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NATIONAL COMMERCIAL SERVICES

Current Developments

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National Commercial Services

No. 187 | January 3, 2018

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 pursuant to article four of the civil practice law and rules…Such license shall be granted by the court in an appropriate case upon such terms as justice requires. The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry".

The owner of vacant land to be improved sought a license under RPAPL Section 881 to enable it to enter on the adjoining land of the appellant to conduct a preconstruction inspection. The Supreme Court, Queens County, granted the petition, and the Appellate Division, Second Department, affirmed the Order of the lower court. According to the Appellate Division,

> "RPAPL 881 allows a property owner to petition for a license to enter the premises of an adjoining owner when such entry is necessary for making improvements or repairs to the petitioner's property and the adjoining owner has refused such access…The factors which the court may consider in determining the petition include the nature and extent of the requested access, the duration of the access, the protections to the adjoining property that are needed, the lack of an alternative means to perform the work, the public interest in the completion of the project, and the measures in place to ensure the financial compensation of the adjoining owner for any damage or inconvenience resulting from the intrusion" [citations omitted].

The Appellate Division found that "the limited access and placement of structures would protect the appellant's property, and would not interfere with the use of the premises; that the access would be limited to certain phases of the project and was expected to last no more than 18 to 24 months after the commencement of construction; that the temporary structures to be erected along the lot line would not be unduly invasive and were necessary in order for the petitioner to build out to the lot line while protecting the adjoining property as required by the New York City Building Code; that the public interest would be served by the development of the project [as an education center]; and that the appellant would be financially protected by the naming of the appellant as an additional insured on the relevant construction insurance policies and by the petitioner's promise to indemnify her for any loss [citations omitted]. Accordingly, the evidence supports the conclusion that the petitioner would suffer an undue hardship if the RPAPL license was denied…". Matter of Queens College Special Projects Fund, Inc. v. Newman, 2017 NY Slip Op 07444, decided October 25, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_07444.htm.

Adjoining Owners

The Supreme Court, Kings County, found that the foundation wall of the Plaintiff's property had been significantly damaged by construction on the Defendant's adjoining property, causing damage such as rendering inoperable the Plaintiff's building's heating system. The Court found that the Plaintiff was not given notice of the construction and that the Defendant's contractor did not comply with requirements for construction which would have protected the foundation of the Plaintiff's building. The Court granted a preliminary injunction staying all construction, renovation or repairs at the Defendant's property, pending a further Order of the Court.

The Court also directed the Defendant to pay for work necessary to make the heating system in the Plaintiff's building operational, and complete the restoration of the foundation wall. Further, within thirty days of the date of entry of the Order, the Defendant was to pay for expenses required to repair the condition causing water infiltration to the Plaintiff's property. If the Defendant does not pay for the repairs, the Court will issue a judgment for the work based on written cost estimates provided by the Plaintiff's counsel. The Court did not require the Plaintiff to post a bond for the injunction. "To impose the cost of a bond upon the innocent plaintiff in this matter

would be unfair and contrary to the equities in this case". Baptiste v. 70A Cooper PH LLC, 2017 NY Slip Op 32416, decided November 22, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_32416.pdf.

Equitable Subrogation/Bankruptcy

The holder of a second mortgage on Defendant Chouen's property sought an Order declaring that it was equitably subrogated to an unrecorded first mortgage to the extent of the amount of the loan proceeds which had been applied to satisfy the first mortgage. The Supreme Court, Suffolk County, denied Defendant Chouen's motion to dismiss the complaint and granted that branch of the Plaintiff's cross-motion for summary judgment declaring that the Plaintiff was equitably subrogated to the first mortgage as of November 11, 2002, the date on which the Plaintiff's mortgage was executed, in the amount advanced to pay off the prior mortgage.

The Appellate Division, Second Department, affirmed the Order of the Supreme Court and remitted the matter for entry of a judgment declaring that the Plaintiff is equitably subrogated to the first mortgage lien in the amount of the payoff as of November 11, 2002. Although Chouen was granted a discharge under Chapter 7 of the Bankruptcy Code, the Plaintiff's lien survived. "'Although a bankruptcy discharge extinguishes one mode of enforcing a note – namely, an action against the debtor in personam, it leaves intact another – namely, an action against the debtor in rem'[citations omitted]." Citimortgage, Inc. v. Chouen, 2017 NY Slip Op 07427, decided October 25, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_07427.htm.

Equitable Subrogation/Statute of Limitations

Proceeds of a mortgage loan made in 1997 were allegedly applied to pay off existing liens. Three Actions were commenced to foreclose the mortgage. The first, in 1999, was dismissed for the failure to prosecute; the second, in 2005, was abandoned; the third, in 2011, was dismissed by the Supreme Court, Nassau County, as being time-barred and the mortgage was declared null and void.

The current holder of the mortgage, which brought the foreclosure in 2011, sought a judgment declaring that under the doctrine of equitable mortgage the 1997 mortgage was a valid lien or that under the doctrine of equitable subrogation it had an equitable lien for no less than the amount of the liens paid off by the loan proceeds. It also sought a money judgment for the amount of real estate taxes and hazard insurance premiums paid by the Plaintiff from June 1998 to the present. The Supreme Court, Nassau County, denied the Defendant mortgagors' motion to dismiss the complaint and cancel the notice of pendency. The Appellate Division, Second Department, reversed and granted the Defendants' motion to dismiss the complaint as asserted against them and canceled the notice of pendency. According to the Appellate Division,

> "[a] cause of action seeking to establish a lien pursuant to the doctrine of equitable mortgage or the doctrine of equitable subrogation is governed by a six-year statute of limitations (see CPLR 213[1]) [citations omitted]. Those causes of action accrued no later than June 16, 1997, when the mortgage and note were made [citation omitted] and, therefore, those causes of actions, commenced in 2014, are untimely…The defendants also established, prima facie, that the unjust enrichment cause of action to recover money allegedly paid by the plaintiff for real property taxes and hazard insurance was time-barred with respect to any payment made by the plaintiff on or before December 2, 2008, xix years prior to the commencement of this action [citation omitted]".

As to real estate taxes and hazard insurance premiums paid by the Plaintiff after December 2, 2008, the Appellate Division held that the complaint failed to state a cause of action to recover those payments under a theory of unjust enrichment. "'[T]he voluntary payment doctrine…bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law' [citations omitted]. Here, no fraud or mistake is alleged". Wells Fargo Bank, N.A. v. Burke, 2017 NY Slip Op 07631, decided November 1, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_07631.htm.

Escrows

Due to the erroneous recital of the name of the judgment debtor a judgment for $347,845.15 was docketed

against Northwood Estates, LLC instead of Northwood Village, LLC, the seller of real property in Nassau County. Therefore, the judgment was not reported by the title insurer which insured the sale. At closing, $360,000 was placed in escrow "to pay the debts and expenses of Seller". After the closing the judgment was corrected, and the judgment was purchased by the title insurer.

The two members of Northwood Village, LLC entered into an agreement settling litigation between them, which provided that $725,000 was to be paid to one of them from the funds held in escrow. The member who was to receive the payment, Hason, moved to have the funds in escrow released to him. However, the title insurer asserted a claim for $347,845.15 against those funds; the law firm acting as escrowee refused to release the funds to Hason. The Supreme Court, Nassau County, denied that member's motion and directed that the escrowee release the funds to the title insurer. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division,

> "Where a debtor places funds in escrow for the payment of specific creditors, as long as those funds remain subject to the debtor's 'present or future control,' those funds are subject to claims brought by other creditors who know about the escrow funds [citations omitted]".

The Appellate Division held that Hason was not relieved of his obligations under the settlement agreement because "seizure of the escrow funds by another creditor was foreseeable". Freedman v. Hason, 2017 NY Slip Op 07977, decided November 15, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_07977.htm.

Mortgage Foreclosures

The Supreme Court, Nassau County, confirmed the Referee's report, awarded the foreclosing Plaintiff an amount that included counsel fees and interest, and entered a judgment of foreclosure and sale. The Appellate Division, Second Department, reversed and remitted the matter for the Referee to recompute, for the court to determine the reasonableness of counsel fees computed by the Referee, and to enter an "appropriate" amended judgment of foreclosure and sale. According to the Appellate Division,

> "in view of the lengthy delay by [the Plaintiff's] predecessors in interest in prosecuting this action, [the Plaintiff] should recover no interest for the roughly three-year period of time from when the action was commenced in 2005 to when the defendant filed a request for judicial intervention in 2008. While [the Plaintiff] did not cause this delay, it should not benefit financially, in the form of accrued interest, from this delay caused by its predecessors in interest. Furthermore, [the Plaintiff] should not recover interest on counsel fees awarded to it. Paragraphs 7 and 21 of the mortgage are inconsistent regarding whether interest could be recovered on counsel fees…[Further,] [i]n this case, a determination must be made on the reasonableness of the counsel fees, following a hearing on that issue, if necessary".

Greenpoint Mortgage Corp. v. Lamberti, 2017 NY Slip Op 08353, decided November 29, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_08353.htm.

Mortgage Foreclosures/Default Judgment/Election of Remedies

Defendant, the owner of a condominium unit, which acquired title subject to the mortgage being foreclosed, opposed the Plaintiff's motion for an Order appointing a referee to compute, and cross-moved for an Order vacating its default and dismissing the complaint. The Defendant asserted that its prior counsel had not served an answer and had not otherwise taken action to avoid a default. The Defendant also contended that it had a meritorious defense.

Although the Supreme Court, Warren County, denied the cross-motion to vacate the default because a default judgment had not been entered, it had "the discretion to vacate a default and/or to extend the time to answer and compel plaintiff to accept an untimely answer, upon a showing of a reasonable excuse for the delay and a meritorious defense". The Court found that "the defendant has made a showing of reasonable excuse for the delay and a meritorious defense to the complaint sufficient to excuse its default and to extend its time to appear

or answer pursuant to CPLR 2004 and 3012(d)". According to the Court,

> "[d]efendant provided a detailed and credible explanation of its default. Under the circumstances, the Court will not impute to defendant the inaction or dilatory conduct of its prior counsel as the documents submitted by defendant's current counsel demonstrate that defendant did not intend to abandon the action and reasonably believed that prior counsel was properly defending its interests".

However, the Court dismissed the complaint because the Plaintiff had obtained a judgment on the mortgage debt against the original obligor and that obligor's guarantors before the foreclosure was commenced and property executions were not served and returned unsatisfied, as required by the one-action rule set forth in RPAPL Section 1301 ("Separate action for mortgage debt"). Agility Funding, LLC v. Wilmington Trust N.A., 2017 NY Slip Op 27353, decided October 11, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_27353.htm.

Lien Law

1807-1811 Park Avenue Development Corp. ("Dev. Corp.") acquired property in 1999 from the New York City Economic Development Corporation ("NYCEDC"). The deed required that within six months Dev. Corp. would commence construction of a building containing floor area of at least 18,708 square feet and complete construction within three years. In 2008, Dev. Corp. and NYCECD entered into a "Modification of Covenants and Restrictions" granting Dev. Corp. an additional two years to complete construction.

When the property was deeded to Dev. Corp. it executed a "Building Loan Note" and a "Building Loan First Mortgage" with Banco Popular North America. In 2011, the note and mortgage, not fully funded, were assigned to Country Bank. In 2011, Dev. Corp., two affiliated entities and Country Bank entered into a "Consolidated, Amended and Restated Mortgage Note" and a "Consolidated, Amended and Restated Mortgage…" The Consolidated Mortgage required that the "Mortgagor … shall fully and timely comply with all terms and conditions of the NYCEDC Covenants and Restrictions", as amended.

A mechanic's lien, and a notice of pendency to foreclose the lien, were filed prior to the recording of a mortgage. Country Bank, the holder of the mortgage, alleged that the mortgage had priority over the mechanic's lien. The foreclosing mechanic lienor asserted that its lien had priority over the mortgage because a building loan agreement was not filed as required under Lien Law Section 22 ("Building Loan Contract"). The Supreme Court, New York County, held that Country Bank's mortgage was a building loan mortgage; since no building loan agreement was filed, the Plaintiff's mechanic's lien had priority over the mortgage.

The Court held that the mortgage documents executed in 2011 were for a building loan, inasmuch as they contained an "'express promise of an owner to make an improvement upon real property', in consideration of which Country Bank made 'advances to or for the account of [Dev. Corp. and its two affiliates, which were] to be secured by a mortgage on [such] real property…' Lien Law Section 2(13)". Ferro Fabricators, Inc. v. 1807-1811 Park Avenue Development Corp., 2017 NY Slip Op 32296, decided October 27, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_32296.pdf.

Notice of Pendency

An Action to foreclose a mortgage was dismissed, without prejudice, because the mortgagee had not complied with requirements pertaining to mandatory settlement conferences. The assignee of the mortgage commenced a new foreclosure and filed a new notice of pendency. The notice of pendency for the first foreclosure expired by operation of law under Civil Practice Law and Rules ("CPLR") Section 6513 ("Duration of notice of pendency"). The Defendant cross-moved for summary judgment dismissing the complaint under CPLR Section 6516 ("Successive notice of pendency"), asserting that the Plaintiff was prohibited from filing a second notice of pendency after the first foreclosure was dismissed. Under Section 6516(c), "…a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective". The Supreme Court, Schenectady County, denied the

Defendant's cross-motion and granted the Plaintiff's motion for summary judgment. The Appellate Division, Third Department, affirmed the Order of the lower court.

The Appellate Division cited subdivision (a) of CPLR Section 6516, which states that "[i]n a foreclosure action, a successive notice of pendency may be filed to comply with section 1331 of the real property actions and proceedings law, notwithstanding that a previously filed notice of pendency in such action or in a previous foreclosure action has expired…". According to the Court, "CPLR 6516(c) only operates to prohibit the filing of a successive notice of pendency in the same action [italics provided] in which a notice of pendency affecting the same property has previously been filed [citations omitted]. Here, the second notice of pendency was filed in an entirely separate action, commenced by a different plaintiff, from that in which the first notice of pendency was filed". Nationstar Mortgage LLC v. Dessingue, 2017 NY Slip Op 07662, decided November 2, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_07662.htm.

Options to Purchase

In 2012, the Plaintiffs and the Defendants entered into an agreement pursuant to which the Plaintiffs leased the Defendants' property for ten years with an option to purchase the property exercisable during the first three years of the lease. Credits against the purchase price were to be applied for base rent paid in the first three years of the lease and for "key money" paid on commencement of the lease. A rider to the agreement, extending the time within which the Plaintiff had to exercise the option, extended the option to "30 days prior to Year five (5) of the Lease Agreement"; it did not state whether the credits against the purchase price would apply if the option was exercised after the third year of the lease. The Defendants asserted that the credits expired at the end of year three. The Plaintiffs sued for specific performance of the option at a price which took the credits into account. The Supreme Court, Suffolk County, held for the Plaintiffs. The Court found that the Plaintiffs had complied with the terms of the option and were ready, willing and able to purchase the property at the reduced price and, according to the Court,

> "…courts may not by construction add or excise terms, nor distort the meaning of those used, and thereby make a new contract for the parties under the guise of interpretating the writing. The court finds that the defendants' interpretation of the parties' agreement violates this rule by adding language to the supplemental rider limiting the availability of the credits. Had that been the parties' intent, they could easily have provided for the [Plaintiffs] to receive the credits only if they exercised the option in years one, two or three of the lease. In the absence of any such language, the court declines to interpret the supplemental rider as impliedly stating something that the parties have neglected to specifically include".

The Plaintiffs also sought to recover rent paid after the option was exercised, alleging that as purchasers in possession they were not required to pay rent after exercise of the option. The Court held that the relationship of landlord and tenant continued after the option was exercised and found for the Defendants on that cause of action. Although upon exercise of an option to purchase the relationship of landlord and tenant changes to that of a vendor and a vendee, and "the owner of the property is not entitled to an award for use and occupancy… unless the parties clearly intended a contrary result", there was an intention to deviate from that general rule and pay rent for the entire lease term. Blackburn Food Corp. v. Ardi, Inc., 2017 NY Slip Op 27369, decided October 25, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_27369.htm.

Right of First Refusal/"Stranger to the Deed" Rule

Richard Smolian executed deeds to two parcels of land in East Hampton. Each deed included a right of first refusal in favor of Richard, his now former wife, and their two adult children. The Plaintiffs, who had purchased the land from Richard, sought, inter alia, a judgment declaring that the rights of first refusal reserved to Richard's wife and children were invalid under the "stranger to the deed" rule. Under the rule, "'a deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed', does not create a valid interest in favor of that third party' [citations omitted]". The Supreme Court, Suffolk County, awarded summary judgment

to the Defendants, holding that the rule did not apply to the right of first refusal. The Appellate Division, Second Department, affirmed the holding of the lower court, ruling that a right of first refusal "does not constitute a 'reservation'… [and] "is not the type of interest created by a reservation". Peters v. Smolian, 2017 NY Slip Op 07473, decided October 25, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_07473.htm.

Tax Assessments

Under Subdivision 3 of Real Property Tax Law Section 524 ("Complaints with respect to assessments"), "except in cities with a population of five million or more", a statement specifying the grounds on which an assessment is being contested, required to be filed with the tax assessor or with the board of assessment review, "must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his office or agent to make such statement who has knowledge of the facts stated therein". The Appellate Division, Second Department, held that the Supreme Court, Westchester County, should have granted motions to dismiss petitions to review real property tax assessments brought by the operator of a restaurant in the Village of Larchmont which was responsible under its lease to pay property taxes on the leased property. According to the Court, the Supreme Court lacked subject matter jurisdiction to review the assessments because "…RPTL article 5 requires that the property owner file the complaint or grievance to obtain administrative review of a tax assessment (see RPTL 524(3)". Matter of Larchmont Pancake House v. Board of Assessors and/or the Assessor of the Town of Mamaroneck, 2017 NY Slip Op 05952, decided August 2, 2017, reported at 153 A.D. 3d 521 and 61 N.Y.S. 3d 45, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_05952.htm.

Transfer Tax

GKK2 Herald LLC ("GKK2") and SLG LLC ("SLG"), the owners, respectively, of 45% and 55% tenant-in-common interests in real property located at 2 Herald Square in Manhattan, transferred their interests to 2 Herald Owner LLC ("Herald LLC"). GKK2 received a 45% member interest in Herald LLC and SLG received a 55% interest in Herald LLC. After, and on the same date as the conveyance to Herald LLC, GKK2 transferred its 45% member interest to SLG. As noted in Current Developments, in a Determination dated April 1, 2015, an Administrative Law Judge ("ALJ") of the New York City Tax Appeals Tribunal's Administrative Law Judge Division, applying the "step transaction" doctrine, ruled that the transfer of the 45% member interest from Herald to SLG was subject to New York City's Real Property Transfer Tax. Matter of the Petition of GKK2 Herald LLC (TAT (H) 13-25(RP)), posted at http://on.nyc.gov/2iUwICS, is discussed in Berey, "Step Transaction Doctrine Applied to New York City Transfer Tax", New York Law Journal, June 9, 2015. New York City's Tax Appeals Tribunal, in a Decision dated July 15, 2016 and posted at http://on.nyc.gov/2kqaPvk, upheld the ALJ's Determination. In a decision dated October 10, 2017, the Appellate Division, First Department, held that the Tax Appeals Tribunal had the authority to apply the step transaction doctrine and had "a rational basis for applying the doctrine in this case". The Appellate Division confirmed the decision of the Tax Tribunal, denied the taxpayer's petition, and dismissed the proceeding. The First Department's decision, 2017 NY Slip Op 07102, is posted at http://nycourts.gov/reporter/3dseries/2017/2017_07102.htm.

As to the application of New York State's Real Estate Transfer Tax to these transfers, in a separate ruling dated May 26, 2016, also reported in Current Developments, an ALJ of New York State's Division of Tax Appeals held that the transfer of the 45% member interest from GKK2 to SLG did not constitute the transfer of a controlling interest in an entity having an interest in real property. According to the ALJ, 20 NYCRR Section 575.6(d), providing for the aggregation of transfers or acquisitions of interest in the same entity, "does not authorize adding a nontaxable mere change in form of ownership transaction [here the transfer of all interests in the property to Herald LLC] with a transfer of a minority, noncontrolling interest in order to achieve a taxable transaction". Matter of the Petition of GKK2 Herald LLC (DTA No. 826402) is posted at http://on.ny.gov/2ALVKfw. The Appellate Division, First Department, in its October 10, 2017 decision referenced above, pointing out distinctions between the application of the City and State transfer taxes, stated that, in any event, "the State ALJ's decision [citations omitted] on the State RETT consequences of these transactions is not binding upon this Court [citations omitted]".

Title Insurance

On September 29, 2017, New York State's Department of Financial Services published in the State Register new Insurance Regulation 208 (11 NYCRR 228) dealing with "Title Insurance Rates, Expenses and Charges". Regulation 208 effective on December 18, 2017. In addition, on September 29, 2017, the Department published in the State Register amendments, effective on publication, to Sections 20, 29, 30 and 34 of 11 NYCRR concerning title insurance and new Regulation 206 (11 NYCRR 35) captioned "Title Insurance: Title Insurance Agents, Affiliated Relationships, and Required Disclosures". The new regulations and the amended regulations are posted at

http://www.dfs.ny.gov/insurance/r_finala/2017/rf208txt.pdf.
http://www.dfs.ny.gov/insurance/r_finala/2017/rf_consolidated_txt.pdf.

On December 19 the Department issued the following Statement: "Given the important consumer protections and impact of the necessary reforms of the title insurance industry that DFS has implemented pursuant to Regulation 208, DFS recognizes that a longer implementation period may be necessary to ensure full compliance. Accordingly, DFS will commence enforcement of Section 228.2, Prohibition on Inducements for Future Title Insurance Business on February 1, 2018". The Statement is posted at http://dfs.ny.gov/about/statements/st1712191.htm.

Best wishes for a healthy and prosperous 2018!

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No. 187; January 3, 2018
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