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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 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 to so enter…".

The Supreme Court, Monroe County, granted the Petitioners a license to enter on the Respondent's adjoining property "for the limited purpose of painting the entire length of an existing wooden fence" which the Petitioner erected near the common boundary line. The license allowed the Petitioner to paint the fence on one of two predesignated dates "once per year in any even numbered year" on two-weeks prior written notice and between the hours of 9 A.M. and 12:00 P.M. The Respondent contended that work for which the license was sought was outside the scope of RPAPL Section 881 "because painting a wooden fence does not constitute an improvement or repair to real property within the meaning of the statute". The Appellate Division, Fourth Department, affirming the judgment of the lower court, concluded that

> "…in the absence of a statutory definition, the usual and commonly understood meaning of the words 'improvement' and/or 'repair' encompasses the painting of the wooden fence in this case…[T]he fact that petitioners ostensibly created the problem by constructing the fence too close to the boundary line does not preclude the court from granting a license…Given that the inconvenience to respondent of such infrequent and brief entries to facilitate an unexceptional task is relatively slight compared to petitioners' hardship if the license is refused, i.e., an ill-maintained fence subject to deterioration, we conclude that the court properly balanced the interests of the parties…[Citations omitted]"

Stuck v. Hickmott, 2018 NY Slip Op 01013, decided February 9, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_01013.htm.

Adjoining Owners

The Plaintiff installed cladding and a drip edge on a wall formerly shared as a party wall until the church building on the Defendant's property was demolished. The Plaintiff commenced an Action for declaratory and injunctive relief; the Defendant counterclaimed that the cladding and drip edge constituted a trespass.

The Supreme Court, Kings County, granted the Defendant's motion for summary judgment and directed the removal of the encroachments. The Appellate Division, Second Department, affirmed the lower court's decision on the issue of trespass but held that the lower court erred in granting summary judgment on the issue of whether the Defendant was entitled to an injunction directing removal of the encroachments. According to the Appellate Division,

> "[i]n order to obtain injunctive relief pursuant to RPAPL 871(1), a party 'is required to demonstrate not only the existence of [an] encroachment, but that the benefit to be gained by compelling its removal would outweigh the harm that would result to [the encroaching party] from granting such relief'…Here, the defendant failed to demonstrate the absence of any triable issues of fact concerning whether the balance of the equities weighed in its favor…[Citations omitted]"

The case was remitted to the Supreme Court, Kings County, for further proceedings consistent with the Appellate Division's ruling. Kimball v. Bay Ridge United Methodist Church, 2018 NY Slip Op 00417, decided January 24, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_00417.htm.

Adverse Possession

Plaintiffs brought an Action pursuant to RPAPL Article 15 ("Action to compel the determination of a claim to real property") seeking to quiet title by adverse possession to a strip of land located between their property line and

a chain link fence located approximately ten feet within the Defendants' adjoining property. Plaintiffs alleged that between 2005 and 2015 they maintained the grass and planted a vegetable garden and that the prior owner of their land had erected a shed on that strip of land. The Supreme Court, Westchester County, granted the Defendants' motion for summary judgment.

RPAPL Section 501 ("Adverse possession; defined") requires that a person asserting a claim of adverse possession establish that its possession of disputed land be "adverse, under claim of right, open and notorious, continuous, exclusive and actual". Section 501 defines a "claim of right" to mean "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be". Further, RPAPL Section 543 ("Adverse possession; how affected by acts across a boundary line") states that "the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse".

The Court held that the 2008 amendments to RPAPL Article 5 ("Adverse Possession") applied to the case because their purposed adverse possession would not have vested prior to that change in the law, and evidence was not submitted that the ten-year period for a claim of adverse possession was met by taking into account periods of adverse use by the Plaintiffs' predecessor in title. Further, according to the Court,

> "[d]efendants demonstrated that the plaintiffs' use of the disputed property was not under a claim of right or continuous for ten years. In this case, the plaintiffs' acts of clearing branches from the disputed land, mowing the lawn, or the existence of a shed on the disputed land are permissive and non-adverse (see RPAPL 543)".

Lorenz v. Soares, 2018 NY Slip Op 50019, decided January 10, 2018, is reported at 58 Misc. 3d 1209(A) and is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_50019.htm.

Condominiums and Cooperatives

The Real Estate Finance Bureau of New York State's Department of Law issued a Memorandum setting forth "Disclosure Requirements Regarding The [federal] Tax Cuts and Jobs Act of 2017". A "guidance document", it requires that offering plans "provide potential purchasers with current and accurate information regarding the tax implications of their purchase" and, to that end, requires certain updated disclosures "in offering plans and [in plan] amendments". The Memorandum is posted at http://on.ny.gov/2nYp9hh.

The Real Estate Finance Bureau also issued an updated Form RS-3 ("Notification to the Attorney General of the State of New York of Abandonment of Offering"). Form RS-3, as revised, is posted at https://ag.ny.gov/sites/default/files/rs3.pdf. The email accompanying the revised Form states that "REF reserves the right to reject submissions using the prior Form RS-3".

Contract Vendees/Equitable Lien

Property was sold to Webber Enterprises, Inc. ("Webber"), subject to a judgment docketed against its seller. Weber executed a first mortgage to the Plaintiff's predecessor in title. The Plaintiff then entered into an agreement with Defendants Mario and Nicole Curcio ("the Curcios") to construct a home on the property for them. On and before December 3, 2013, the Curcios deposited $20,000 with Webber and were credited $9,661 for plumbing work they had paid for prior to December 5, 2013. Webber executed to the Plaintiff a second mortgage on December 20, 2013 and a third mortgage in 2014. The Curcios sought a ruling holding that they held an equitable lien prior in right to the liens of the second and third mortgages.

The Supreme Court, Monroe County, held that the judgment constituted a first lien on the property, and that the first mortgage was a second lien. The $20,000 deposited by the Curcios, and the amount for which they received a credit, together with statutory interest from December 5, 2013, was held to be an equitable third lien, prior to the

second and third mortgages executed by Webber, to be paid from proceeds of any foreclosure sale after payment of the first and second liens. An equitable lien for $110,000 advanced by the Curcios after recording of the second mortgage was held to be subject to the lien of that mortgage. According to the Court,

> "[t]he presence of [the second mortgage of record] put [the Curcios] on notice that the lender had a secured interest in the property and, hence, their investment as contract vendees after the entry of the second mortgage does not acquire a higher priority in the distribution of proceeds…For these reasons, any claim to an equitable lien for funds advanced by the [Curcios] after the recording of the second mortgage is denied".

Maximum Income Partners, Inc. v. Webber, 2016 NY Slip Op 51902, decided July 18, 2016, was posted by the Slip Opinion Service, New York Official Reports, of the New York State Law Reporting Bureau on February 7, 2018 at http://www.nycourts.gov/reporter/3dseries/2016/2016_51902.htm.

Contracts of Sale

The purchase agreement between the Plaintiffs and the Defendant-Sponsor required the Defendant to set a closing date concurrently with or after certificates of occupancy were obtained for the building or the condominium unit intended to be acquired by the Purchaser. The agreement obligated the Defendant to use its best efforts to procure the certificates of occupancy within two years of the issuance of a temporary certificate of occupancy. When the agreement was entered into, the building was under construction. The Plaintiffs sought a return of their down-payment, alleging that the purchase agreement was void, illusory or unenforceable.

The Supreme Court, New York County, granted the Defendant's motion to dismiss the complaint and awarded the Defendant attorneys' fees and costs. The Appellate Division agreed that the Defendant was entitled to attorneys' fees and cost because they were provided for in the purchase agreement but it held that the case should not be dismissed. The Appellate Division also vacated the lower court's ruling that the Plaintiffs were not entitled to the return of their down payment. According to the Appellate Division, the return of the down payment was premature, "since [the Plaintiffs] may still close on their unit". Further,

> "[a]t the time plaintiffs commenced the instant action, the requisite certificates of occupancy were not yet obtained, and the complaint makes no allegation of unreasonable delays on defendant's part in the progress of the condominium's construction. While the agreement does not specify a closing date, the law provides for a reasonable time to close...Accordingly, the agreement is not illusory or unenforceable... [Citations omitted]"

Clements v. 201 Water Street LLC, 2018 NY Slip Op 00471, dated January 25, 2018 is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_00471.htm.

Deeds/Quieting Title

The Plaintiff, the holder of a mortgage on property in Queens County, seeking to quiet title under RPAPL Article 15 ("Action to compel the determination of claims to real property"), sought a Judgment that Herman N. Duhaney, the mortgagor, is the sole fee owner of the property, barring all other persons from claiming an estate or interest in the property superior to the Plaintiff's mortgage. The Plaintiff alleged that prior to the mortgage loan closing the other owner of the property conveyed all of her interest in the property to Duhaney. The deed, however, was not recorded and is presumably lost or misplaced. The Supreme Court, Queens County, denied the Plaintiff's motion for summary judgment.

The Appellate Division, Second Department, reversed the Order of the lower court, with costs, and granted the Plaintiff's motion for summary judgment. The Appellate Division noted that Duhaney's answer to the complaint did

not deny the existence or validity of the 2008 deed or that the deed was never recorded and was presumably lost or misplaced, which allegations were therefore deemed admitted. Therefore, the Plaintiff's motion papers and Duhaney's answer "were sufficient to establish the plaintiff's prima facie entitlement to judgment as a matter of law". JP Morgan Chase Bank, N.A. v. Duhaney, 2017 NY Slip Op 09119, decided December 27, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_09119.htm.

Easements

The common owner of adjoining parcels of land in Saratoga Springs conveyed one of those parcels, reserving "an easement or right-of way for ingress and egress from Green Street [across the property conveyed] to the garage and woodshed" located in the rear of the parcel that was retained. The Plaintiff, a successor owner of the benefitted property, commenced an Action against the successor owner of the burdened property, seeking a declaratory judgment that the Defendant's property was burdened by the easement, and an Order directing the Defendant to remove any obstructions interfering with his use of the easement. The Plaintiff alternatively claimed that he acquired an easement by prescription. The Defendant counterclaimed, seeking a declaration that the property was unencumbered by an easement. The Defendant argued that the easement was extinguished; the purpose of the easement no longer existed and the easement had not been used for its intended purpose for more than fifty years.

The Supreme Court, Saratoga County, partially granted the Defendant's motion for summary judgment and dismissed the amended complaint. The Appellate Division, Third Department, affirmed. According to the Appellate Division,

> "An easement expressly created for, or limited to, a specific purpose may be extinguished by the abandonment of that purpose…The language of the express easement [reserved in the deed] does not, as plaintiff argues, evidence an intention to create an unrestricted and unqualified right-of-way over the servient estate to access the rear of the dominant estate…As such, we agree with the Supreme Court that the Green Street easement was created for the limited and specific purpose of providing access to the garage and woodshed on the dominant property….[The] defendant established that plaintiff unequivocally and permanently abandoned the specific purpose for which the Green Street easement was created…[Citations omitted]"

As to the claimed easement by prescription, the Appellate Division declined to find that the Supreme Court erroneously determined that the Plaintiff did not acquire a right-of-way from Green Street over the Defendant's property. Stone v. Donlon, 2017 NY Slip Op 09225, decided December 28, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_09225.htm.

Leases/Yellowstone Injunction

A Yellowstone injunction, so referenced based on a decision of the Court of Appeals in First National Stores v. Yellowstone Shopping Center (21 NY2d 630), enjoins a landlord seeking to terminate a lease because of a claimed tenant's default from terminating the lease, giving the tenant an opportunity to cure the default.

The Plaintiffs, the tenants under two commercial leases, sought a judgment declaring that they had not defaulted under their leases and that their leases remained in full force and effect. The Supreme Court, Kings County, denied the Plaintiffs' motion for a Yellowstone injunction and granted the Defendant landlord's cross-motion for summary judgment dismissing the complaint. The Court pointed to a provision in the leases providing that the lessee "waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease". The Appellate Division, Second Department, granted a temporary stay of the Defendant's enforcement remedies pending determination of an appeal.

The Appellate Division, in affirming the lower court's Order, framed the issue as "whether written leases negotiated at arm's length by commercial tenants may include a waiver of the right to declarative relief that is enforceable at law or, alternatively, whether such a waiver is void and unenforceable as a matter of public policy", and held that "under the circumstances of this case, the commercial tenants' voluntary and limited waiver of declaratory judgment remedies in their written leases is valid and enforceable, and not violative of New York's public policy, particularly as the tenants in this instance did not waive other available legal remedies".

According to the Appellate Division, after noting that the "the parties were sophisticated entities that negotiated at arm's length and entered into lengthy and detailed leases defining each party's rights and obligations with great care and specificity",

> "[w]hile the right to bring a declaratory judgment action was surrendered…other judicial remedies remained available to the plaintiffs…[T]he plaintiffs had the contractual right to receive notices to cure and an opportunity to correct any claimed breaches. The plaintiffs did not expressly surrender the right to seek money damages from the defendant if the defendant were to breach the contract or commit tortious conduct injurious to persons or property. The plaintiffs also did not surrender the right to fully litigate and defend themselves in any summary proceeding that the defendant might commence in Civil Court (citations omitted)".

159 MP Corp. v. Redbridge Bedford, LLC, 2018 NY Slip Op 00537, decided January 31, 2018, is posted at http://nycourts.gov/reporter/3dseries/2018/2018_00537.htm.

Lien Law

Lien Law Section 9 ("Contents of notice of lien") requires that a mechanic's lien filed by a partnership or a corporation state its business address unless it is a foreign corporation, in which case it is required to set forth its principal place of business within New York.

The Defendant-mechanic's lienor, a subcontractor which New York State Department of State's online records indicate is a foreign limited liability company, filed two mechanic's liens. The Defendant asserted that the liens were fatally flawed because they set forth only a post office address. The Supreme Court, Nassau County, denied the Plaintiff's motion for summary judgment and for an Order discharging the liens and granted the Defendant's cross-motion for leave to amend the notices of mechanic's liens nunc pro tunc. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division,

> "…affording the Lien Law its liberal construction to protect the beneficial interests of lienors (see Lien Law Section 23 ["Construction of Article"] [other citations omitted], the use of a post office box address rather than the address of a foreign corporation's principal place of business within the state is a nonjurisdictional defect capable of amendment pursuant to Lien Law Section 12-a (2)".

Park Side Construction Contractors, Inc. v. Bryan's Quality Plus, LLC, 2017 NY Slip OP 08838, decided December 20, 2017, is posted at http://www.nycourts.gov/reporter/3dseries/2017/2017_08838.htm.

Lien Law

M & T Bank provided construction loan financing under a building loan agreement. Although funds had been disbursed under the agreement, the developer ceased making payments to the Plaintiff, which was the general contractor and the construction manager under a construction agreement. The Plaintiff filed a mechanic's lien. It then sued the developer and the bank for indemnification based on an alleged breach of the building loan agreement, an alleged breach of a statutory duty of due care in the distribution of building loan funds, negligent misrepresentation, and a violation of Lien Law Section 71 ("Purpose of the trust…"), which requires that trust assets

be held and applied for payment of the cost of the improvement. The Supreme Court, Saratoga County, granted M&T's motion to dismiss the complaint as to it and granted the Defendants' motions to dismiss all of the Plaintiff's cross-claims, noting that the Plaintiff already had a direct action pending against the developer based on a claim of negligent misrepresentation. As to the Plaintiff's claims against M&T Bank, the Court stated that "the Lien Law does not establish any duty of care on the part of a lender, such as defendant, M&T, in regard to the distribution of funds pursuant to a building loan agreement". MLB Construction Services, LLC v. Lake Avenue Plaza, LLC, 2016 NY Slip Op 32823, decided July 18, 2016, was posted by the Slip Opinion Service, New York Official Reports, of the New York State Law Reporting Bureau on January 30, 2018 at http://www.nycourts.gov/reporter/pdfs/2016/2016_32823.pdf.

Mortgage Foreclosures

The Defendant-mortgagor moved for dismissal of the complaint in an Action to foreclose a mortgage, asserting that the six-year statute of limitations applicable to foreclosures ran on the entire debt secured by the mortgage from when the lender accelerated the debt in a letter sent by the mortgage loan servicer to the Defendant in 2008. The letter advised the Defendant and her co-obligor, who was also a Defendant, that because of a default in their making payments on the loan the lender had retained counsel "to exercise all of [the loan servicer's] rights and remedies at law, and in equity, including, but not limited to, the right to sell the above captioned premises at a public sale". The Appellate Division, Third Department, affirmed the Supreme Court, Ulster County's denial of the Defendant's motion for summary judgment dismissing the complaint as to her. The intent to accelerate a debt must be made "'in a clear and unequivocal manner' [Citations omitted]". However, in this case,

> "[t]he letter therefore left all legal and equitable avenues open, did not indicate that immediate payment was demanded and, indeed, went on to state that the debt's validity would not be assumed unless there was an absence of timely written objection to all or some of it. There was, moreover, neither an explicit demand for payment in the letter nor the use of the word 'accelerate'. The letter accordingly failed to 'clearly and unequivocally advise defendant…that all sums due under the note and mortgage were immediately due and payable' so as to accelerate the debt and trigger the running of the statute of limitations [Citations omitted]".

Bank of America, National Association v. Luma, 2018 NY Slip Op 00214, decided January 11, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_00214.htm.

Mortgage Foreclosures/Standing

While a mortgage foreclosure was pending, the Defendant-mortgagor commenced an Action to quiet title, alleging that the assignment of the mortgage being foreclosed was unauthorized. The Supreme Court, Nassau County, dismissed the complaint as to the Defendants who executed and notarized the assignment of the mortgage and the Defendant who signed the complaint in the foreclosure. The Appellate Division, Second Department, affirmed, holding that an issue as to a mortgagee's standing to foreclosure should be raised in the foreclosure of the mortgage, not in an Action to quiet title. Cudjoe v. Boriskin, 2018 NY Slip Op 00127, decided January 10, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_00127.htm.

Streets/Subdivisions

The Town of Clifton Park sought declaratory relief as to the ownership of a paper street running between two lots on a subdivision map filed in 1968 in the Office of the County Clerk, Saratoga County, as to whether the paper street was dedicated to, and accepted by the Town and, if not, whether the offer of dedication was withdrawn, and a determination of the lot owners prescriptive rights, if any. The Supreme Court, Saratoga County held that the filing of the subdivision map showing the paper street constituted an offer of dedication; although the offer of dedication was not accepted by the Town it was not revoked and it remained in effect. The owners of the

filed map lots adjoining the paper street were held to be the owners of the portion of the street adjoining their respective properties to the center line thereof. According to the Court,

> "[w]hen an owner of property sells a lot with reference to a map, and the map shows that the lot abuts a street, or the descriptive lines run to or along such street, the conveyance presumptively conveys fee ownership to the center of the street on which the lot abuts".

It was sufficient that the deeds to the subdivision lots adjoining the paper street had either referred to the filed map lot number because the lot as shown on the map borders the paper street or contained a metes and bounds legal description the courses of which run along the edge of the paper street. There was nothing to indicate that the person who filed the subdivision map did not intend to convey title to the center line of the road in his deeds to the initial lot owners. Town of Clifton Park v. Boni Builders, Inc., 2016 NY Slip Op 32826, dated June 23, 2016, was posted on January 31, 2018 at http://www.nycourts.gov/reporter/pdfs/2016/2016_32826.pdf.

Tenancy-by-the-Entirety/Mortgage

In May 2002, the Defendant-husband executed a note and mortgage on real property owned by him and his wife, also a Defendant. The husband had deeded the property to his wife and himself as tenants by the entirety in February 2002; the deed was recorded in April 2002. Only the husband executed the note and the mortgage. The husband died after an Action was commenced to foreclose the mortgage; no estate for the husband had apparently yet been formed. The wife asserted that since the mortgage loan was extended to her husband after the creation of the tenancy, and since they were married until his death, the Plaintiff could not foreclose on her interest as the surviving tenant by the entirety. The Supreme Court, Kings County, granted the wife's motion to dismiss and vacated the notice of pendency. According to the Court,

> "…the husband was only able to mortgage his interest in the property since the subject mortgage was owned by the defendant and her husband as tenants by the entirety at the time the subject mortgage was signed and recorded. However, since the husband predeceased the defendant, the plaintiff is now left with no interest in the property at all as the defendant's survivorship rights are unencumbered under the instant situation".

The Plaintiff also alleged that the mortgage was entitled to be re-characterized as an equitable mortgage because proceeds of its mortgage loan were applied to pay off a mortgage executed by the husband before he conveyed the property to his wife and himself. The Court noted that the Plaintiff had not sought to impose an equitable mortgage in its summons and complaint. M&T Bank v. Cohen, 2017 NY Slip Op 32757, decided December 18, 2017, is posted at http://www.nycourts.gov/reporter/pdfs/2017/2017_32757.pdf.

Title News

New York State's Department of Financial Services has approved a revised Title Insurance Rate Manual for New York State. The revised Manual, submitted to the Department by the Title Insurance Rate Service Association, Inc. ("TIRSA"), is effective on April 8, 2018.

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