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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Condominiums and Cooperatives

New York State Department of Law's Real Estate Finance Bureau has issued an updated Cooperative Policy Statement #1 ("CPS-1"), titled "Testing the Market", which, according to the Bureau's email announcing the issuance of the updated Statement, "allows sponsors of newly constructed, vacant, and/or non-residential condominiums, cooperatives, homeowners associations, and/or timeshares to 'test the market' prior to the Department of Law's acceptance of an offering plan". The updated CPS-1, effective March 13, 2018, is posted at https://ag.ny.gov/sites/default/files/cps1.pdf.

Condominiums/Common Charge Liens

An acquisition loan mortgage, a building loan mortgage and a project loan mortgage encumbering the same condominium unit were assigned to the Plaintiff, which commenced to foreclose on the project loan mortgage. The Condominium's Board of Managers moved to dismiss the Action as to it, contending that its common charge lien had priority over the project loan. Under Real Property Law Section 339-z ("Lien for common charges…"), a common charge lien is prior to all other liens except for, as relevant in this case, "all sums unpaid on a first mortgage of record". The Plaintiff argued that each mortgage took priority over the common charge lien because each of them was a first mortgage of record, held by the same entity and prior in time to the claim of unpaid common charges. The three mortgages had not been consolidated.

The Supreme Court, New York County, granted the Board of Managers' motion to dismiss, holding that the common charge lien was superior to the project loan mortgage. According to the Court,

> *"[h]ad [the Plaintiff] actually consolidated the [mortgages] and recorded such consolidated loan at any time prior to the Condo Board recording its lien for unpaid common charges, the case law supports the argument that all [of] the component liens thus hypothetically consolidated would be considered a single 'first mortgage of record' which would have maintained priority over the Condo Board's lien…However, by [the Plaintiff's] own admission, this was never done. To attempt to consolidate the loans now would be to no avail…Had [the Plaintiff] consolidated the project loan with the acquisition loan prior to the condo board recording its lien, or if [the Plaintiff] had foreclosed on the acquisition loan rather than the project loan, the relief sought herein would be proper…"*

CFC Specialty Program Managers, LLC v. AB Funding Corporation, 2018 NY Slip Op 30571, decided March 29, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_30571.pdf.

Contracts of Sale/Fraudulent Inducement

In 2015, three years after they purchased a house from the Defendants-Sellers, the Plaintiffs became aware of damage to the home which allowed for the infiltration of water. The Plaintiffs alleged that the Sellers concealed the damage by making "cosmetic repairs" and sued them for fraudulently concealing a defective condition. The Supreme Court, Suffolk County, granted the Sellers' motion to dismiss the complaint as to them. The Action continued against the Plaintiffs' home inspection company for negligence, gross negligence and for violating General Business Law Section 349 ("Deceptive acts and practices unlawful").

Although a misrepresentation of a material fact which is an inducement to enter into a contract of sale will sustain a cause of action for fraud, the Plaintiffs did not allege that the Sellers made any misrepresentations to induce them to sign the contract, and the Sellers did not execute a Property Condition Disclosure Statement. Further, the Plaintiffs had a home inspection performed, and there was no allegation that the Sellers interfered with their efforts to discover the condition of the property before the contract was signed. Striplin v. AC&E Home Inspection Corp., 2018 NY Slip Op 30231, decided January 10, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_30231.pdf.

Contracts of Sale/Mortgage Contingency

The Defendant, the vendee under a contract for the sale of real property containing a standard mortgage contingency provision, received a conditional mortgage commitment letter. The Defendant thereafter provided the bank with additional financial projections which caused the mortgage commitment to be revoked. There being no mortgage financing, the transaction did not close. The Plaintiff-Seller commenced an Action for breach of contract, alleging that the Defendant wrongfully induced the bank to revoke the commitment. The Supreme Court, Onondaga County, granted the Plaintiff's motion for summary judgment. The Appellate Division, Fourth Department, reversed the lower court's ruling. According to the Appellate Division, the "plaintiff failed to establish as a matter of law that 'the lender's revocation of the mortgage commitment was attributable to bad faith on the part of [defendant]' [citation omitted], rather than to the defendant's efforts to honor his duty of fair dealing to the bank by providing it with further information regarding the proposed transaction [citations omitted]". Md3 Holdings, LLC v. Buerkle, 2018 NY Slip Op 01836, decided March 16, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_01836.htm.

Deeds-in-Lieu of Foreclosure/Equity of Redemption

Under Real Property Law ("RPL") Section 320 ("Certain deeds deemed mortgages"), "[a] deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage…" In In Re The First Union Baptist Church of the Bronx, the United States District Court for the Southern District of New York reversed a decision of a Bankruptcy Court Judge, reported at 572 B.R. 79 and at 2017 Bankr. LEXIS 2189, holding that a deed in lieu of foreclosure, recorded pursuant to the terms of a negotiated settlement agreement (the "Agreement") approved by a different Bankruptcy Court Judge since then retired, violated Section 320, was an impermissible penalty, and was therefore void.

After a foreclosure sale was scheduled, the borrower, the First Union Baptist Church of the Bronx (the "Church"), filed for bankruptcy under Chapter 11 of the Bankruptcy Code. After extensive negotiations, the Church and TD Capital Group LLC ("TD Capital"), the holder of the mortgage by assignment, entered into an Agreement pursuant to which a deed in lieu of foreclosure would be executed and placed into escrow with TD Capital, to be released and recorded if the Church defaulted in its obligations under the Agreement. After the Church defaulted in making a monthly payment for the use and occupancy of the property required under the Agreement, the deed was released from escrow and recorded.

The District Court, holding that the release of the deed from escrow and its recording did not violate RPL Section 320 and was not an unenforceable penalty, reversed the Bankruptcy Court Judge's decision, vacated the judgment to the extent that it set aside the deed, granted summary judgment to the appellants, and dismissed the adversary complaint. As to the claim that the deed violated Section 320, the District Court found that the conveyance was not a mortgage but that it was

> *"part of an extensively negotiated, judicially-ordered settlement… [which] laid out a comprehensive plan for extending the time in which [the Church] might be able to retain the property, despite the fact that a judgment of foreclosure had already been obtained…Moreover, the terms of the Agreement themselves are not clearly mortgage related. The payments [to be made by the Church under the Agreement] were termed 'use and occupancy payments', not mortgage payments, they were not related to the interest rates, and their payment did not affect the total [of] $1,500,000 owed to TD".*

As to the claim that the transfer of title by the deed in lieu was an unenforceable penalty, the District Court found that "all the facts and circumstances at the time of the Agreement support the Deed Transaction as [being] proportionate to TD's potential damages". When the Agreement was entered into, "the property value was likely close to the value of the compromise amount ($1,500,000) [the amount agreed to be paid by the Church to satisfy its obligations under the mortgage loan] though, in all likelihood, even lower". The District Court's decision on February 7, 2018 in Case Nos. 17-cv-7184 and 17-cv-7199, is reported at 2018 U.S. Dist. LEXIS 20669 and 2018 WL 770401.

Easements

The owners of several seasonal camp properties commenced an Action pursuant to Real Property Actions and Proceedings Law ("RPAPL") Article 15 ("Action to compel the determination of a claim to real property") to enforce an easement over a private road, known as Macavoy Way, to the extent it was located within part of the Defendant's land. The Plaintiffs alleged that the Defendant prevented the exercise of their access rights under the easement and sought a preliminary injunction requiring the Defendant to remove obstructions which the Defendant had placed in the road.

In 1958, the common owner of the lands now owned by the Plaintiffs and the Defendant conveyed the property now owned by the Defendant by a deed which reserved the right for the grantor's successors in ownership to cross the land being conveyed. The exact location of the easement was not described in the deed. The Supreme Court, Essex County, granted the Plaintiffs' motion for a preliminary injunction. The Appellate Division, Third Department, affirmed, finding that the Plaintiffs had established a likelihood that they would establish that there was an easement appurtenant by implication and by prescription. According to the Appellate Division,

> *"…while the exact location of the easement is not described…the description encompasses defendant's current properties. Also, plaintiffs' and their predecessors' extensive use of the same location, for close to 50 years, demonstrates the location of the easement over defendant's properties and that such use of his property was meant to be permanent...Plaintiffs also demonstrated danger of irreparable harm and a balance of the equities in their favor by photographs demonstrating that the northern section of the Macavoy Way is not a safe route and that defendant blocked the southern section of the road…Furthermore, due to the obstructions…emergency responders and utility companies are unable to access Macavoy Way…"*

Biles v. Whisher, 2018 NY Slip Op 02518, decided April 12, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_02518.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, Broward, Palm Beach and Miami-Dade Counties in Florida, Bexar County, Texas, Los Angeles, San Diego, San Francisco, San Mateo and Santa Clara Counties in California, and the City and County of Honolulu in Hawaii. The monetary thresholds for such transactions in the affected jurisdictions are posted on the FinCEN website at https://www.fincen.gov/sites/default/files/shared/Title_Ins_GTO_Table.pdf.

FinCEN has issued a Geographic Targeting Order dated March 19, 2018 extending the Order Period from March 21, 2018 to September 16. 2018. The new GTO is available at https://bit.ly/2J2reRr.

Lien Law/Monitoring Systems

The owner of a building in Manhattan sought an Order discharging a mechanic's lien filed by a surveying company. The mechanic's lien was filed for money allegedly owed for the rental of Real Time Vibration Monitoring Systems ("RTVM systems") that were used while work was being performed at the Plaintiff's building. The Supreme Court, New York County, granted the Petition and directed the County Clerk to vacate and cancel the lien. According to the Court, "although rental equipment can be lienable, the equipment must be directly related to the improvement of the property… [and] produce a permanent improvement in the property…[T]he RTVM systems at issue here, which were not permanent and did not permanently improve the property, are not lienable. Similarly, compensation for the labor the lienor provided in monitoring the RTVM systems is not lienable [citations omitted]". Matter of 134-136 West Houston, LLC v. New York City Land Surveyor, P.C., 2018 NY Slip Op 50304, decided March 12, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_50304.htm.

Lien Law/Necessary Parties

Under Lien Law Section 44 ("Parties to an action in a court of record"), the owners of the real property subject to a mechanic's lien are the necessary parties defendant in an Action to foreclose the lien.

The owner of a cooperative unit and the cooperative corporation owning the building in which the unit is located were named as defendants in an Action for breach of contract and to foreclose a mechanic's lien. After the lien was bonded, the cooperative corporation moved for the complaint to be dismissed as to it on the ground that the bond ensured that the amount of the lien would be fully paid. The Supreme Court, New York County, noting that the Appellate Division, First Department, had held that the owner of real property remains a necessary party after the filing of a bond, granted the cooperative corporation's motion, holding that the corporation was no longer a necessary party. Under subsection 7 of Lien Law Section 37 ("Bond to discharge all liens"), "the principal and surety on the bond, the contractor, and all claimants who have filed notices of claim prior to the date of the filing of the summons and complaint" are the only necessary parties in an action against the bond. According to the Court,

> *"[t]he only considerations articulated [by the Appellate Division, First Department in 1972] in Harlem Plumbing Supply Co., Inc. v. Handelsman, 40 AD2d 768 in support of keeping the owner in the action were purely technical. Given, however, that the [Second and Third] departments of the Appellate Division have disagreed with this technical reasoning, relying on Lien Law Section 37(7); that other motion courts in New York County have followed the Second and Third Departments and avoided the technical problem; inasmuch as this Court can discern no public policy reason to keep the owner in the action under these circumstances; and noting that the First Department has not had occasion to revisit this proposition in many years; this Court follows the rule that, upon filing of a bond discharging a mechanic's lien, Lien Law Section 37(7) supplants Lien Law Section 44(3) in prescribing the necessary parties to the action, and causes the owner to no longer be a necessary party".*

Doma Inc. v. 885 Park Ave. Corporation, 2018 NY Slip Op 28078, decided March 13, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_28078.htm.

Lien Law/Notice of Lien

Lien Law Section 11 ("Service of copy of notice of lien") requires that notice of the filing of a mechanic's lien be served upon the owner of the real property affected by the filing "[w]ithin five days before or thirty days after the filing of the notice of lien". In "K" - Detailing, Inc. v. N&C Ironworks, Inc., the Plaintiff served notice of the lien ten days before it was filed. Defendants sought to have the lien discharged on ground that the notice of lien, required to be served within five days before the lien was filed, was served too early. The Supreme Court, New York County, ruled that serving notice of a mechanic's lien more than five days before the lien is filed did not require vacating the lien. Lien Law Section 11 was amended in 1996 to add "five days before" "to ensure that owners get timely notice of a lien". The Court was "unable to find that serving notice of the lien 10 days early (or five days earlier than provided for in the statute) frustrates the goal of service that is reasonably contemporary with [the] filing of the lien". 2018 NY Slip Op 30500, decided March 26, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_30500.pdf.

Lien Law/Tenant's Improvements

Named in an Action to foreclose a mechanic's lien for HVAC work performed for a tenant, when the property was owned by prior owners, were the current owners of the property. The Defendant property owners moved to dismiss, arguing that the work was done under an agreement with the tenant, and that the prior owner had not "affirmatively" consented to the work. The Plaintiff countered that the issue of the fee owner's "consent" to the improvement, grounds to file a mechanic's lien under Lien Law Section 3 ("Mechanic's lien on real property"), was a question of fact to be determined at trial. The Supreme Court, New York County, denied the Defendants' motion to dismiss for failure to state a cause of action, noting that "since a mechanic's lien constitutes an encumbrance on the property, the mere fact that defendants were not the owners of the property at the time the work was performed or the lien was acquired does not establish entitlement to dismissal". The Court did, however, dismiss the cause of action for a recovery in quantum meruit as against the Defendant property owners. A claim for quantum meruit "lies against the party that sought the work to be performed". Apple City Builders Corp. v. 46-50 Gansevoort Street, LLC, 2018 NY Slip Op 30583, decided April 4, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_30583.pdf.

Mortgage Foreclosures/CPLR Default Notice

The Supreme Court, Bronx County, issued an Order granting the foreclosing Plaintiff's motion to confirm the referee's report and for a judgment of foreclosure. The Appellate Division, First Department, reversed and remanded the case to the lower court for a traverse hearing on whether the Defendant was properly served with the summons and complaint. The Appellate Division further addressed the question of whether the additional service requirement for default notices in foreclosures against residential property under subsection (g)(3) of CPLR Section 315 ('Default judgment") applied. The notice required by that Section of the CPLR was mailed to the address of the property being foreclosed instead of the Defendant's actual residence address next door.

Under CPLR Section 315(g)(3), "[w]hen a default judgment based on nonappearance is sought against a natural person in an action based on nonpayment of a contractual obligation... [an] additional notice [is to be] given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence...". The Appellate Division held that "[a]s defendant does not reside at the mortgaged property, this foreclosure proceeding does not place his home at risk. Accordingly, we find that plaintiff was not required to serve a 3215(g)(3) notice on defendant". Bank of America, N.A. v. Diaz, 2018 NY Slip Op 02421, decided April 10, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_02421.htm.

Mortgages/Statute of Limitations

The Plaintiff sought an Order canceling and discharging a mortgage on his property, alleging that the six-year statute of limitations to enforce a mortgage under CPLR Section 213 had expired. On March 24, 2009 Wells Fargo Bank, N.A., the Defendant in this case, brought an Action to foreclose the mortgage, which proceeding was dismissed by the Court in 2013. The Court found that the statute of limitations for the entire debt began to run when the debt was accelerated by the commencement of the 2009 foreclosure; therefore the statute of limitations for the entire mortgage debt expired on March 24, 2015.

Wells Fargo asserted that it had revoked its election to accelerate and produced a de-acceleration notice it claimed to have sent to the Plaintiff on March 11, 2015. However, the Supreme Court, Queens County, denied motions of each of the Plaintiff and the Defendant on the issue of whether the loan was properly de-accelerated before expiration of the statute of limitations. According to the Court,

> *"…Wells Fargo has offered no proof of its office practices to ensure that the de-acceleration letter was properly mailed and received [citations omitted], and has therefore failed to meet its prima facie burden. Conversely, [the Plaintiff] has failed to establish that the letter was not properly sent, and, if it was properly sent, that this action did not constitute an affirmative act to revoke its prior acceleration".*

Assyag v. Wells Fargo Bank, N.A., 2016 NY Slip Op 32855, decided September 7, 2016, was posted by the Slip Opinion Service, New York Official Reports, of the New York State Law Reporting Bureau on March 16, 2018 at http://www.nycourts.gov/reporter/pdfs/2016/2016_32855.pdf.

In another decision involving the application of the statute of limitations, the Supreme Court, Queens County, granted a Defendant's motion to dismiss as time-barred, with prejudice, an Action to foreclose a mortgage and cancel the related notice of pendency. The six-year statute of limitations ran as to the entire indebtedness from the date on which the complaint was filed in a 2007 proceeding to foreclose the mortgage, which was voluntarily discontinued in 2014. In that prior Action, the mortgagee stated that it "elected and hereby elects to declare immediately due and payable the entire unpaid balance of principal".

The Court found that the Plaintiff, the successor by merger to the original mortgagee, which commenced the current foreclosure of the mortgage, had failed "to establish that it took any action to de-accelerate the loan within the statute of limitations period. To the extent that the voluntary discontinuance of the Prior Action can be accepted as such an act, this occurred more than seven years after the acceleration of the loan". U.S. Bank National Association v. Rowe, 2017 NY Slip Op 32819, decided October 25, 2017, was posted by the Slip Opinion Service, New York Official Reports, of the New York State Law Reporting Bureau on March 12, 2018 at http://www.nycourts.gov/reporter/pdfs/2017/2017_32819.pdf.

In an additional case, the Supreme Court, Westchester County, held that absent a provision in the mortgage stating that the entire debt was accelerated upon a payment default, and absent the mortgagee's election to accelerate the debt, the statute of limitations did not run as to payments that were to be made within the six years prior to the commencement of the foreclosure. Wells Fargo Bank, N.A. v. Fetonti, 2018 NY Slip Op 30193, decided January 25, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_30193.pdf.

Mortgages/Statute of Limitations/Bankruptcy

Under Subsection 4 of RPAPL Section 1501 ("Who may maintain an action"), "[w]here the period allowed by the applicable statute of limitations for the commencement of an action to foreclose a mortgage…has expired… [an action may be commenced] to secure the cancellation and discharge of such encumbrance, and to…adjudge the estate or interest of the plaintiff in such real property to be free therefrom…" However, Subsection (a) of Civil Practice Law and Rules ("CPLR") Section 213 (Actions to be commenced within six years…") provides that ["w [here the commencement of an action has been stayed by a court order or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced".

In 2014, the Plaintiff, the owner of the property subject to a mortgage being foreclosed, brought an Action pursuant to RPAPL Section 1501(4), alleging that enforcement of the mortgage was barred by the CPLR's six-year statute of limitations which, in this case, ran from the date in 2007 when the original mortgagee accelerated the debt by commencing to foreclose the mortgage. That Action, and a suit to foreclose the mortgage brought in 2011 by U.S. Bank National Association, the assignee of the note and mortgage, were both discontinued.

The Supreme Court, Suffolk County, granted Defendant U.S. Bank's motion to dismiss the complaint. The Court held that the statute of limitations was tolled by CPLR Section 213(a) by the bankruptcy petitions filed by the Plaintiff after each foreclosure was commenced. The Appellate Division, Second Department, affirmed the lower court's ruling. It was established that "the statute of limitations had been tolled for over 4 1/2 years. Therefore, U.S. Bank's right to commence a foreclosure action in this matter was extended until December 2017". Lubonty v. U.S. Bank National Association, 2018 NY Slip Op 02153, decided March 28, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_02153.htm.

Notice of Pendency

The Supreme Court, New York County, denied the Respondent's motion to cancel the notice of pendency filed in an Action which, the Respondent argued, was solely about shareholder rights and money damages. According to the Court, while "…actions that are solely seeking money damages…do not fall within the scope of the statute for notice of pendency.... [t]he Petitioner's action is one that is requesting dissolution of a limited liability company, whose sole asset is real property and they are seeking to assign a receiver to manage the properties owned by the company and sell the same. The Petitioner's request is clearly one that will affect the title to, or possession or use or enjoyment of the real property…" supporting the filing of a lis pendens under CPLR Section 6501("Notice of pendency…"). Matter of F.C.I.C., LLC v. Hatzlucha Houses, LLC, 2016 NY Slip Op 32865, decided March 22, 2016, was posted by the Slip Opinion Service, New York Official Reports, of the New York State Law Reporting Bureau on April 5, 2018 at http://www.nycourts.gov/reporter/pdfs/2016/2016_32865.pdf.

Recording Act

The properties benefitted and burdened by an easement in a Declaration of Easements recorded by the common owner of the parcels in 1981, were all then part of tax lot 30. One of the easements burdens land owned by the Plaintiff. The Plaintiff's property has since 1984, when tax lot 30 was subdivided, been identified on the tax records as tax lot 9. The Declaration, when recorded in the Office of the City Register in 1981, was indexed against tax lot 30; it was not separately indexed against tax lot 9 until the Defendant, the owner of the parcel benefitted by the easement, recorded the Declaration against tax lot 9 in 2014.

The Plaintiff alleged that it did not have actual or constructive notice of the Declaration when it purchased tax lot 9 in 2011; it claimed that the recording of the Declaration against tax lot 9 in 2014 was "'egregious and unlawful misconduct' that has substantially damaged the value of its property". It sought damages for trespass and for the diminution of the value of its property, and a ruling holding that the easement in the Declaration was not effective as to tax lot 9. The Supreme Court, New York County, granted the Defendant's motion to dismiss the complaint, holding that a search of the Plaintiff's chain of title would have revealed the Declaration. According to the Court, the Plaintiff

> *"has not submitted any New York case holding that an instrument that is duly recorded and properly entered on the Register's records against the appropriate block and lot at the time of recording, can be defeated by a ministerial error committed years later in the maintenance and updating of the Register's records. Allowing for such a result could potentially undermine the registry system or lead to abuse thereof…The nonfeasance of the Register, in failing to properly include the Declaration on its records in connection with the new Lot 9 at the time of the subdivision, constitutes a ministerial error that did not void the 1981 recording…"*

Akasa Holidngs, LLC v. 214 Lafayette House, LLC, 2018 NY Slip Op 28074, decided March 5, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_28074.htm.

Statute of Frauds

The Plaintiff alleged that when he transferred real property to the Defendant for no consideration he did so pursuant to an oral agreement that the property would be conveyed back on the Plaintiff's request. Four years after the property was conveyed to the Defendant, the Plaintiff requested the return of the property, which the Defendant refused to do. The Plaintiff commenced an Action for, inter alia, breach of contract. The Supreme Court, Rockland County, granted the Defendant's motion for summary judgment and dismissed the complaint, which ruling was affirmed by the Appellate Division, Second Department. An oral agreement concerning the conveyance of real property is invalid under the statute of frauds. General Obligations Law Section 5-703 ("Conveyances and contracts concerning real property required to be in writing"), provides that "[a]n estate or interest in real property, other than a lease for a term not exceeding one year…over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing". Lebovits v. Friedman, 2018 NY Slip Op 01457, decided March 7, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_01457.htm.

Visual Artists Rights Act of 1990 ("VARA")

Plaintiffs, 21 aerosol artists, sought a preliminary injunction preventing a real estate developer and four of his companies from demolishing warehouse buildings in Long Island City, Queens County, on the walls of which the Plaintiffs had painted works of art. The United States District Court for the Eastern District of New York denied a preliminary injunction but, before a written opinion was issued, the paintings were whitewashed over. The Court then held that the Plaintiffs' works of aerosol art were works of "visual art" protected under VARA [17 U.S.C. Section 106A], which "gives the 'author of a work of visual art' the right to sue to prevent the destruction of [the] work if it is one of recognized stature". Cohen v. G&M Realty L.P. 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

According to the District Court, in a decision rendered February 12, 2018, "[s]ince the Plaintiffs' works were effectively destroyed, plaintiffs were relegated to seeking monetary relief under VARA". VARA "permits the artist to seek monetary damages under [17 U.S.C.] Section 106A (a) (3) (A) if the work was distorted, mutilated, or otherwise modified to the prejudice of the artist's honor or reputation".

Under 17 U.S.C. Section 504 ('Remedies for infringement; Damages and profits"), statutory damages can be awarded "in a sum of not less than $750 or more than $30,000 as the court considers just" but "[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that the infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of no more than $150,000". The Court, finding that the developer acted willfully in destroying the works of art, awarded statutory damages of $150,000 for each of 45 works of art for a total of $6,750,000. Damages for emotional distress were not recoverable. Cohen v. G&M Realty L.P., Case Nos. 13-CV-05612 and 15-CV-3230, is reported at 2018 U.S. Dist. LEXIS 22662 and 2018 WL 851374.

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