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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Condominium Act/Common Elements

A condominium's Board of Managers, acting on behalf of the unit owners, sought a preliminary injunction requiring the Defendant unit owner to allow access to the Defendant's unit to remove a flag and flagpole alleged to have been installed on the exterior of the building in violation of the condominium's declaration, by-laws and rules. Under those documents, with which the Defendant agreed to comply, a unit owner is not allowed to decorate any portion of the common elements without the consent of the Board, a unit owner is prohibited from placing any "furniture, equipment, or other personal articles" in the General Common Elements, "no…articles of any kind shall be hung on or out of a Unit…," and a unit owner may not "use or occupy" a unit "in a manner… which create(s) any nuisance in the Common Elements". The Defendant moved to dismiss, arguing that he had complied with the by-laws and that Real Property Law Section 339-j ("Compliance with by-laws and rules and regulations"), part of the Condominium Act, allowed him to fly his flag. Section 339-j provides that

> *"[e]ach unit owner shall comply strictly with the by-laws and with the rules, regulations, resolutions and decisions adopted pursuant thereto. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief or both maintainable by the board of managers on behalf of the unit owners…Notwithstanding the foregoing provisions of this section, no action or proceeding for any relief may be maintained due to the display of a flag of the United States measuring not more than four feet by six feet".*

The Defendant's flag measured 2 ½ feet by 4 ½ feet.

The Supreme Court, New York County, granted the Plaintiffs' motion for a preliminary injunction, ordering the Defendant, during the pendency of the Action, from prohibiting the Board of Managers, or its agents, from removing the flag and flagpole. According to the Court, "[p]laintiffs have demonstrated a likelihood of success on the merits as the declaration, by-laws and rules confirm the [Board of Managers] authority to circumscribe what residents may and may not do with respect to the Common Elements and the exterior of the building". As to the application of the last sentence of Section 339-j, which the Court noted was a question of first impression,

> *"…this court finds that the Condominium Act...does not prohibit the board from enacting rules and regulations relative to the location and installation of any personal item which may interfere with other occupants or create a nuisance in the Common Elements. Indeed, plaintiffs' objection does not concern defendant's display of the flag, but rather the location and installation of the flag and flagpole on the exterior of the building. Defendant is free to display his flag from within the confines of his unit and as the record demonstrates, [the Board of Managers] has not interfered with that right in any manner".*

Board of Managers of Clinton West Condominium v. Desmond, 2018 NY Slip Op 30907, decided May 11, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_30907.pdf.

Condominiums/Limited Common Elements

The deed conveying a condominium unit to the Plaintiff did not expressly include certain basement space which, under the Declaration and the Offering Plan, was a limited common element appurtenant to the unit purchased by the Plaintiff. Under the Declaration, the use of the basement space was deemed conveyed in a transfer of the unit, even if the space was not specifically described. However, under the mistaken belief that they had the right to use the basement space, the Defendants, also unit owners, occupied the basement space. The Plaintiff claimed that the Defendants were trespassing and sought a warrant of eviction and a permanent injunction. The Defendants counterclaimed for a declaration that they owned the basement space and had an exclusive right to its use. Alternatively, the Defendants counterclaimed for unjust enrichment, alleging that they paid a premium for their unit on the belief that it included the basement space.

The Supreme Court, New York County, denied the Plaintiff's motion for summary judgment. The Appellate Division, First Department, modified the lower court's ruling, granting the Plaintiff's motion for summary judgment. According to the Appellate Division,

> *"…plaintiff was entitled to judgment as a matter of law on the trespass claim because defendants intentionally occupied the basement space, which was exclusively for the use of plaintiff's unit. With respect to plaintiff's claims for a warrant of eviction and a permanent injunction, plaintiff demonstrated a probability of success on the merits, the danger of irreparable injury, and a balance of equities in its favor. The Orlando defendants were still occupying the space, other remedies were inadequate, and a balancing of the equities favored plaintiff, based on its legal right to use the space (citations omitted)".*

The Appellate Division held that the Defendants' counterclaim for unjust enrichment was properly dismissed because any premium paid when they purchased their unit for the use of the basement space was paid to their seller, not to the Plaintiff. P360 Spaces LLC v. Orlando, 2018 NY Slip Op 02749, decided April 24, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_02749.htm.

Contracts of Sale/Tenants by the Entirety

Rafael and Aracelis Crespo, husband and wife, owned property in Brooklyn as tenants by the entirety. Mr. Crespo, but not his wife, entered into a contract to sell the property to the Plaintiff. However, the Crespos instead sold the property to Defendant BTML Development Corp. ("BTML"). The Plaintiff sought specific performance. The Supreme Court, Kings County, denied BTML's motion for summary judgment dismissing the complaint as to it; the Appellate Division, Second Department, affirmed. According to the Appellate Division, the Plaintiff "failed to raise a triable issue of fact with regard to whether Aracelis Crespo had complete knowledge of and actively participated in the transaction, whether she ratified the sale contract after the fact, or whether Rafael Crespo was authorized in writing to act as [his wife's] agent in the matter"; the contract was not therefore, as a matter of law, enforceable against the wife's interest.

Further, "BTML failed to establish…either [that] the plaintiff was not ready, willing and able to perform or [that] BTML was a bona fide purchaser whose conveyance was first duly recorded…BTML failed to eliminate triable issues of fact as to whether it was aware of Rafael Crespo's contract with the plaintiff before it purchased the premises and, thus, whether it made the purchase in good faith". Carpenter v. Crespo, 2018 NY Slip Op 03501, decided May 16, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_03501.htm.

Cooperatives/Partition

The Plaintiff, the holder of a money judgment against Defendant James Brady, sought an Order directing the turnover of the shares attributable to two commercial cooperative units owned since October 2006 by Brady and his wife to the sheriff for auction, and to have its judgment satisfied from the sale proceeds. The Supreme Court, New York County, ordered that the shares be turned over to the sheriff and, after the auction sale, that the sales proceeds were to be distributed to any judgment creditor or lien creditor of James Brady. The stock certificates issued for the units did not state whether the shares were held as joint tenants, tenants by the entirety or tenants in common.

Under subsection (c) of Estates, Powers and Trusts Law ("EPTL") Section 6-2.2 ("When estate is in common, in joint tenancy or by the entirety"), a disposition on or after January 1, 2006 of stock of a cooperative apartment corporation allocated to an apartment or a unit, together with a proprietary lease, "creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenant in the common". Subsection (a) of EPTL Section 6-2.2 provides that "a disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy". Under subsection (b) of EPTL Section 6-2.2, "[a]disposition of real property to a husband a wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or tenancy in common". (Emphasis added)

The Court held that EPTL Section 6-2.2 (c) did not apply because the shares of stock were issued by a commercial cooperative, not by a "cooperative apartment corporation". Further, "[b]ecause this case is primarily a judgment enforcement proceeding, and not an action for partition...the units should be treated as personal property [and therefore EPTL Section 6-2.2(b) did not apply]. Accordingly, under EPTL 6-2.2(a), the ownership of the shares will be considered a tenancy in common, subject to partition and sale by the judgment creditor". IGS Realty Co, LP v. Brady, 2018 NY Slip Op 31093, decided May 23, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_31093.pdf.

Cooperatives/Unpaid Maintenance

The term of an auction sale of a cooperative unit for unpaid maintenance charges stated that "the winning bidder would be responsible for any maintenance arrears" and that the sale was "subject to ...any maintenance due at the Closing to the Co-op Corporation". The Plaintiff, the assignee of the successful bidder, sought an Order annulling that provision requiring him to pay unpaid maintenance up to the date of sale, as well as maintenance and assessments that accrued while the sale was stayed when the prior holder of the cooperative interest contested the auction. The Uniform Commercial Code's Section 9-615 ("Application of proceeds of disposition") provides only that maintenance arrears are to be paid from the proceeds of sale after expenses of the sale are paid.

The Supreme Court, Westchester County, holding that the Plaintiff was required to pay all maintenance arrears and assessments through the date of the closing, denied the Plaintiff's motion for relief, granted the Defendants' cross-motion for an Order dismissing the complaint, and directed the Plaintiff to pay the maintenance charges due. According to the Court,

> *"…the terms of sale were read aloud prior to the auction, and they indicated unequivocally that the winning bidder would be responsible for any maintenance arrears. Nothing in the papers indicates that plaintiff, or his agent, was somehow pressured to bid on the property. His agent was free to walk away from the auction at any time, or to bid on a property that did not include such a term".*

As to maintenance charges accruing during the stay of the sale, the defendants, which included the holder of the legal title of a loan on the cooperative interest and the loan servicer, "took all available steps to expedite the process of having the complaint [in the action brought by the prior holder of the cooperative interest] dismissed" and the Plaintiff did not attempt to intervene in that Action. Stavinsky v. Prof-2013-S3 Legal Title Trust, 2018 NY Slip Op 28160, decided May 10, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_28160.htm.

Doctrine of Judicial Estoppel

The Plaintiff sought to have a constructive trust imposed on property owned by the Defendant, alleging that the Plaintiff provided funds for the purchase of the property in 2007 for the renovation of the property and for payments of the mortgage loan and real estate taxes, and that the Defendant had promised him a 50% interest in the property and rights of survivorship. The Supreme Court, Westchester County, granted the Defendants' motion for summary judgment, dismissed the complaint, vacated the notice of pendency, and awarded the Defendants' attorney's fees and court costs. The Appellate Division, Second Department, affirmed the lower court's ruling. Because the Plaintiff represented in a 2011 bankruptcy petition that he had no interests in real property, and based on that representation his debts were discharged, the Plaintiff, by the doctrine of judicial estoppel, was barred from asserting that he had an interest in the property. Sanctions were properly awarded by the Supreme Court's finding that the Action was completely without merit. Bihn v. Connelly, 2018 NY Slip Op 03956, decided June 6. 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_03956.htm.

Easements

The Plaintiffs sought a declaration that they had a right-of-way over a driveway running across the Defendant's adjacent property. The parties entered into a stipulation of settlement in which the Defendant agreed to grant the Plaintiffs an easement over a portion of the driveway. However, because the settlement did not include a description of the easement the Defendant contended that the stipulation was an unenforceable agreement to agree. The Supreme Court, Ulster County, issued an Order which, relying on a survey defining the bounds of the easement, granted an easement with a detailed description. The Appellate Division, Third Department, affirmed, holding that the stipulation was an enforceable agreement; it authorized the Supreme Court "to define the easement in the event of a dispute and, by tying the easement to the driveway as it existed on a given date, supplied 'an objective method' with which to do so". Key v. Stefanis, 2018 NY Slip Op 03398, decided May 10, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_03398.htm.

Easements/Appurtenant

An instrument of record provided that the Plaintiff's predecessor in interest would have the right to access the Plaintiff's parcel over a road on the Defendant's land. Before the Plaintiff purchased its property, the Defendant erected a gate that blocked the road. The Plaintiff sought a declaration that the Defendant's property was subject to a permanent easement appurtenant. The Supreme Court, Steuben County, held in favor of the Plaintiff; the Appellate Division, Third Department, vacated the lower court's judgment, ruling that the Defendant's property was not subject to a permanent appurtenant easement in favor of the Plaintiff's land. According to the Appellate Division, "the document signed by the parties' predecessors in interest contains no words of permanency, nor any intention that it is meant to bind the grantor's successors in interest". New York Land Development Corp. v. Bennett, 2018 NY Slip Op 02926, decided April 27, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_02926.htm.

Easements/Appurtenant or In Gross

In 2010, when the Defendant owned 51% of the shares of Plaintiff 304 East 52nd Street Housing Corporation ("Housing Corp."), Housing Corp. granted the Defendant a "perpetual exclusive, non-terminable easement, privilege and right of way…in, to and through all portions of [the Housing Corp.'s Property including…the air space in Grantor's Property, except for the air space currently occupied by the building…for the exclusive use and enjoyment of [Defendant] and [his] successors and assigns…", together with other "perpetual exclusive, non-terminable" easements in Housing Corp's property. The Defendant executed the instrument on behalf of Housing Corp. and on his own behalf. Housing Corp. and ARSR Solutions, LLC ("ARSR"), which became the holder of all outstanding shares of Housing Corp., commenced an Action to quiet title and for a declaratory judgment that the easement granted was void. The Supreme Court, New York County, granted the Plaintiffs' motion for summary judgment, holding that the easement was void and directing the City Register, on filing of a copy of the Court's Order with notice of entry, to cancel the easement.

The Court held that the instrument did not create an appurtenant easement; although the Defendant alleges that he owned several nearby properties when he executed the easement, "the easement does not refer to any of these appurtenant properties…[T]he easement does not create a benefit for any of the appurtenant properties but for [the Defendant] himself".

The Court further held that the instrument did not create an easement in gross because it was a self-dealing transaction; the Plaintiff, as the principal shareholder in Housing Corp., signed the document as both the transferor and the transferee when ARSR was in the process of enforcing the Defendant's pledge to it of his shares in Housing Corp. and in certain cooperative units which he owned. 304 East 52nd Street Housing Corporation v. Kennelly, 2018 NY Slip Op 30695, decided April 19, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_30695.pdf.

Future Estates/Possibility of Reverter

Deeds executed in 1941 and 1943 transferred land "for so long as" each property was used "for golf club purposes, and for no other purposes". The deeds further stated that if either lot shall "ever cease to be used…for golf club purposes…the estate granted…shall thereupon become void, and title to said lands shall revert back" to the grantors or their successors in interest "who thereupon may enter said lands as if this conveyance had never been made". Plaintiff, the owner of the lands burdened by the restrictions, sought a declaration that the restrictions were void and unenforceable. The Defendants are the heirs of the grantors of the 1941 deed and the successors in interest to the assignees of the reversionary interest under the 1953 deed.

The Supreme Court, Orange County, held that the deed restrictions are valid and enforceable. The Appellate Division, Second Department, affirmed, holding that the deeds "unequivocally called for [the] automatic forfeiture of the estate upon breach and thereby created for their respective grantors a possibility of reverter". Further, under common law, a possibility of reverter can be assigned. Whether the deed restrictions unreasonably limited the use and development of the properties was "improperly raised for the first time on appeal". NJCB SPEC-1, LLC v. Budnik, 2018 NY Slip Op 03376, decided May 9, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_03376.htm.

Landlord and Tenant

An Action to recover unpaid rent under a month-to-month tenancy was commenced by Pauline Smith, who was the landlord when the lease agreement was executed. The Respondent argued that Smith lacked standing because she conveyed the property to her sister after the lease was executed. Relying on a 2017 decision of the Appellate Term, Second Department, Attia v. Imoukhuede, reported at 57 NYS 3d 674, the City Court, Mount Vernon held that the Petitioner had standing. Under Section 721 ("Person who may maintain proceeding") of Article 7 ("Summary Proceeding to recover possession of real property") of the Real Property Actions and Proceedings Law. Section 721, a summary proceeding can be commenced by either the "landlord" or the "lessor" without a requirement of ownership. Smith v. Jenkins, 2018 NY Slip Op 50712, decided May 18, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_50712.htm.

Lien Law/Mechanics' Liens

The Supreme Court, New York County, ordered the discharge of mechanics' liens filed to recover monies alleged to be due and payable for janitorial services such as carpet spot cleaning, floor buffing, vacuuming, housekeeping and garbage removal. The Court held that the "janitorial services and materials furnished constituted temporary improvements and were not for the 'permanent improvement' of the property" as required by the Lien Law to support the filing of a mechanic's lien. 88 Greenwich LLC v. Onesource NY, LLC, 2004 NY Slip Op 30394, decided August 23, 2004, was posted by the Slip Opinion Service, New York Official Reports, of the New York State Law Reporting Bureau on May 17, 2018 at http://www.nycourts.gov/reporter/pdfs/2004/2004_30394.pdf.

Mortgage Foreclosure/Notices

The Supreme Court, Ulster County, denied the foreclosing Plaintiff's motion for summary judgment and dismissed the complaint because of the failure to comply with the notice requirement in Real Property Actions and Proceedings Law Section 1320 ("Special summons requirement in private residence cases". Under Section 1320, "[i]n an action to foreclose a mortgage on a residential property containing not more than three units… the summons shall contain a [specific] notice in boldface" captioned "You are in Danger of Losing Your Home". According to the Court, "[w]hile courts may disregard a defect or irregularity if a substantial right of a party is not prejudiced, failing to comply with one of the foreclosure reforms mandatory conditions precedent will not be deemed a minor irregularity that can be overlooked". Aronson v. Callahan, 2018 NY Slip Op 30937, decided April 17, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_30937.pdf.

Mortgage Foreclosure/Reforeclosure

Before the commencement of an Action to foreclose a mortgage, title to the property being foreclosed was transferred to Defendant Guardian Preservation LLC ("Guardian"). Guardian was not named a party defendant. After purchasing the property at the foreclosure sale and receiving the Referee's deed, the mortgagee sought to cut off Guardian's interest, asserting causes of action for reforeclosure under Real Property Actions and Proceedings Law ("RPAPL") Sections 1503 ("Actions to determined claims where foreclosure of mortgage was void or voidable") and Section 1523 ("Judgment of foreclosure in certain cases"), and for strict foreclosure under RPAPL Section 1532 ("Judgment foreclosing right of redemption"). The Supreme Court, Otsego County, granted the Plaintiff's motion for summary judgment, holding that the Plaintiff was entitled to a judgment of reforeclosure, and afforded Guardian 45 days to pay the mortgage debt and redeem the property. The Appellate Division, Third Department, affirmed. According to the Appellate Division,

> *"[t]o prevail in a reforeclosure action, the plaintiff must demonstrate that the defect in the original foreclosure action was not the result of fraud or 'wil[l]ful neglect' (RPAPL 1523[1]). Further, absent any actual prejudice occasioned by the defect in the original foreclosure, the court's judgment may fix a time for redemption of the property and, if the defendant fails to redeem within the fixed time, it will thereafter be precluded from redeeming the property or claiming any right, title or interest therein (see RPAPL 1523[2])".*

The Appellate Division found that there was no "willful neglect" by the Plaintiff; it had relied on a title search and an updated mortgage foreclosure certificate which failed to report Guardian's interest in the property. In addition, the Defendant "has not established any actual prejudice, such as being prejudiced from raising meritorious defenses to the original foreclosure action, as its submissions in opposition to the instant action and the summary judgment motion identified none …Further, [the] Supreme Court explicitly granted defendant a 45-day right of redemption in its order". HSBC Bank USA. National Association v. Guardian Preservation LLC, 2018 NY Slip Op 02692, decided April 19, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_02692.htm.

Mortgages/Descriptions

The note and the mortgage being foreclosed by JPMorgan Chase Bank, National Association ("Chase") referred only to tax lot 48, but the metes and bounds description attached to the mortgage encompassed tax lots 48 and 49. A mortgage later executed to Defendant E.R. Holdings, LLC ("Holdings") was recorded as a second lien against tax lot 48 and a first lien against tax lot 49. Holdings asserted affirmative defenses and a counterclaim seeking a judgment declaring that its mortgage was a valid first mortgage lien on tax lot 49. The Supreme Court, Queens County, denied Chase's motion for summary judgment on the complaint insofar as asserted against Holdings; it also dismissed Holding's affirmative defenses and counterclaims. The Court found "that the plaintiff failed to establish, prima facie, that it was the original parties' intent that the [mortgage held by Chase] cover both lots". The Appellate Division, Second Department, affirmed the lower court's denial of the branches of the plaintiff's motion that were for summary judgment on the complaint as asserted against Holdings. According to the Appellate Division,

> *"…there is no rule that it is the metes and bounds description that determines what property is encumbered by any mortgage and not the street address or tax lot number. Rather, where, as here, there is a conflict between the metes and bounds description and the street address and/or tax lot numbers given in the mortgage, there is an ambiguity that requires consideration of parol evidence…In support of its motion for summary judgment, the plaintiff failed to submit evidence resolving that ambiguity one way or the other…[A] triable issue of fact remained regarding that issue".*

JPMorgan Chase Bank, N.A. v. Zhan Hua Cao, 2018 NY Slip Op 02603, decided April 18, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_02603.htm.

Recording Act/Judgments

In 2009, Defendant Paul Tauber ("Tauber") obtained a judgment for $217,245 including interest of $16,050 and an amount for costs and disbursements. The judgment was mistakenly docketed by the Kings County Clerk in the amount of $16,050. The Plaintiff, which took title to the property in 2016 subject to the judgment, sought a judgment declaring that the judgment lien as against the property, be deemed to be for $16,050 and for injunctive relief against the judgment creditor and the Sheriff's Office of the City of New York to enjoin a sale of the property following satisfaction of the alleged $16,050 lien.

The Supreme Court, Kings County, held that the parties with interests in the property arising after the judgment was docketed, which also included the holder of a restated and consolidated mortgage executed in 2012, acquired their interests subject to the judgment lien in the amount of $217,245 plus accumulating interest. The Court denied the Plaintiff's motion for injunctive relief, denied the Plaintiff's motion for a default judgment against the Sheriff, and granted the branch of Tauber's cross-motion for summary judgment dismissing the claim as against him. According to the Court,

> *"[o]nce a potential purchaser is given notice that a cloud on title exists on the property by reason of a judgment lien, the purchaser would not then have to rely solely on the information contained in the docket index as to the amount of the judgment, as this information would be readily available from other sources such as the clerk's records or from the attorney of the judgment creditor whose name and address appears in the docket entry…[T]his court declines to hold that a validly issued and entered judgment is trumped by a mere erroneous data entry, particularly in this case where the docket was otherwise accurate and gave proper notice that a judgment lien existed on the subject property, where the true judgment amount was readily and easily verifiable and where holding otherwise would inequitably vitiate Tauber's ability to collect on his duly awarded judgment".*

Myrtle 684 LLC v. Tauber, 2018 NY Slip Op 30579, decided April 2, 2018, is posted at http://nycourts.gov/reporter/pdfs/2018/2018_30579.pdf.

Right of First Offer ("ROFO")/Condominium Units

In 1985, 83rd Street Investors ("Investors"), the Plaintiffs' predecessor-in-interest, and Hinsdale Amusement Corporation ("Hinsdale") entered into an Easement Agreement granting Investors the right to develop a mixed use residential and commercial building on property above and adjacent to Hinsdale's land (the "Movie Theatre"). The Agreement also granted Investors, and its successors and assigns, a ROFO to purchase the Movie Theatre in the event that Investor's land "shall be subjected to a condominium regime, comprised, inter alia, of several residential and a single condominium unit: and that the ROFO "shall pass to the owner from time to time of the commercial condominium unit". Investors proceeded to construct a condominium above and adjacent to the Movie Theatre, consisting of Residential Units, a Garage Unit and a commercial Retail Unit.

In 2008, Investors transferred the Retail and Garage Units to related entities; the deeds did not mention the ROFO. In 2011, the Retail Unit was sold to TIAA-CREF Global Investments LLC ("TIAA-CREF"). The deed did not mention the ROFO, and the grantee disclaimed any interest in the ROFO. In 2012, the transferor of the Retail Unit purportedly assigned its rights under the ROFO to the Plaintiff, which owned the Garage Unit. In 2018, the Plaintiffs became aware that the Defendant, the successor owner of the Movie Theatre, had entered into a contract to sell the Movie Theatre. The Plaintiffs moved to enjoin the sale; the Supreme Court, New York County, denied the motion. The Court then held, after trial, that the Garage Unit Owner did not possess any right to the ROFO and that the ROFO rights could only be exercised by the Retail Unit owner, TIAA-CREF, a non-party to the litigation.

According to the Court, under the Condominium's Declaration and the Easement Agreement, the Garage Unit was not commercial space, its use was limited to Residential Unit owners, and the Easement limited the ROFO rights to each owner of the commercial condominium unit. As to the assignment of the rights to exercise the ROFO in 2012, "[a]n interest that runs with the land is inseparable from ownership of the land to which the interest relates and cannot be transferred separately from the land". That the ROFO rights were not expressly conveyed in the deed to the Retail Unit was irrelevant; "the ROFO rights passed to the owner of the Commercial Unit 'from time to time' as the Easement Agreement intended". The release of the ROFO rights by TIAA-CREF was "a nullity". The Plaintiffs' claims were dismissed. 83rd Street Garage LLC v. American Multi-Cinema, Inc., Index No. 652296/2018, was decided by Judge Ostrager on May 24, 2018.

Streets

The Supreme Court, Tompkins County, held that the Plaintiffs had title to the center line of that part of State Route 34 adjoining its lake-side property, subject to a right-of-way for the public to use Route 34 for highway purposes and also subject to the rights of others to park vehicles on Route 34 unless that use unreasonably interfered with the Plaintiffs' rights of ingress to and egress from their property. The Court enjoined the Defendants, adjoining property owners, and their agents and guests, from parking their cars in that part of the half-street owned by the Plaintiffs, identified as a "reconstructed gravel area", adjoining a stairway leading from the level of the road that the Plaintiffs use to access their property. The Appellate Division, Third Department, affirmed the lower court's ruling. According to the Appellate Division the

> *"…Supreme Court properly ruled that plaintiffs cannot prevent other from parking their vehicles within the highway easement on the road front property along the shoulder of Route 34, unless those individuals unreasonably interfere with plaintiff's right of ingress and egress…"*

The Appellate Division found that the Supreme Court "property considered the facts and the rights of the parties in issuing injunctions giving plaintiffs exclusive use of the reconstructed gravel area, as well as the space between that area and the highway..." Evidence was submitted showing that the Defendants and others parked their vehicles so as to make it difficult or impossible for the Plaintiffs to use the stairway. The remainder of the part of Route 34 owned by the Plaintiffs was subject to a highway easement for the public and could be used by the parties and the public generally for parking.

> *"[E]ven if a person owns fee title to property over which a public highway runs, the public has a highway easement and may use the property for travel and purposes authorized by the easement…[T]he term highway use 'includes use for parking as well as travel purposes'[citation omitted]".*

Augusta v. Kwortnik, 2018 NY Slip Op 03574, decided May 17, 2018, is posted at http://nycourts.gov/reporter/3dseries/2018/2018_03574.htm.

Trusts/Cooperative Units

Plaintiff, the sole trustee of a trust which owned a cooperative unit, commenced an Action for a declaration that a Uniform Commercial Code Financing Statement filed against the unit as security for a loan to the Plaintiff, personally and in his capacity as trustee, was void and for a preliminary injunction enjoining the Defendant from foreclosing on the apartment. The Plaintiff submitted an affidavit in which he claimed that the loan proceeds were for his personal use. The Defendant submitted evidence that a portion of the loan proceeds were used to satisfy a money judgment against the Plaintiff, the Settlors of the trust, and the trust. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment, holding that the financing statement was null and void and granting a preliminary injunction. The Appellate Division, Second Department, modified the lower court's Order, deleting the provision declaring that the financing statement was null and void. According to the Appellate Division,

> *"[p]ersons dealing with a trustee must take notice of the trustee's authority…The record presents unresolved material issues of fact as to whether the loan proceeds were used to satisfy non-trust debts, and whether the lender acted in good faith in extending the loan".*

The grant of the preliminary injunction was upheld. Magid v. Sunrise Holdings Group, LLC, 2018 NY Slip Op 02775, decided April 25, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_02775.htm.

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