wall supporting two adjoining buildings, but now contains a newly-constructed building that is supported by a new independent wall, may cantilever its new building over that portion of the former party wall which does not cross the parties' property line". The Court granted the Defendant's motion for partial summary judgment dismissing the above referenced causes of action. According to the Court,

> "[w]here one adjoining owner demolishes its building…this puts an end to the necessity of support [by the party wall] on its side of the building…At that point, the owner of the property no longer using the wall for support still has 'ownership rights in that part of the wall lying on its property'…And that owner may use its side of the wall for its own commercial use, so long as none of its structures compromised the integrity of the wall or cross the property line". [Citations omitted]

145 W. 21st Realty LLC v. First West 21st Street LLC, 2017 NY Slip Op 31377, decided June 26, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31377.pdf.

## Mortgage Satisfactions

The satisfaction of a mortgage was recorded after the mortgagee had assigned the mortgage. Affirming the ruling of the Supreme County, New York County directing that the satisfaction be vacated and expunged, the Appellate Division held that the satisfaction was void ab initio. Bank of New York Mellon Trust Company, N.A. v. Claypoole, 2017 NY Slip Op 03895, decided May 16, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_03895.htm.

## Parkland

As reported in Current Developments dated July 20, 2015, on July 2, 2015, in Matter of Avella v. The City of New York (131A.D.3d 77), the Appellate Division, First Department, held that New York City's leasing of a parking area in Flushing Meadows Park adjoining Citi Field for construction of a retail entertainment center without State legislative approval violated the public trust doctrine and the Court enjoined taking further action toward its construction. The public trust doctrine requires "the direct and specific approval of the State Legislature, plainly conferred" to use dedicated park areas for other than park purposes. [Citation omitted] According to the Court, "[n]o reasonable reading of [New York City] Administrative Code Section 18-118 ["Renting of stadium in Flushing Meadow Park…"] allows for the conclusion that the legislature in 1961 [when enacting Chapter 729 of the Laws of 1961 for the financing and use of a baseball stadium within the Park] contemplated, much less gave permission for, a shopping mall, unrelated to the anticipated stadium [Shea Stadium], to be constructed in the Park."

The Opinion of the Court of Appeals, in affirming the Appellate Division's ruling, states the following:

> "There is no dispute that the Willets West development is proposed to be constructed entirely on city parkland…Only the state legislature has the power to alienate parkland (or other lands held in public trust) for purposes other than those for which they have been designated…[T]he legislature did not authorize the City to do more than enter into agreements for the use of the stadium for public – not commercial, purposes…"

Matter of Avella v. City of New York, 2017 NY Slip Op 04383, decided by the Court of Appeals on June 6, 2017, posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_04383.htm.

## Real Estate Taxes/ "Voluntary Payment Rule"

Petitioner sought a declaration that its fiber optic cables and were not taxable as real property and an Order

requiring the Respondents to refunds real estate taxes it had paid for the 2010-2012 tax years. The Supreme Court, Chautauqua County, held that the Petitioner's property was taxable under Real Property Tax Law Section 102 (12)(f). The Court also noted that the Petition was required to be dismissed under the voluntary payment rule.

According to the Court,

> "[i]t is well settled that to recover payments made under a mistake of law, a taxpayer is required to show that the payments were made voluntarily…This requirement gives governmental entities notice that they may need to provide tax refunds, and if the tax is paid fully without protest or in any way that would reflect the payment is not voluntary, then it is proper to deny the petition…It is uncontested in this case that Petitioner paid the taxes…without protest of any sort. The Fourth Department has consistently stated that only taxes paid under protest are subject to repayment when illegally collected. Petitioner's voluntary payment of the taxes effectively bars it from lawfully seeking redress in any event". [Citations omitted]

Matter of Level 3 Communications, LLC v. Chautauqua County, 2015 NY Slip Op 32698, decided August 31, 2015, was posted on June 1, 2017 at http://www.nycourts.gov/reporter/pdfs/2015/2015_32698.pdf.

## Religious Corporations

A Church, having entered into a contract to sell its real property in Queens County for $18,700,000, obtained an appraisal valuing the property at $19,500,000. Its Board of Directors voted not to proceed with the sale at a price below its appraised value and sought a determination by New York State's Attorney General as to its obligations under the contract. The Department of Law advised that the requirements of Not-for-Profit Corporation ("NPC") Law Sections 511(a)(7) and (8) had not been met; it would therefore object to the proposed sale. The Church repudiated the contract and returned the down payment. The purchaser under the contract commenced an Action seeking a judgment that the contract was binding and enforceable and for specific performance. The Supreme Court, Queens County, granted the Church's motion for summary judgment dismissing the complaint, holding that the contract was not binding and enforceable. The Appellate Division, Second Department, affirmed.

Under Subsections 7 and 8 of NPC Law Section 511 ("Petition for Court Approval"), the sale of corporate assets by a not-for-profit corporation must be recommended or authorized by a vote of its Board of Directors at a meeting duly called and consented to by the members of the corporation when required by law. NPC Law Section 511 applies to the sale of real property by a religious corporation under Religious Corporations Law Section 12 ("Sale, mortgage and lease of real property of religious corporation"). According to the Appellate Division, "…notwithstanding the execution of the contract by the Church's president, the contract was not binding against the Church, since it was not approved by the Church's board of trustees or members". Dong v. First Korean Church of New York, 2017 NY Slip Op 05063, decided June 21, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_05063.htm.

## Restrictive Covenants

The Plaintiff alleged that the Defendants had violated restrictive covenants affecting the Defendants' property and sought damages for trespass and for a private nuisance, and injunctive relief. The Supreme Court, Suffolk County, granted the Defendant's motion to dismiss. The Appellate Division, Second Department, in affirming the lower court's order, held that the Plaintiff did not have standing to enforce the restrictive covenants. Since the deed imposing the covenants imposed them for the benefit of another, adjoining land the Plaintiff could not, enforce the covenants as a third-party beneficiary. In addition, the covenants were not part of a common development scheme for the benefit of all property owners within the development. Wheeler v. Del Duca, 2017 NY Slip Op 05116, decided June 21, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_05116.htm.

## Right of First Refusal ("ROFR")

The Plaintiff had a right of first refusal to purchase land improved by a car wash under an agreement which provided that the Plaintiff would have the right to purchase the land "on the same terms as set forth in the third-party offer". The Defendants, the owners of the property subject to the ROFR, entered into a purchase and sale agreement, subject to the Plaintiff's ROFR, to sell the property to a third-party, also a Defendant. Under the purchase and sale agreement, a restrictive covenant prohibiting the operation of a cash wash at the property for ten years was to be included in the deed. The contract vendee owned a car wash across the street from the property to be conveyed.

The Plaintiff, seeking to exercise the ROFR, but without "a deed that attempts to restrict the use of the subject car wash post closing", commenced an Action for specific performance and for a declaration that the property could not be conveyed to the third-party purchaser. The Supreme Court, Broome County, dismissed the complaint, holding that the Plaintiff had waived its ROFR and the sale with the third-party could go forward. According to the Court, "[t]he Right of First Refusal does not require that any third party offer be unconditional…[and the Plaintiff] has not provided evidence that the 2016 Purchase and Sale Agreement was the result of any collusion between the defendants". Clifton Land Company, LLC v. Magic Cash Wash, LLC, 2017 NY Slip Op 31303, decided June 19, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31303.pdf.

## Tenancy by the Entirety

Real property in Brooklyn was deeded in 1972 to Edwin W. Ramsey and Bertha Ramsey. Although the deed did not specify how they took title they were, in fact, married at that time of the conveyance. Bertha died and Edwin transferred the property to the Plaintiffs. The property was included as a testamentary asset in Bertha's Last Will and Testament. The Plaintiffs commenced an Action to quiet title under Real Property Actions and Proceedings Law Article 15 ("Action to compel the determination of a claim to real property"). The Supreme Court, Kings County granted the Plaintiffs' motion for summary judgment, holding that the Plaintiffs are vested with absolute and unencumbered fee title to the property. The Appellate Division, Second Department, affirmed. Under Estates Powers and Trusts Law Section 6-2.2 ("When estate is in common, in joint tenancy or by the entirety"), "(b) a disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common". According to the Appellate Division,

> "[t]heir evidence, including Edwin and Bertha's 1968 marriage certificate and the 1972 deed, showed that Edwin and Bertha had a tenancy by the entirety in the property as they were married at the time of the 1972 deed conveying the property to them and the deed did not 'expressly declare[ ] [there] to be a joint tenancy or a tenancy in common' (EPTL 6-2.2 [b]. Thus, when Bertha died in 2012, Edwin, as the surviving spouse, 'received[d] the fee interest in its entirety, free and clear of any debts, claims, liens or other encumbrances as against' Bertha [citation omitted]. Edwin was therefore free to convey the property to the plaintiffs, which he did".

Cormack v. Burks, 2017 NY Slip Op 04252, decided May 31, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_04252.htm.

**Michael J. Berey**
Senior Underwriting Counsel

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mberey@firstam.com