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NATIONAL COMMERCIAL SERVICES

Current Developments

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Adjoining Owners

Under Real Property Actions and Proceedings Law ("RPAPL") Section 881 ("Access to adjoining property to make improvements or repairs"), "[w]hen an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter…."

Petitioner sought a limited license to enter the Respondents' adjoining properties to enable it "to perform [a] non-invasive photographic survey, [to] install and remove temporary protections to respondents' property, and [to] install materials to weatherproof respondents' property" as necessary for the demolition of a parking garage and the construction of a building on Petitioner's property. The Supreme Court, New York County, finding that Respondents had refused to grant a license, that the work to be done under the license was necessary, and work on Petitioner's property could not otherwise proceed, granted the license for a period of six months, the work to be done under the license weekdays between the hours of 9:00 a.m. to 5:00 p.m.

The Court also ordered, inter alia, that Petitioner and its contractor obtain and maintain policies of insurance covering liability and property damage, for no less than $42,000,000 and $26,000,000, for the benefit of the Respondents and their tenants for the period of the license, and that Petitioner post a temporary bond for $1,500,000 to cover any damage to the property of the Respondents and their tenants. Matter of EXG 159W48 LLC v. Benyetta 148 LLC, 2017 NY Slip Op 31479, decided June 23, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31479.pdf.

Adverse Possession

The Plaintiff, whose predecessors-in-interest purchased the land in question in 1948, sought a ruling declaring that it was the sole owner of the property. The City of New York counterclaimed for a judgment declaring that it had acquired title by adverse possession because the Department of Sanitation has been using the land as a truck parking lot for more than thirty years. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment, holding that the City's collection of real estate taxes from the Plaintiff and its predecessors was an admission that it did not possess the property under a claim of right, defeating the City's claim of adverse possession under RPAPL Article 5 ("Adverse Possession") as in effect prior to its amendment in 2008. The Appellate Division, Second Department, reversed the lower court's ruling and remitted the case to the Supreme Court for entry of a judgment that the City had acquired title by adverse possession. According to the Appellate Division,

> "[h]ere, the City established its prima facie entitlement to judgment as a matter of law by submitting evidence establishing that its possession of the property was actual, open and notorious, exclusive, and continuous for a least 10 years. Therefore, the burden shifted to the plaintiff to rebut the presumption of adversity. We conclude that the mere payment of taxes on the subject property is insufficient to rebut the presumption".

Estate of Vertley Clanton v. City of New York, 2017 NY Slip Op 06254, decided August 23, 2017, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_06254.htm.

Development Rights/Upstate New York

The remainder interest in a farm in Dutchess County, was devised to four siblings, subject to a life estate. Three of the siblings sought authorization under RPAPL Section 1602 ("Application by owner of present or future interest for court authorization to mortgage, to lease or to sell real property") to sell the property's development rights to preserve the land's future use as a farm. The Defendant was the other sibling. The parties stipulated that the sale of development rights were rights to develop the property to its maximum density as allowed by zoning and planning regulations. In exchange for receiving a sum of money, the Plaintiffs wanted to be able to impose perpetual restrictions limiting the number of homes that could be built. The Supreme Court, Dutchess County,

held that such rights do not constitute real property for purposes of RPAPL Section 1602. Under Section 1602, "[w]hen the ownership of real property is divided into one or more possessory interests and one or more future interests, the owner of any interest in such real property… may apply to the court designated in section 1603 for an order directing that said real property, or a part thereof, be mortgaged, leased or sold…"
The Appellate Division, Second Department, held that these development rights, the bundle of rights comprising the maximum development capacity of the property, "constitute 'real property, or a part thereof' for purposes of RPAPL Section 1602". However, the Appellate Division affirmed the dismissal by the lower court because the proposed sale of development rights would not be "expedient" as required by RPAPL Section 1604 ("When application shall be granted").

The Appellate Division found that the sale of development rights was not "expedient" because no buyer for the development rights had been identified, and no evidence had been presented as to the value of the land with and without the development rights, of any other benefit that would be achieved by a sale of the development rights, and that the sale was necessary to preserve the property as an asset. Hahn v. Hager, 2017 NY Slip Op 05710, decided July 19, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_05710.htm.

Financial Crimes Enforcement Network ("FinCEN")

As reported in Current Developments, FinCEN has issued Geographic Targeting Orders ("GTOs") 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 New York City, Miami-Dade County, Florida, Bexar County, Texas, Broward and Palm Beach Counties in Florida, and Los Angeles, San Diego, San Francisco, San Mateo and Santa Clara Counties in California. The GTOs have been further extended for 180 days beginning September 27, 2017 by a new GTO issued by FinCEN on August 22, 2017.

The newly issued GTO expands the scope of the requirements to include the purchase of real estate by an entity in the City and County of Honolulu in Hawaii for a total purchase price of for $3,000,000 or more. In addition, transactions within the scope of the GTO are now required to be reported to FinCEN when "such 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, or a funds transfer". The GTO is posted at http://bit.ly/2wC1wjV.

Lien Law

The Plaintiff filed a mechanic's lien on October 1, 2014. On July 29, 2015, a bond was filed for 110% of the lien under Lien Law Section 19 ("Discharge of lien for public improvement"). An action to foreclose the lien was not commenced and the lien was not extended. Lien Law Section 17 provides that a mechanic's lien terminates if an action to foreclose the mechanic's lien has not been commenced, or an extension of the lien has not been filed, within one year of the date on which the lien was originally filed. The Supreme Court, New York County, granted the Defendants' motions to dismiss the claim against the surety and to vacate the lien and to cancel the bond. However, the Court denied the Defendants' motion to dismiss the claim for unjust enrichment.

According to the Court, because the Plaintiff neither commenced to foreclose the lien or extended its lien, "… plaintiff has forfeited its claim based on the lien against both the real property owner Blue Nirvana and its surety, leaving plaintiff to pursue its underlying breach of contract or quasi-contractual claims against the owner for the work plaintiff claims it performed on the property". EZ Runer Construction Corp. v. Blue Nirvana, LLC, 2017 NY Slip Op 31663, decided July 24, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31663.pdf.

Mortgage Foreclosures

In 2006, a note and a mortgage were executed to Argent Mortgage Company, LLC ("Argent"). In 2007, Argent assigned the note and the mortgage to Residential Funding Company, LLC ("RFC"). Later in 2007, Argent commenced a foreclosure of the mortgage which was dismissed for lack of standing. In 2014, RFC assigned the note and the mortgage to Wilmington Savings Fund Society, FSB, as trustee for the Knoxville 2012 Trust ("Wilmington"). In 2014, 21st Mortgage Corporation, as the mortgage loan servicer for Wilmington, brought an Action to foreclose the mortgage. The Defendant raised as affirmative defenses the statute of limitations, a lack

of standing and a lack of capacity to sue. The Supreme Court, Kings County, denied the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, affirmed the lower court's ruling.

According to the Appellate Division, commencement of the foreclosure in 2007 did not accelerate the debt, since Argent did not have the authority to accelerate the debt or to sue for foreclosure. In addition, the Plaintiff failed to establish that it had standing to sue; although the Plaintiff averred that this note and mortgage were part of a portfolio of assets deposited into Wilmington, evidence was not submitted to establish that the note and mortgage were among the purchased assets. Finally, as to the Plaintiff's capacity to sue, it was not demonstrated that the Plaintiff had been delegated the authority to sue on behalf of Wilmington. 21st Mortgage Corporation v. Adames, 2017 NY Slip OP 05925, decided August 2, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_05925.htm.

Mortgage Foreclosures/Mortgage Securing a Guarantee

The Plaintiff, after foreclosing mortgages executed by its borrowers, sought to foreclose a collateral mortgage executed by guarantors. The Defendants in the foreclosure of the collateral mortgage sought a summary judgment dismissing the complaint, and discharging the notice of pendency and the collateral mortgage. The guarantors asserted that because they were not defendants in the foreclosure of the primary mortgage, and therefore a deficiency judgment under RPAPL Section 1371 ("Deficiency judgment") was not obtained as to them, the collateral mortgage could not be foreclosed. The Supreme Court, Richmond County, granted the Plaintiff's motion for summary judgment. According to the Court,

> "[t]he provisions of RPAPL Section 1311 ["Necessary defendants"] do not require foreclosure plaintiffs to name guarantors as necessary defendants. Consequently, the Court of Appeals decision in Sanders v. Palmer, 68 NY2d 180 (1986) is inapplicable to the facts presented in this case. In Sanders, the Court of Appeals prevented defendants in a foreclosure suit from being subjected to multiple lawsuits. Here, cross movants were not defendants in the prior foreclosure action. Therefore, this separate foreclosure action does not constitute a second action against the same defendants seeking a deficiency judgment".

MFC Real Estate LLC v. Litt, 2017 NY Slip Op 50910, decided July 11, 2017, reported at 56 Misc. 3d 1209, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_50910.htm.

Mortgage Foreclosures/Fixtures

The Supreme Court, Westchester County, held that the rooftop solar panel system at the property being foreclosed could be removed by Solarcity, the company which had leased the system to the owner of the property being foreclosed. The system was removable, and the contract stated that Solarcity owned the system for the term of the lease. It was not a fixture that was required to remain with the home. Federal National Mortgage Association v. Lipman, Index No. 57722/16, decided August 8, 2017, was reported in the New York Law Journal on August 8, 2017.

Mortgage Foreclosures/Holdover Proceeding

Petitioners, the owners of property in Bronx County, brought a holdover proceeding to recover possession of leased space from the tenants under a lease which had purportedly expired. The tenants countered that the Petitioners lacked standing to sue because a judgment had been entered in the foreclosure of a mortgage on the property. However, no actual sale of the property had taken place. The Civil Court, Bronx County, held that the Petitioners retained the standing to maintain the holdover proceeding. "The entry of a judgment of foreclosure does not divest the owner of his interest in the property until there is an actual sale…Since the property has yet to be sold, Petitioners are still considered to be the landlord and owner, and as defined by RPAPL Section 721(1) [Person who may maintain proceeding (to recover possession of real property)] retain standing to maintain this holdover proceeding". 3648 White Plains LLC v. Mensah, 2017 NY Slip Op 31459, decided July 12, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31459.pdf.

Mortgage Foreclosures/Mootness Doctrine

The Appellate Division, Second Department, dismissed the appeal of an Order of the Supreme Court, Queens County, directing the foreclosing mortgagee to assign the mortgage to a new lender on payment of the outstanding indebtedness. The Appellate Division deemed that appeal as being "academic". The mortgage had been satisfied and the complaint had been dismissed; since "any determination of this appeal by this Court will not affect the rights of the parties…", no exception to the mootness doctrine was warranted. The Appellate Division vacated the lower court's Order. According to the Court,

> "[w]hile it is the general policy of New York courts to simply dismiss an appeal which has been rendered academic, vacatur of an order or judgment on appeal may be an appropriate exercise of discretion where necessary 'in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent [citations omitted]. Under the particular circumstances of this case, we deem it appropriate to vacate the order appealed from".

Nautilus Capital, LLC v. Rama Realty Associates, LLC, 2017 NY Slip Op 01703, decided March 8, 2017, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_01703.htm.

Mortgage Foreclosures/Statute of Limitations

An Action to foreclose a mortgage commenced in 2009 was dismissed by the Supreme Court, Queens County, in 2011 for lack of personal jurisdiction over the Defendant property owner. In 2015, the lender sent a letter to the borrower revoking the lender's prior acceleration of the indebtedness. The borrower then filed an Action seeking the issuance of an Order under Real Property Actions and Proceedings Law ("RPAPL") Section 1501 ("Who May Maintain an Action") discharging the mortgage and canceling the note secured by the mortgage on the grounds that the commencement of a new foreclosure would be barred by the six-year statute of limitations in Civil Practice Law and Rules Section 213 (Actions to be Commenced within Six Years"). RPAPL Section 1501(4) states that "[w]here the period allowed by the applicable statute of limitations for the commencement of an action to foreclose a mortgage…has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action…to secure the cancellation and discharge of record of such encumbrance…".

The Supreme Court, Queens County, granted the Plaintiff's motion for summary judgment and directed the County Clerk, Queens County, to cancel the mortgage. According to the Court,

> "…if a prior foreclosure action is dismissed for failure to acquire jurisdiction over a mortgagor, a subsequent foreclosure action will be permitted only if it is brought within the applicable statute of limitations. [citation omitted]. In this case, the statute of limitations prevents Citimortgage from instituting a new foreclosure action…Having clearly and unequivocally elected to accelerate the entire amount that was due on the loan that was secured by the mortgage…Citimortgage may not insulate itself from the provisions of RPAPL Section 1501 by simply sending [the borrower] a letter indicating it no longer wished to exercise the acceleration option contained in the promissory note and mortgage".

Soroush v. Citimortgage, Inc., 2016 NY Slip Op 32750, decided January 7, 2016, was posted on August 4, 2017 at http://nycourts.gov/reporter/pdfs/2016/2016_32750.pdf.

In Nationstar Mortgage LLC v. Levy, decided by the Supreme Court, Kings County, on May 15, 2017, the Defendant's motion to dismiss the foreclosure based on the expiration of the statute of limitations was denied. Although the foreclosure was commenced by the Plaintiff more than six years after it commenced to foreclosure the same mortgage in 2008, when the indebtedness was accelerated, which Action was discontinued, the Court held that the Plaintiff had revoked its election to accelerate the indebtedness within the limitations period.

On September 12, 2012, after the prior foreclosure was discontinued, the Plaintiff mailed a default notice to the borrower stating that "if you do not pay the full amount of the default, we shall accelerate the entire sum of both principal and interest due and payable…". According to the Court,

> "…the service of the September 12, 2012 notice, in essence, provided [the borrower] with a refreshed opportunity to bring the loan current and did not indicate that plaintiff was seeking payment of the entire indebtedness, coupled with plaintiff's discontinuance of the prior action, unequivocally demonstrates that plaintiff intended to revoke the prior acceleration. While the notice did not contain an express statement that plaintiff was thereby revoking its prior acceleration, insofar as the notice demanded only arrears and late charges, it is inconsistent with plaintiff's insistence that the entire debt be paid".

This decision, 2017 NY Slip Op 31676, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31676.pdf.

Mortgage Foreclosures/Vacating Sale

Defendant, the property owner, sought an Order setting aside the sale of the property by the Referee to a third-party purchaser because the Defendant and his attorney were advised by a representative of the mortgage loan servicer in separate telephone conversations that it was reasonable to assume that the foreclosure sale the next day would be postponed, following which the loan would be modified and the mortgage reinstated. However, neither the Plaintiff's attorneys nor the Referee were advised that the sale had been postponed. Finding that there had been a mutual mistake, the Supreme Court, Westchester County, held that the Defendant was entitled to be relieved of the sale of the property and the purchaser at the sale was entitled to a refund from the Referee of her down payment, with interest at the rate of 3% payable by the Plaintiff, computed from the date of the sale to the date of repayment. The Court further ordered the Plaintiff and the Defendant to execute the documentation reasonably required to reinstate the mortgage loan. On satisfaction of these conditions, a stipulation of discontinuance of the foreclosure, with prejudice, was to be filed. Hudson City Savings Bank v. Woodard, 2017 NY Slip Op 27270, decided August 17, 2017, is posted at Capital One, N.A. v. Karp, 2017 NY Slip Op 27209, decided June 22, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_27270.htm.

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance has posted its Annual Statistical Report of New York State Tax Collections for the State's fiscal year 2016-2017 (April 1, 2016 - March 31, 2017). According to the Report, the Real Estate Transfer Tax collected in FY 2016-2017 was $1,126,369,125, down from $1,163,059,805 collected in FY 2015-2016. Mortgage recording tax collected statewide in FY 2016-2017 was $2,173,936,159; the mortgage recording tax collected in New York City was $1,159,923,890. As reported in the Annual Statistical Report issued for FY 2015-2016, for that fiscal year the mortgage recording tax collected statewide was $2,148,937,051; the mortgage recoding tax collected in New York City was $1,657,539,988. The Report for Fiscal Year 2016-2017 is posted at http://on.ny.gov/2xdQd0Z.

Real Estate Transfer Tax ("RETT")/Transfers from Trusts

New York State's Department of Taxation and Finance's Office of Counsel issued an Advisory Opinion dated August 1, 2017 concerning the application of the RETT to the distribution of real property from a trust to the trust beneficiaries on the death of the settlor. The Opinion concludes that if "…no consideration is paid by the beneficiary for the conveyance, the RETT will not be due on the transfer. To the extent that the beneficiary is paying cash to the Trustee for the transfer of the real property, the RETT will be due". The Advisory Opinion, TSB-A-17(1)R, is posted at https://www.tax.ny.gov/pdf/advisory_opinions/real_estate/a17_1r.pdf.

Recording Act/Judgments

Real property owned of record by George Guttmann and Alex Robinovich was sold in a "short sale" to Defendant Xifeng Zhang ("Zhang"). At the closing, the sellers executed an affidavit stating that there were no judgments against them, and the title report did not report any judgments. There was, however, a money judgment

docketed against George Guttman and Alex Rabinovich. After that conveyance, the assignee of the judgment, the Plaintiff in the Action, sought to enforce the judgment against the real property. The Supreme Court, Kings County, granted Zhang's motion for summary judgment dismissing the complaint as against her, declared that the property is free and clear of any interest of the judgment creditor, and ordered the cancellation of the lis pendens filed against the property. According to the Court,

> "…defendant Zhang has satisfied her prima facie entitlement to summary judgment dismissing the complaint as against her by demonstrating that [the Plaintiff's judgment] was docketed against 'Guttman' and 'Rabinovich', which are different surnames than that of the former title owners of the property, 'Guttmann' and 'Robinovich'. A judgment docketed against 'George Guttman' and "Alex Rabinovich' did not constitute constructive notice upon defendant Zhang, a good faith purchaser for value, that the Property owned by 'George Guttmann' and 'Alex Robinovich' is subject to a lien, as a matter of law [citations omitted]. [The Plaintiff], in opposition, has failed to submit evidence that defendant Zhang had either actual or constructive knowledge of [the judgment]…"

Kunin v. Guttman, 2017 NY Slip Op 31735, decided August 16, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31735.pdf.

Religious Corporations

Prior to the enactment of Chapter 555 of the Law of 2015, Religious Corporations Law ("RCL") Section 12 ("Sale, mortgage and lease of real property of religious corporations") required that leave of court be obtained for a religious corporation to sell, mortgage or lease for a term exceeding five years any of its real property. Under Chapter 555, effective December 11, 2015, the Attorney General of the State of New York is authorized to approve the sale, mortgage or such a lease of the real property of a religious corporation in lieu of obtaining leave of court.

The Appellate Division, Second Department, applying RCL Section 12 prior to the enactment of Chapter 555, affirming a ruling on February 23, 2015 of the Supreme Court, Kings County, held that the conveyance by a religious corporation to the Defendants "was invalid because it was made without leave of court". Heights v. Schwarz, 2017 NY Slip Op 05707, decided July 19, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_05707.htm.

Streets/Easements of Light and Air

Petitioners, the owners of units in a condominium adjoining Lincoln Boulevard in Long Beach, sought review of a decision of the City of Long Beach to install a comfort station extending from the boardwalk into Lincoln Boulevard adjacent to their building. They claimed that the City violated the requirement of the State's Environmental Quality Review Act ("SEQRA") and the City Charter and that the comfort station would interfere with their easements of light, air and access. The Supreme Court, Nassau County, denied the Petitioners' motion for a preliminary injunction, and dismissed the Action. The Appellate Division, Second Department, affirmed the Supreme Court's order and judgment, as modified to add a provision declaring that the construction of the Comfort Station is a permitted use of a public street. According to the Appellate Division,

> "…an owner of land abutting a highway or street possesses, as incident to his or her ownership, easements of light, air, and access…[citations omitted]. Nevertheless, '[w]hen the fee of the highway has been transferred to the State, the State may use the highway for any public purpose not inconsistent with or prejudicial to its use for highway purposes…[and] [t]he mere disturbance of the rights of light, air and access of abutting owners on such a highway by the imposition of a new use, consistent with its use as an open public street, must be tolerated and no right of action arises therefrom, although such use interferes with the enjoyment of the premises' [citations omitted]"

In this case, the construction of the comfort station would not completely block Petitioners' ocean view or prevent

them from using the public street. The Appellate Division also held that Petitioners lacked standing to raise SEQRA; they had not demonstrated they would suffer an environmental injury. Matter of Shapiro v. Torres, 2017 NY Slip Op 06281, decided August 23, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_06281.htm.

Transfer Tax/REITS

Under Tax Law Section 1402 ("Imposition of tax"), which applies to New York State's Real Estate Transfer Tax, and, as to New York City's Real Property Transfer Tax, under Tax Law Section 1201 ("Taxes administered by cities of one million or more") and Section 11-2102 ("Imposition of tax") of the City's Administrative Code, New York State and New York City transfer taxes are applied to certain "real estate investment trust transfers" at a rate of fifty percent of the otherwise applicable rate. Chapter 272 of the Laws of 2017 has extended the date to which the reduced tax rates may apply when a conveyance of real property is made to an existing REIT from September 1, 2017 to September 1, 2020. Assembly Bill 07523/Senate Bill 05739 is posted at http://bit.ly/2yislbk.

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