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Current Developments

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No. 186 | November 6, 2017

Adjoining Properties/Retaining Walls

Plaintiff sought an Order directing The City of New York to repair and maintain part of a retaining wall running between the Plaintiff's property and adjoining property owned by the City. The City moved to dismiss the complaint, contending that the retaining wall is only on the Plaintiff's property or, based on a review of a survey, that the wall encroaches onto the City's property but is not shared. The City also asserted that the Environmental Control Board, having upheld the issuance of a violation to the Plaintiff because the retaining wall was in a condition of disrepair, supported its position that the wall is not on the City's property.

The Supreme Court, Bronx County, denied the City's motion to dismiss, concluding that the Plaintiff had stated a valid cause of action under New York City Administrative Code Section 28-305.1.1 ("Structures located on the lot line of adjacent properties and partially on both properties"), which states the following:

> "The owners of adjacent properties shall be responsible jointly for the proper maintenance and repair of retaining walls…that are located along the common lot line and on both their properties; and each such owner shall be responsible for one-half of the costs of maintaining and repairing such…retaining walls…or such portions thereof…"

According to the Court, "if any portion of the damaged portion of the wall lies on the City's property, the two parties are jointly liable for the repair of same…The Court is not persuaded…that the retaining wall rests entirely on plaintiff's property…The ECB's decision confirms that only a portion of the subject retaining wall rests on plaintiff's property, but it does not conclusively demonstrate, or even suggest, on which lot or lots the remainder of the wall rests".

45 Associates LLC v. The City of New York, 2017 NY Slip Op 31922, decided August 11, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31922.pdf.

Condominiums/Common Charge Liens

The Plaintiff Board of Managers commenced an Action to foreclose its recorded common charge lien for unpaid common charges in the amount of $16,488.36, accrued interest and attorneys' fees. During the pendency of the Action, the Defendants paid the common charges and interest. The Plaintiff contended that the lien remained unsatisfied because the Defendants still owed $194,598.23 for repair fees, fines for allegedly violating rules of the Condominium, and for attorneys' fees, some of which related to a different, unrelated lawsuit. The Supreme Court, New York County, held that the Defendants had satisfied the lien and granted the Defendants' motion for summary judgment dismissing the causes of action to foreclose the common charge lien and for breach of contract.

The Court noted that under the Condominium's Declaration, the right to recover "all costs incurred, including reasonable attorney's fees" are not a lien against a Unit. Further, according to the Court, the fines and the cost incurred by the Condominium for repairs were not common charges; a common charge lien under Real Property Action Sections 339-z and 339-aa ("Lien for common charges…") is to only include unpaid common charges. A determination of reasonable attorney fees incurred to recover the common charges was referred to a special referee; it was inappropriate to consider attorney fees incurred in other outstanding litigation. Board of Managers of The Modern 23 Condominium v. Scime, 2017 NY Slip Op 31878, decided August 17, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_31878.pdf.

Condominiums/Cooperatives

Chapter 305 of the Laws of 2017, enacted September 12, 2017 and effective January 1, 2018, adds Section 519-a to the not-for-profit corporation law ("NPCL") and Section 727 to the business corporation law ("BCL"), each captioned "Annual Reports for Certain Transactions Required". These Sections require that each condominium and cooperative housing corporation, incorporated under either the NPCL or the BCL, issue an annual report "containing information on any contracts made, entered into, or otherwise voted on by the board of directors

that were considered a related party transaction" under NPCL Section 715 ("Officers") or BCL Section 715 ("Related party transactions"). If there were no related party transactions, the annual report is to state that "[n]o actions taken by the board were subject to the annual report required pursuant to" NPCL Section 519-a or BCL Section 727, as applicable.

If there is a related party transaction, the annual report is to include information relating to each such contracts, the record of the meeting on which the contract was approved, including details as to how each director voted, and the date the contract "would be and remain valid". Senate Bill 6652A/Assembly Bill 8261A are located at http://bit.ly/2ieWp3X.

Condominiums/Sidewalks

Under New York City Administrative Code Section 7-210 ("Liability of real property owner for failure to maintain sidewalk"), as to property other than a one-three family residential real property owner-occupied in whole or in part used exclusively for residential purposes, "the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition".

The Appellate Division, First Department, affirming the dismissal by the Supreme Court, New York County, of a complaint against the owner of commercial units and a tenant of a commercial unit in a condominium, held that the Defendants were not owners for the purpose of Section 7-210 "and thus [they] had no duty to maintain the public sidewalk in front of the condominium". The Appellate Division, as to the tenant, noted that it had no obligation to maintain the sidewalk and that there was no evidence that it "created the alleged defect in the sidewalk" which had caused the Plaintiff's injury. Further, according to the Court, the tenant's "receipt of deliveries on trolleys transported over the sidewalk to its store did not constitute a special use of the sidewalk". Keech v. 30 East 85th Street Company, LLC, 2017 NY Slip Op 07192, decided October 12, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_07192.htm.

Continuing Legal Education

New York's Continuing Legal Education Program Rules have been amended effective January 1, 2018 by the Continuing Legal Education Board to add "Diversity, Inclusion and Elimination of Bias" as a category for CLE credit. 22 NYCRR 1500.2(g) defines this new category as including "courses, programs and activities [relating] to the practice of law [which] may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys, and court personnel".

22 NYCRR Section 1500.22 states that an attorney must complete "at least one credit hour" in "Diversity, Inclusion and Elimination of Bias" in each biennial reporting cycle. Attorneys re-registering on or after July 1, 2018 must meet this requirement. CLE Program Rules are located at http://bit.ly/2xZm9Zg.

Contracts of Sale

As reported in Current Developments dated March 1, 2016, a contract executed in 2004 for the sale of property listed as an inactive hazardous waste site provided for an "Outside Closing Date" of 18 months from the date of the purchase agreement. The contract was amended numerous times, first in 2006, with the closing date finally extended to July 22, 2008. Closing was contingent on the Defendant-Seller obtaining certain government approvals. In 2008, prior to the last extended closing date, the Purchaser commenced an Action seeking rescission of the 2006 contract amendment and specific performance of the 2004 contract, with an abatement in the purchase price to account for the Defendants' failure to acquire the necessary approvals. The Plaintiff's causes of action were dismissed by the Supreme Court, New York County.

The Defendants counterclaimed that the contract was terminated when the Plaintiff materially breached the contract and, therefore, the Defendants could retain the down payment and other payments made by the

Purchaser. The Supreme Court, New York County, granted the Defendants' motion for partial summary judgment on that counterclaim, holding that the Purchaser anticipatorily breached the contract by commencing the suit, and that the Defendants were entitled to retain the down payment and the other payments as liquidated damages. The Appellate Division, First Department, affirmed the ruling of the lower court in a decision reported at 138 AD3d 112. According to the Appellate Division, "…because a rescission action unequivocally evinces the plaintiff's intent to disavow its contractual obligations, the commencement of such an action before the date of performance constitutes an anticipatory breach". The Court of Appeals reversed, holding that under the circumstances of this case "the mere commencement of an action seeking 'rescission and/or reformation' of a contract [does not] constitute an anticipatory breach of such agreement". According to the Court of Appeals,

> "…where the amended complaint seeks, among other things, reformation of the amendments to the contract and specific performance of the original agreement – there was no 'positive and unequivocal' repudiation (citation omitted). There is no material difference between this action and a declaratory judgment action. At bottom, both actions seek a judicial determination as to the terms of a contract, and the mere act of asking for judicial approval to avoid a performance obligation is not the same as establishing that one will not perform that obligation absent such approval (citation omitted)".

Princes Point LLC v. Muss Development L.L.C., 2017 NY Slip Op 07298, decided October 19, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_07298.htm.

Cooperatives

Without permission, Defendants used a portion of the building's roof adjoining their cooperative units where it was set back, accessing the roof through a window in one of their units. The cooperative's Board of Directors sought a declaratory judgment that the Defendants had no right to use, occupy or enjoy the roof and an injunction. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment, declaring that the Defendants had no right to use the part of the roof in question and enjoining them from using the roof. The apartments identified in the Offering Plan for the building as having terraces did not include the Defendants' units. In addition, the roof is not appurtenant to the Defendants' units "since its use is neither essential nor reasonably necessary to defendants' full beneficial use and enjoyment of the [A]partment' [citation omitted]". Further the "defendants' use of the Roof was not 'exclusive [for a claim of adverse possession]…for the statutory period of 10 years' [citation omitted]". Fairmont Tenants Corp. v. Braff, 2017 NY Slip Op 32119, decided October 10, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_32119.pdf.

Lien Law

An Action to foreclose a mechanic's lien was discontinued by stipulation and the lien was released of record because the Plaintiff did not have a license when working at the Defendants' property. The Defendants also sought damages because the lien was exaggerated, and the imposition of sanctions against the Plaintiff and its counsel.

The Supreme Court, New York County, held that the Defendants could not recover under Lien Law Section 39-a ("Liability of lienor where lien has been declared void on account of willful exaggeration") and the court granted the Plaintiff's motion to dismiss the counterclaim for an exaggerated lien. Under Lien Law Section 39-a, "[w]here in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor". The Appellate Division, First Department, in Wellbilt Equipment Corp. v. Fireman, reported at 275 AD2d 162, has held that "damages under section 39-a may not be awarded unless the lien has been declared void for willful exaggeration after a trial in an action to foreclose the lien". In this case, the lien was disposed of by stipulation.

The Court also denied the Defendant's cross-motion for sanctions. It held that the Defendants "have not made a showing that [the Plaintiff] and its counsel knowingly brought a meritless action". New Age General Contracting,

Inc. v. Theso Corp., 2017 NY Slip Op 32170, decided October 13, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_32170.pdf.

Mortgage Foreclosures/Default

In the foreclosure of a mortgage executed by Defendants Betty Renesca and her former husband, the Plaintiff's motion for an Order of Reference was granted by the Supreme Court, Queens County. Betty and an occupant of the mortgaged premises who was also a Defendant moved to vacate the Order of Reference and to vacate their default in opposing the Plaintiff's motion.

Betty claimed that her execution of a loan modification was a reasonable excuse for her default in answering the complaint and for her default in opposing the motion for the Order of Reference. However, the Court denied the Defendants' motion. The lender had rejected the modification because her former husband had refused to cooperate and, in any event, according to the Court,

> "Betty…failed to allege much less demonstrate even an arguably meritorious defense to the action. A pending loan modification, if any, is not a meritorious defense to the foreclosure action as there is no guarantee the borrower will qualify for a loan modification. Moreover, a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment as long as it has made a meaningful effort at reaching a resolution [citations omitted]".

The Court dismissed the Action against the occupant as she no longer resided at the property and was therefore not a necessary party. Bank of America, N.A. v. Renesca, 2017 NY Slip Op 32023, decided September 25, 2017, is reported at http://www.nycourts.gov/reporter/pdfs/2017/2017_32023.pdf.

Mortgages/Development Rights

Affirming an Order of the Supreme Court, New York County, denying the Defendant's motion to dismiss, the Appellate Division, First Department, held that a mortgage, and the related UCC financing statement, did not encumber FAR bonus development rights awarded by New York City for the benefit of the mortgaged properties. The mortgage granted a lien on "'all' of defendant's rights 'in any manner whatsoever' and 'in any way… belonging, relating to or pertaining to the land'". According to the Appellate Division, "[t]hat the FAR bonus could be transferred to another developer supports plaintiff's argument that it was not an inherent element of ownership of the land and therefore [the FAR bonus] was not collateral under the mortgage". CB Frontier LLC v. LStar Capital Finance II, LLC, 2017 NY Slip Op 06621, decided September 26, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_06621.htm.

Mortgages/Erroneous Satisfaction

After a mortgage was assigned and then consolidated with later executed mortgages, a satisfaction of the first executed mortgage was recorded in error. The Plaintiff, the holder of the consolidated mortgage, sought an Order cancelling and expunging the satisfaction of mortgage, reinstating the mortgage, and declaring that the consolidated mortgages are a valid, consolidated first lien. The Supreme Court, Queens County, granted the Plaintiff's motion for summary judgment. Evidence was submitted to establish that the satisfaction was erroneously executed and recorded and that the Defendants continued to make payments on the mortgage loan. According to the Court, "[a] mortgagee may have an erroneous discharge of mortgage, without concomitant satisfaction of the mortgage debt, cancelled, and have the mortgage reinstated where there has not been detrimental reliance on the erroneous recording [citations omitted]". Here, the Defendants had not changed their position in reliance on the recording of the satisfaction of the mortgage. Wells Fargo Bank, N.A. v. Escoto, 2016 NY Slip Op 32769, decided January 27, 2016, was posted on October 13, 2017 at http://www.nycourts.gov/reporter/pdfs/2016/2016_32769.pdf.

Recording Act/Foreclosure Sales

Property was sold to the Defendants pursuant to a judgment of foreclosure and sale while there were appeals pending. Plaintiff, the foreclosed owner of the property, sought a judgment that the Defendants did not hold title to the property, because the Order and Judgment of the Supreme Court, Queens County, granting the Defendants' motion for summary judgment dismissing the complaint and declaring that the Defendants had title to the property, was on appeal when the Referee's deed was delivered. The Appellate Division, Second Department, affirmed the ruling of the lower court, holding that the Defendants were bona fide purchasers for value. According to the Court, "[t]he good faith of a purchaser who acquires property for value during the pendency of an appeal 'is not vitiated by the purchaser's actual knowledge of the appeal' [citations omitted]". The Court noted that the Plaintiff "had failed to obtain a stay of enforcement of the orders appealed from in the foreclosure action or a stay of the foreclosure sale". Singh v. Ahamad, 2017 NY Slip Op 06939, decided October 4, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_06939.htm.

Restrictive Covenants/Standing to Enforce

A deed executed in 1924, transferring then undeveloped land in Mount Vernon, contained a restrictive covenant prohibiting the erection of a garage except for the exclusive use of occupants of a building on the property. The Plaintiff, the owner of land that was part of the property conveyed in 1924, sought an Order restraining the Defendants from operating a commercial parking garage on property that was also part of the land conveyed. The Supreme Court, Westchester County, denied the Defendants' motion to dismiss for lack of standing and granted the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, reversed, holding that the Plaintiff lacked standing to enforce the covenant.

The Appellate Division, noting that the record did not show whether the grantor of the 1924 deed retained a dominant estate benefitting from the covenant or that the covenant ran with the land, held that the Plaintiff lacked standing to enforce the covenant because the restrictive covenant was not part of a common development schedule created to benefit subdivision property owners. According to the Court,

> "[t]here is no evidence that when [the grantor of the 1924 deed] conveyed the land…the land was to be divided, and [the grantee of the 1924 deed] was under no obligation to divide it. As best as can be determined from the record, the covenant appears to have been for the benefit of [the grantor of the 1924 deed] or his remaining lands, if he had any. At the time of the conveyance, the covenant cannot be said to have benefitted any part of the land burdened by it".

Fleetwood Chateau Owners Corp. v. Fleetwood Garage Corp., 2017 NY Slip Op 06431, decided September 13, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_06431.htm.

Right of First Refusal

An agreement with the Defendant afforded the Plaintiff a right of first refusal to purchase a commercial building "at the same price and on the same terms…as any 'bona fide' offer" The Defendant transferred the property for $238,493 to an entity, also a Defendant, which was reported on Form RP-5217 (the "Real Property Transfer Report") submitted to New York State in connection with the transaction as being a bona fide purchaser. The Defendants alleged that the transfer was between related companies and not a sale. The Supreme Court, Erie County, granted the Defendants' motion for summary judgment and dismissed the complaint. The Appellate Division, Fourth Department, reversed and reinstated the complaint.

The Appellate Division applied the doctrine of "tax estoppel", under which "'[a] party to litigation may not take a position contrary to a position taken in [a] tax return' [citation omitted]". Since the Defendants certified on Form RP-5217 that the transfer of the property was not a "sale between related companies or partners in business", they were estopped from claiming that the transfer was not a bona fide sale.

The Court further held that the Defendants also were estopped from claiming that $2,000,000 in mortgage

indebtedness constituted part of the purchase price on the exercise of the right of first refusal. On Form RP-5217 they reported that the transfer was a cash sale for $238,493; the "plaintiff was ready, willing, and able to purchase the property for that amount". Amalfi, Inc. v. 428 Co., Inc., 2017 NY Slip Op 06770, decided September 29, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_06770.htm.

Zoning Resolution/Development Rights

Article VIII ("Special Purpose Districts") of New York City's Zoning Resolution ("ZR") was amended effective August 9, 2017 to establish the "Greater East Midtown Subdistrict" within the "Special Midtown District". The Subdistrict encompasses a 78-block area bounded generally by East 39th Street to East 57th Street and Third Avenue to Madison Avenue. "Special Regulations for the East Midtown Subdistrict" in the ZR are set forth beginning at ZR Section 81-60.

Notwithstanding the contiguity requirements of ZR Section 12-10 and the rules governing the transfer of development rights from land improved by a landmark building of ZR Section 74-79 et. seq., the amendment allows for the transfer of development rights from a property improved by a landmark to property within the "Vanderbilt Corridor Subarea" pursuant to a special permit issued by the City Planning Commission ("CPC") (ZR Section 81-632 et. seq.), the transfer of development rights from a property improved by a landmark to a "qualifying site" by CPC certification (ZR Section 81-642), and the transfer of development rights from a property improved by a landmark to a "non-qualifying site" pursuant to a special permit issued by the CPC (ZR Section 81-653). City Council Resolution No. 1619-2017 is located at http://on.nyc.gov/2yCfZ08.

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Reporting Current Developments since 1997
No. 186; Monday November 6, 2017
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