



**First American Title™**  
NATIONAL COMMERCIAL SERVICES

NEWSLETTER ▶ NO. 191 | AUGUST 27, 2018

# Current Developments

First American Title  
National Commercial Services

By Michael J. Berey  
Senior Underwriting Counsel

©2018 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF

First American Title Insurance Company, and the operating divisions thereof, make no express or implied warranty respecting the information presented and assume no responsibility for errors or omissions. First American, the eagle logo, First American Title, and firstam.com are registered trademarks or trademarks of First American Financial Corporation and/or its affiliates.

## Adverse Possession

Current Developments issued January 15, 2016 reported on *Children’s Magical Garden, Inc. v. Norfolk Street Development, LLC*, 2015 NY Slip Op 32227, decided by the Supreme Court, New York County, on November 23, 2015. The case involves property owned by each of the Defendants at various times which has been used as a community garden for thirty years. The garden was operated by an unincorporated association of community activists until 2012 when a not-for-profit corporation, the Children’s Magical Garden, Inc., the Plaintiff in the Action, was formed. The Plaintiff sought, among other relief, a declaratory judgment that it had acquired title by adverse possession. The Defendants moved for summary judgment dismissing the complaint, asserting that the Plaintiff did not adequately plead the necessary elements of adverse possession; the Defendants argued that the Plaintiff did not occupy the property for the period required to claim title by adverse possession and could not apply the “tacking” doctrine because the unincorporated association, in possession of the Garden before the Plaintiff was incorporated, could not acquire title. The Defendants also asserted that the Plaintiff lacked standing to sue. The Supreme Court, New York County, denied the Defendants’ motion, holding that the Plaintiff had adequately pleaded a cause of action for adverse possession and had standing. Although an unincorporated association cannot acquire title, “[t]he Court of Appeals has held that an unincorporated association can adversely possess a parcel and then incorporate and take title to that property if the requisite requirements are met...” The Appellate Division, First Department, in a decision dated July 12, 2018, affirmed the denial of the Defendants’ motion to dismiss. The Appellate Division held that

*“[i]t is well settled that an unincorporated association may adversely possess property and later incorporate and take title to it because ‘[a]lthough the unincorporated society could not acquire title by adverse possession, its officers could for its benefit, and when the corporation is duly organized **the prior possession may be tacked to its own to establish its title under the statute of limitations**’ [emphasis added; citation omitted].”*

The Appellate Division also held that under the facts presented the Plaintiff had “adequately pleaded a cause of action for adverse possession”. RPAPL Section 501 (“Adverse possession; defined”), as amended in 2008 to require that a party claiming adverse possession have “‘a reasonable basis for the belief that the property belongs to the adverse possessor’ has [no] bearing on this matter” because the adverse possession claim ripened before 2008.

The Appellate Division’s decision on July 12, 2018, 2018 NY Slip Op 05223, and the Supreme Court’s ruling are posted at the following links: [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_05223.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_05223.htm)  
[http://www.courts.state.ny.us/Reporter/pdfs/2015/2015\\_32227.pdf](http://www.courts.state.ny.us/Reporter/pdfs/2015/2015_32227.pdf)

## Clogging/Mezzanine Loans

A loan for real estate projects in Kansas City and Cincinnati was secured by a mortgage on the land being developed and by the pledge of the membership interests in the borrower. The lenders commenced a UCC foreclosure sale of the membership interests. The borrowers sought a preliminary injunction enjoining the UCC sale, asserting that their agreements with the lenders, providing for the enforcement of the pledges of their interests, clogged their equitable right to pay and discharge the mortgage before a foreclosure. The Supreme Court, New York County, denied the motion. According to the Court,

*“...Plaintiffs’ equitable right of redemption has not been, as they assert, ‘clogged’ by the operative agreements. Plaintiffs, at this very moment, retain a right of redemption under UCC Section 9-623 (“Right to redeem collateral”), which provides that redemption may occur at any time before a secured party disposes of the collateral at a foreclosure sale. Thus, the UCC provides a right of redemption if Plaintiffs can fulfill their obligations under the applicable agreements. Additionally, there is nothing to prevent Plaintiffs from taking part in the bidding process at the UCC sale”.*

*HH Cincinnati Textile L.P. v. Access Capital Servicing LLC*, 2018 NY Slip Op 31263, decided June 19, 2018, is posted at [http://www.nycourts.gov/reporter/pdfs/2018/2018\\_31263.pdf](http://www.nycourts.gov/reporter/pdfs/2018/2018_31263.pdf).

## Condominiums/Common Charges

The Offering Plan for a condominium formed in 1986 stated that the Commercial and Professional Units were to pay, in the aggregate, 17.2% of the expenses for the common elements, computed based on their relative usage of the common elements, even though 17.2% was less than the total of the units' interests in the common elements. The Second Amendment to the Offering Plan, effective in 1987, increased the units' collective percentage interests in the common elements to 22%. In its 2017/2018 Budget, the Defendant Board of Managers allocated the Commercial and Professional Units 22% of the expenses for the common elements. In addition, the Board of Managers sent invoices to the Plaintiff, the owner of the units, reflecting an adjustment to the common element charges for the prior six years, and filed a lien. The Plaintiff sought a declaratory judgment barring the Board from allocating common element charges other than based on their actual usage, enjoining the Board from enforcing the 22% formula, and for damages against the Board members and the managing agent for breach of fiduciary duty.

Judge Ostrager of the Supreme Court, New York County, granted the Defendant's motion to dismiss as to the charges imposed by the Board from the date when the 2017/2018 Budget was adopted and dismissed the cause of action for breach of fiduciary duty. The Court noted Real Property Law ("RPL") Section 339-m ("Common profits and expenses"), which provides, with emphasis added by the Court, that

*"...the common expenses shall be charged to...the unit owners **according to their respective common interests...Notwithstanding any provision of this article, profits and expenses may be specifically allocated and apportioned by the board of managers in a manner different from common profits and expenses, to one or more non-residential units where so authorized by the declaration and by-laws"**.*

The Condominium's Declaration and By-Laws require charges for the common elements to be allocated based on each unit's common interest percentage. Therefore, the Court rejected "plaintiff's claim that the defendant Condominium is barred from charging plaintiff for Common Element expenses based on Common Interest, at least beginning with the 2017/2018 budget and going forward". However, due to "issues of fact relating to plaintiff's claims of waiver and estoppel and the Condominium's extended course of conduct charging and accepting lesser amounts", the Court did not rule on the charges imposed for the prior years, although it did indicate that the Condominium was barred from recovering common charges assessed in arrears for any period of time older than the six-year statute of limitations. *MacArthur Properties I, LLC v. Galbraith*, 2018 NY Slip Op 31612, decided July 12, 2018, is posted at [http://www.nycourts.gov/reporter/pdfs/2018/2018\\_31612.pdf](http://www.nycourts.gov/reporter/pdfs/2018/2018_31612.pdf).

In another case dealing with the allocation of common charges among condominium units, decided January 13, 2003 but posted to the New York State Law Reporting Bureau's Slip Opinion Service on August 1, 2018, Judge Diamond of the Supreme Court, New York County, applying provisions of a condominium's Declaration and By-Laws, and its Offering Plan, "which segregate expenses according to a unit's category", held that the Board of Managers "can not allocate residential common expenses to [the commercial and professional units] and are limited to allocating [to those units] common charges which reflect [their] use of the common elements of the condominium". *Lesal Associates v. Board of Managers of the Downing Court Condominium*, 2003 NY Slip Op 30261, is posted at [http://www.nycourts.gov/reporter/pdfs/2003/2003\\_30261.pdf](http://www.nycourts.gov/reporter/pdfs/2003/2003_30261.pdf).

## Condominiums and Cooperatives

The New York State Department of Law's Real Estate Finance Bureau issued a "guidance document" dated August 6, 2018 "intended to clarify and reiterate [a] sponsor's obligation to provide comprehensive and adequate disclosure in any amendment to an offering plan". The Bureau's Memorandum states that "[s]imply attaching a revised or updated exhibit to an amendment does not rise to the level of adequate disclosure, as material changes reflected in said exhibit may not be readily discernible".

"Disclosure Requirements Regarding Changes to Amendment Exhibits" is posted at <https://on.ny.gov/2MruQP8>.

The Real Estate Finance Bureau has also issued a “guidance document” effective August 29, 2018 captioned “Disclosure Requirements Regarding Building Smoking Policies Pursuant to Local Law 147”. New York City’s Local Law 147 amends New York City’s Administrative Code to require that each building in the City with three or more residential dwelling units (Class A multiple dwellings) adopt a written smoking policy that is disclosed to all residents, incorporated into all leases and into purchase agreements for units, and included in the building’s governing documents. The guidance document “clarifies how Local Law 147 affects [Department of Law] disclosure requirements for sponsors of condominiums and cooperatives located in New York City with three or more residential units or apartments”. The Bureau’s Memorandum is posted at <https://on.ny.gov/2Bb8ujL>. New York City Council Int. 1585-2017, enacted as 2017 Local Law 147 effective August 28, 2018, is available at <https://on.nyc.gov/2Pfr08S>.

## Contracts of Sale/Anticipatory Breach

The purchaser’s attorney sent a letter to the seller’s attorney scheduling the closing for 10 AM on April 11, 2014 at the seller’s attorney’s office, time being of the essence. The seller’s brother attended the closing with a power of attorney and a pre-executed deed, but neither the purchaser nor his attorney appeared. In a suit brought by the buyers for specific performance, the Supreme Court, Kings County, granted the Defendants’ motion for summary judgment, dismissed the complaint, and granted the Defendants’ counterclaims. The lower court’s Order was reversed by the Appellate Division, Second Department. Although the seller was ready, willing and able to perform on the law day, the “evidence was sufficient to raise a triable issue of fact as to whether the buyer’s failure to appear at the closing was excused”. The Plaintiff had submitted an affirmation from her lawyer and an affidavit from his paralegal stating that the Seller’s attorney had advised them that the Seller “did not intend to proceed to closing, would not attend the closing, and wanted to cancel the contract”. According to the Appellate Division, “[a] seller’s statement to the buyer that he or she does not intend to attend the closing can amount to an anticipatory breach of the contract [citation omitted]”. *Jian Yun Guo v. Azzab*, 2018 NY Slip Op 04314, decided June 13, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_04314.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_04314.htm).

## Contracts of Sale/Not-for-Profit Corporations

The Plaintiff and the Defendant, a not-for-profit corporation, entered into a contract for the sale of the Defendant’s real property. The contract was executed on behalf of the Defendant by one of its Trustees but the contract was not approved by the Defendant’s Board of Directors and its Members as required by Not-for-Profit Corporation Law Section 5-510 (“Disposition of all or substantially all assets”). The Defendant sought to repudiate the contract by returning the down payment. The Plaintiff commenced an Action for specific performance and moved for summary judgment on its complaint. The Supreme Court, Westchester County, denied the Plaintiff’s motion insofar as it sought specific performance, canceled the notice of pendency filed in the Action, and canceled the contract. The Appellate Division, Second Department, affirmed the Order of the lower court. “According to the Appellate Division, “[a] contract of sale executed by a not-for-profit corporation’s principal, which has not been approved by its board and members in accordance with N-PCL 510, is unenforceable [citations omitted]”. *Dowling v. Terrace City Lodge 1499 IBPOE*, 2018 NY Slip Op 05280, decided July 18, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_05280.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_05280.htm).

## Contracts of Sale/Permitted Exceptions

A few days before the time of the essence closing date, the Defendant-buyer advised the Plaintiff-seller that it would not close the transaction. Among other things, the Defendant claimed that the Plaintiff was not ready, willing or able to close because an easement-covenant affecting the property had not been removed, and the Plaintiff's contract representation that there were no encumbrances on the property at closing would therefore be untrue. The easement-covenant allowed the building on the property intended to be conveyed to encroach on its adjoining parcel. After the closing date, the Plaintiff terminated the contract and elected to retain the contract deposit. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment, directed the escrow agent to disburse the down payment from escrow to the Plaintiff, and awarded the Plaintiff reasonable legal fees and costs to be determined by a referee.

The Appellate Division, First Department, finding that the Plaintiff was ready, willing and able to perform on the closing date, affirmed the lower court's ruling. According to the court, "defendant buyer failed to demonstrate that it had a lawful basis for refusing to close since the easement-covenant, which benefitted the property and was evident in the title survey, was a 'permitted exception' as defined in...the contract of sale. Thus, buyer materially breached the contract when it failed to appear on the time-is-of-the-essence closing date..." Under the contract, the Plaintiff was entitled to the deposit as liquidated damages and to its legal fees. *45 Renwick Street, LLC v. Lionbridge, LLC*, 2018 Ny Slip Op 04641, decided June 21, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_04641.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_04641.htm).

## Deeds/Date of Delivery

The Plaintiff commenced a negligence lawsuit for injuries he suffered when he fell on March 29, 2013 at a property owned by the Defendants. The fall was alleged to have been caused by a defective and unsafe stairway and hand rail. Defendant Reoco, LLC moved to dismiss the complaint because it did not have an ownership interest in the premises until April 11, 2013, when the referee's deed was delivered and accepted, notwithstanding that the deed was dated March 28, 2013. The Appellate Division, Third Department, affirmed the lower court's ruling denying the Defendant's motion to dismiss. According to the Appellate Division, New York affords a "strong presumption" that a deed is delivered and accepted on the date set forth in the instrument; that presumption can be overcome by evidence of the actual intent of the parties to a deed. However, documents submitted by the Defendant did not "address the parties' intent or whether the deed was intended to be delivered and accepted as of April 11, 2013, as opposed to the deed's March 28, 2013 execution date". *Wisdom v. Reoco, LLC*, 2018 NY Slip Op 04628, decided June 21, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_04628.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_04628.htm).

## Easements

The Plaintiff alleged that New York City's Buildings Department required that Plaintiff's building's fire escapes lead to a secondary means of egress which, according to the architectural plans filed to obtain a certificate of occupancy, was afforded by access to the rear yard of the Defendant's adjoining property. After the Defendant acquired its property in 2015, the Defendant installed a fence separating its property from the Plaintiff's property. The Fire Department issued a violation for failing to maintain a required secondary means of egress, and the Department of Buildings required that the Plaintiff have a fire watch guard to direct occupants from its building if there was a fire. The Plaintiff, by order to show cause, sought an Order directing the Defendant to remove or modify the fence so as to not interfere with the secondary access from the Plaintiff's property, to enjoin the Defendant from blocking or impeding its building's secondary access in the event of an emergency, and directing the Defendant to reimburse the cost of retaining a fire watch guard until no longer required. The Supreme Court, New York County, denied the Plaintiff's motion for a preliminary injunction.

The Court ruled that the Plaintiff had failed to establish a likelihood of success of any of its claims that its property had an easement over the Defendant's property. There was no easement appurtenant because there was no agreement granting an easement there; there was no easement by implication or by necessity since the Plaintiff's and the Defendant's properties had never been in common ownership; and the existence of an easement by prescription had not been shown.

As to the claim of an easement by prescription, there was no door in the fence since at least 2003 and the Plaintiff's assertion that access to the rear yard of the Defendant's property had been "permitted by the prior owners for years negates the required element of hostility" for a claim of an easement by necessity. *Asian American HDFC, Inc. v. 110 Ridge St. Venture LLC*, 2018 NY Slip Op 31627, decided July 12, 2018, is posted at [http://www.nycourts.gov/reporter/pdfs/2018/2018\\_31627.pdf](http://www.nycourts.gov/reporter/pdfs/2018/2018_31627.pdf).

## Leaseholds/Illegal Use

Under RPL Section 231 ("Lease, when void..."), "[w]henver the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or [occupancy] agreement...shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied". The Appellate Division, First Department, reversing a ruling of the Supreme Court, New York County, held that the Plaintiff's leasehold interest was void because the Plaintiff was selling elephant ivory without a license or permit for four to five months after its previous license expired, in violation of sections of New York State's Environmental Conservation Law. *Metropolitan Fine Arts & Antiques, Inc. v. 10 West 57th Street Realty LLC*, 2018 NY Slip Op 04445, decided June 14, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_04445.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_04445.htm).

## Marketability of Title/Rule Against Perpetuities

A Declaration recorded in Bronx County was executed by Matco Enterprises, Inc., a general partner of the Plaintiff, Sheridan Court Mews Associates ("Sheridan"), by Defendant Matthew Gallagher, a limited partner; it was not signed on behalf of Sheridan. The Declaration stated that

*"[t]he Declarant [the signatories to the Declaration, collectively] shall not take any action, nor consent in any way to sell, mortgage, assign, lease, convey, transfer, encumber, pledge, hypothecate, accept any benefit, or otherwise take any action nor consent in any way to any action in (a) Matco, or (b) any of the Shares of Matco, or (c) in the Limited Partnership [Sheridan] or any of its interests therein (d) any of the parcels comprising the property..., nor in its interest in any of the parcels, without the written consent of MDR Associates, LLC...Should any of the aforementioned actions be taken, or consent provided for such actions, it shall be null and void and of no force and effect".*

The Defendants alleged that the Declaration was not intended to restrict the actions of Sheridan, that it was only intended to bind their interests in Sheridan in consideration for a loan made to Matthew Gallagher. However, the Supreme Court, Bronx County, granted the Plaintiff's motion for summary judgment, holding that the Declaration was void and of no effect and directing the City Register to cancel and discharge the Declaration from the record. According to the Court, although the Declaration was not binding upon Sheridan it constituted a cloud on title which rendered the property inalienable. Further, the Declaration, being of unlimited duration, violated the Rule against remote vesting in Estates, Powers and Trusts Law Section 9-1.1 ("Rule against perpetuities") and the common law rule against unreasonable restraints on alienation.

*"In this case, the Declaration requiring MDR's consent before Gallagher/Metco (partners of Sheridan) is permitted to do anything with the Property may be considered an 'option' or future interest of MDR in the Property, and that portion of the Declaration is void because it is of unlimited duration. [citation omitted]. Furthermore, under the more flexible common rule against unreasonable restraints on alienation, the Declaration – which imposes no time restrictions on MDR's potential future interest in the Property, and hinders the future disposition of the property – is unreasonable as a matter of law [citation omitted]"*.

*Sheridan Court Mews Associates v. MDR Associates, LLC*, 2018 NY Slip Op 50862, 59 Misc. 3d 1233, decided June 1, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_50862.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_50862.htm).

## Mortgage Extension/Statute of Frauds

The notes secured by two mortgages, and a note secured by other collateral, afforded the borrower, Plaintiff Mosdot Shuva Israel ("MSI"), the opportunity between November 17, 2013 and January 31, 2014 to extend the maturity date for each note from their original maturity date of March 17, 2014 for five years. MSI alleged that in early 2013 it and Defendant Signature Bank's Chairman and its Director of Real Estate, also Defendants, purportedly orally agreed to the terms of an early exercise of the option to extend the loans. The Defendants sent MSI a Term Sheet stating that they were "willing to consider [the] request to modify and extend" the loans if certain conditions were met and that "this letter is not a commitment by [the lender] or an agreement to approve the subject loan". After MSI made payments on the loans, the Defendants allegedly orally stated that documents extending the loans would be sent for signature. MSI did not receive the loan documents and the loans were not extended.

Signature Bank then sold the loans to a third party, the Plaintiff failed to pay the notes on their original maturity date, and the assignee obtained a judgment of foreclosure. The Plaintiff sued Signature Bank, its Chairman and its Director of Real Estate, asserting claims of fraudulent inducement, promissory and equitable estoppel, breach of contract and breach of the implied covenant of good faith and fair dealing. The Supreme Court, New York County, granted the Defendants' motion to dismiss the complaint.

The claim for breach of contract was held to not be legally cognizable; the Plaintiff could not demonstrate that there was a binding oral contract to extend the loans. The notes stated that they could be modified only by a written agreement, and an oral modification of mortgages is barred by the statute of frauds. In addition, "the express terms [of the Term Sheet] demonstrate that any discussions prior to its execution constituted nothing more than preliminary negotiations regarding the maturity dates and interest rates, rather than a meeting of the minds and an agreement to be bound". The claim that there was a breach of the implied covenants of good faith and fair dealing duplicated the breach of contract claim. *Israel v. Signature Bank*, 2018 NY Slip Op 31370, decided June 26, 2018, is posted at [http://www.nycourts.gov/reporter/pdfs/2018/2018\\_31370.pdf](http://www.nycourts.gov/reporter/pdfs/2018/2018_31370.pdf).

## Mortgage Foreclosures/Appointment of Receiver

The Defendants sought to have vacated an Order obtained ex parte appointing a receiver of the property being foreclosed. The mortgages provided that the mortgagee "may", in the event of a default, apply ex parte for the appointment of a receiver "without notice and without regard for the adequacy of the security for the debt". The Defendants contended that the Plaintiff would not suffer irreparable harm if the Order was vacated.

The Supreme Court, New York County, vacated the Order appointing the receiver. Under paragraph 10 ("Mortgagee entitled to appointment of a receiver") of RPL Section 254 ("Construction of clauses and covenants in mortgages and bonds or notes"), "[a] covenant 'that the holder of this mortgage, in any action to foreclose it, **shall be entitled to the appointment of a receiver**, must be construed as meaning that the mortgagee, his heirs, successors or assigns, shall be entitled, without notice and without regard to adequacy of any security of the debt, to the appointment of a receiver of the rents and profits of the premises covered by the mortgage (Emphasis added)". According to the Court, that provision applies when the mortgage affords the mortgagee "an automatic and absolute right to the appointment of a receiver. Here the first and second mortgages merely accord plaintiff the right to request such appointment".

Further, "even where mortgages by their terms purport to give an absolute right to the appointment of a receiver, the propriety of such an appointment rests in the sound discretion of the court of equity", and it must be established that absent the appointment of a receiver the mortgagee would suffer irreparable harm. In this case, the Plaintiff did not establish that there would be irreparable harm to the property or that the value of the security would be impaired. *31 East 28th Street Note Buyer LLC v. JTRE Park 28 LLC*, 2018 NY Slip Op 31114, decided May 31, 2018, is posted at [http://www.nycourts.gov/reporter/pdfs/2018/2018\\_31114.pdf](http://www.nycourts.gov/reporter/pdfs/2018/2018_31114.pdf).

## Mortgage Foreclosures/One Action Rule

The Defendant asserted that the mortgage foreclosure affecting her property could not proceed under RPAPL Section 1301 (“Separate action for mortgage debt”) without leave of court because a prior foreclosure brought by CitiMortgage, Inc., the Plaintiff’s predecessor-in-interest, had not been discontinued or abandoned. Under Subsection “3” of Section 1301 (“Separate action for mortgage debt”), “[w]hile the action is pending or after final judgment for the plaintiff therein, no other action [to recover any part of the mortgage debt] shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought”.

The Supreme Court, New York County, granted the Plaintiff’s motion for summary judgment and dismissed the Defendant’s cross-motion to dismiss. According to the Court,

*“RPAPL Section 1301(3) was enacted [to] prevent a mortgagee from maintaining a separate action to foreclose upon the note during the pendency of a foreclosure action under the mortgage. Thus, RPAPL Section 1301(3) is inapplicable in this case, as there is no separate action being maintained by the plaintiff to recover any part of the debt”.*

The Court further noted that after the prior Action was marked off the court calendar and marked “disposed” in an Order of the Court filed with the County Clerk, CitiMortgage, Inc. took no action to return the case to the Court’s calendar. “As such, it is evident that...CitiMortgage, Inc. abandoned the prior action. Consequently, RPAPL Section 1301(3) is inapplicable where there is no active second action simultaneously attempting to recover on the same debt”. U.S. Bank National Association, as Trustee v. Chait, 2018 NY Slip Op 31559, decided July 10, 2018, is posted at [http://www.nycourts.gov/reporter/pdfs/2018/2018\\_31559.pdf](http://www.nycourts.gov/reporter/pdfs/2018/2018_31559.pdf).

## Mortgage Foreclosures/Revocation of Acceleration

When the Plaintiff commenced its first mortgage foreclosure on March 21, 2006, the mortgage debt was effectively accelerated and the six-year statute of limitations under Civil Practice Law and Rules Section 213 (“Actions to be commenced within six years: ...on bond or note, and mortgage on real property...”) then started to run. The Defendant filed petitions in bankruptcy in 2007 and 2008; both petitions were dismissed. The foreclosure was discontinued in July 2012.

In a second mortgage foreclosure commenced on February 13, 2013, the Supreme Court, Suffolk County, granted the Defendant’s motion to dismiss on the grounds that the statute of limitations had expired, and the Action was therefore untimely. The automatic stay provided under the Bankruptcy Code tolled the limitations period and extended it until November 2012, which was before the date on which the present foreclosure was commenced.

The Plaintiff argued that when, in March 2012, the Plaintiff’s motion to discontinue the prior foreclosure and cancel the notice of pendency was granted, the discontinuance constituted a de-acceleration and, therefore, the current foreclosure was timely. The Court ruled that

*“[n]either the July 5, 2012 Order of Discontinuance, nor the plaintiff’s Affirmation in Support of such Order, provides any evidence of a clear, unequivocal affirmative act by plaintiff, which gives actual notice to the defendant that the acceleration had been revoked. This Court finds that the mere voluntary discontinuance of a foreclosure action, standing alone and without further proof expressing plaintiff’s intent, does not constitute an affirmative act revoking the acceleration of the mortgage debt [citations omitted]”.*

US Bank National Association, as Trustee v. Ahmed, 2018 NY Slip Op 51157, decided July 23, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_51157.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_51157.htm).

## Mortgage Foreclosures/Service of Notice to Quit

Under RPAPL Section 713 (“Grounds where no landlord-tenant relationship exists”), “[a] special proceeding may be maintained under this article [7; “Summary proceeding to recover possession of real property”] after a ten-day notice to quit has been served upon the respondent in the manner prescribed in section 735, upon the following grounds...5...the property has been sold in foreclosure and either the deed delivered pursuant to such sale, or a copy of such deed, certified as provided in the civil practice law and rules, has been exhibited to him”.

In a post-foreclosure summary proceeding, the occupants of a condominium unit foreclosed in 2013 asserted that service on them of 10-day notices to quit by substituted service did not fulfill the requirements of RPAPL Section 713(5). The notice, with a copy of the referee’s deed annexed, was served on them by conspicuous-place service after two unsuccessful attempts to effect personal service. The Civil Court of The City of New York, Queens County, dismissed the Petition, holding that the Petitioner, the purchaser at the foreclosure sale, did not demonstrate that the deed was exhibited, as required by Section 713(5). The Appellate Term, Second Department, reversed the Civil Court’s Order and granted the Petitioner’s cross-motion for summary judgment. According to the Appellate Division,

*“[w]e are persuaded that service by means other than personal delivery of a certified copy of the deed, i.e. service of a certified copy of the deed which is left at the premises for the respondent to retain and examine, satisfies the exhibition requirement”.*

The occupants also argued that the deed exhibited to them was a photocopy without an original, official seal and therefore not properly certified. The Appellate Term, noting that an attorney may certify that a document is a “true and complete copy” under Civil Practice Law and Rules Section 2105 (“Certification by attorney”), held that Petitioner’s attorney’s signing the original certification followed by service of a photocopy of the document complied with the requirements of CPLR Section 2105. *Plotch v. Dellis*, 2018 NY Slip Op 28116, decided April 13, 2018, is posted at [http://nycourts.gov/reporter/3dseries/2018/2018\\_28116.htm](http://nycourts.gov/reporter/3dseries/2018/2018_28116.htm).

## Mortgage Recording Tax/New York State Transfer Tax

New York’s Department of Taxation and Finance announced that the interest rate to be charged for the period October 1, 2018 – December 31, 2018 on late payments and assessments of Mortgage Recording Tax and the State’s Real Estate Transfer Tax will be 9% per annum, compounded daily. The interest rate to be paid on refunds will be 4% per annum, compounded daily. The notice issued by the Department is posted at <https://on.ny.gov/2KO23CG>.

New York State’s Department of Taxation and Finance has posted its Annual Statistical Report of New York State Tax Collections for the State’s fiscal year 2017-2018 (April 1, 2017 - March 31, 2018). According to the Report, the Real Estate Transfer Tax collected in FY 2017-2018 was \$1,125,072,656. Mortgage recording tax collected statewide in FY 2017-2018 was \$2,081,953,107; the mortgage recording tax collected in New York City was \$1,433,589,208. The Report for Fiscal Year 2017-2018 is posted at <https://on.ny.gov/2MuGCYQ>.

## Mortgages

On March 3, 1997, the Plaintiff and her husband, the Defendant, entered into a stipulation of settlement in their divorce proceeding which awarded their marital home to the Plaintiff. A few weeks later, the Defendant caused to be recorded a mortgage, purportedly executed in 1994 by the Plaintiff in favor of the Defendant's father, who was deceased when the mortgage was recorded. The Supreme Court, Queens County, directed the cancellation and discharge of the mortgage. The Appellate Division, Second Department, affirmed the ruling of the lower court, finding that there lacked "any documentary evidence to support the validity of the mortgage and note". According to the Appellate Division, although the certificate of acknowledge attached to the mortgage raises a presumption of due execution, "that presumption may be overcome only on 'proof so clear and convincing as to amount to a moral certainty' [citation omitted]". The Defendant affirmed that she never borrowed money from her father and never signed the note and mortgage. Further,

*"the mortgage was recorded just weeks after the parties entered into the stipulation of settlement in the divorce action, was for a purported loan in the sum of \$840,000, which was \$260,000 more than the price paid for the subject property, and was a 30-year term mortgage that required no payment until the expiration of the term, at 10% interest compounded annually, a date when [the father] would have been 114 years old. [There also was] evidence that tended to establish that the plaintiff was unable to communicate with [her father], and that [her father] was not in a position to lend large sums of money..."*

Kupperstock v. Kupperstock, 2018 NY Slip Op 05457, decided July 25, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_05457.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_05457.htm).

## Party Walls

The Plaintiff, the Board of Managers of a condominium, purchased an adjoining parcel, the description in the deed to which included a course running "to the center of a party wall" on the west side of the lot. The wall referenced was also the easterly wall of the Defendant's building. The Plaintiff sought damages for the Defendant's alleged failure to construct and repair the wall and an Order requiring the Defendant to fix the side of the wall facing the Plaintiff's property, because unless repaired the wall might collapse onto the Plaintiff's property. The Plaintiff argued that only the Defendant's building has used the wall for structural support since the 1980s and, therefore, the wall ceased to function as a party wall. The Supreme Court, New York County, found that the wall was no longer a party wall and, therefore, the Plaintiff "should only have to share in the costs [of maintaining the wall] if its actions or inactions contributed to the deterioration of the wall". According to the Court,

*"only one building [on the Plaintiff's property] was demolished, the building that remained [on the Defendant's property] used the original party wall for support and there is no clear intention that plaintiff wants the wall to continue as a party wall".*

The Court granted the Defendant's motion for leave to assert a counterclaim for negligence: the Defendant claimed that water runoff from a ramp installed by the Defendant pitched toward the wall had caused the party wall to deteriorate. Board of Managers of the 235 E. 22nd St. Condominium v. Wing Fat Property, Inc., 2018 NY Slip Op 31603, decided March 1, 2018, is posted at [http://www.nycourts.gov/reporter/pdfs/2018/2018\\_31603.pdf](http://www.nycourts.gov/reporter/pdfs/2018/2018_31603.pdf).

## Powers-of-Attorney/Ratification

Mortgages executed on October 8, 2007 and October 15, 2007 on behalf of Defendant OKI-DO Ltd. (“OKI”), and a consolidation agreement, were signed by Edward Stein (“Stein”) pursuant to a power of attorney, purportedly signed on October 4, 2007 by Dr. Kazuko Hillyer (“Dr. Hillyer”), the sole shareholder, officer and director of OKI. The Supreme Court, Suffolk County, noted that this power of attorney “revoked all previous authorizations from OKI to any purported agents”.

In the foreclosure of those mortgages, OKI argued that the October power of attorney was a forgery. Dr. Hillyer had, however, given Stein a durable power of attorney in July of 2007 which authorized Stein to “take such other actions relating to said real property and the sale thereof as my attorney-in-fact may deem advisable and: Execute all Corporate transactions of OKI-DO LTD, a New York Corporation, with, on my behalf, as President”.

The Court held that although the Plaintiffs had failed to prove that Stein had apparent authority under the October 2007 power of attorney, Stein had actual authority to act on behalf of OKI under the July 3, 2007 power of attorney. Further, the Court found that Dr. Hillyer was aware of the mortgages by no later than February of 2008 and, failing to take any action, “OKI ratified Mr. Stein’s actions and became bound by it”. *Sklavos v. OKI-DO Ltd.*, 2018 NY Slip Op 50920, decided June 18, 2018, is posted at [http://nycourts.gov/reporter/3dseries/2018/2018\\_50920.htm](http://nycourts.gov/reporter/3dseries/2018/2018_50920.htm).

## Real Estate Taxes/Qualified Empire Zone Enterprise

Under Tax Law Section 15 (“QEZE credit for real property taxes”) “[a] taxpayer which is a qualified zone enterprise (QEZE), or which is a sole proprietor of a QEZE or a member of a partnership which is a QEZE, and which is subject to tax under article 9-A, twenty-two or thirty- three of this chapter, shall be allowed a credit against such tax...for eligible real property taxes...” To be eligible for a credit, the real property owned by a QEZE must be located in an empire zone and the QEZE must be certified pursuant to the New York State Empire Zones Act (General Municipal Law Article 18-B. If the real estate taxes are paid by a QEZE which is a lessee, in addition to meeting other requirements which were not at issue in the case, the lessee has to have made “direct payment of such taxes to the taxing authority”. (Emphasis added)

Angelo Balbo Management, LLC (“Balbo Management”), a certified QEZE and the tenant of property owned by Angelo Balbo Realty Corp., agreed to deposit into escrow monthly with the fee mortgagee’s servicing agent funds necessary to pay real estate taxes; the servicing agent would pay the real estate taxes from the escrow when due on behalf of Angelo Balbo Realty Corp. In 2011 and 2012, Angelo Balbo, the sole shareholder and member of the aforesaid entities and his wife, claimed QEZE real property tax credits earned by Balbo Management. The Department of Taxation and Finance, on audit, denied the credits and reduced the refunds claimed because Balbo Management paid the taxes through the mortgage lender and not by a “direct payment”. The Tax Appeals Tribunal upheld the Department’s position. Petitioners then commenced an Article 78 proceeding to review the determination of the Tax Appeals Tribunal. The Appellate Division, Third Department, held that Petitioners were entitled to the tax credits; it annulled the determination of the Tax Appeals Tribunal and remitted the matter to the Tribunal. According to the Appellate Division,

*“While tax statutes authorizing tax credits are to be strictly construed against the taxpayer [citations omitted], the interpretation of same should not be so narrow and literal as to defeat the statute’s intended purpose...[O]nce Balbo Management deposited the funds into the mortgage tax escrow account for the express purpose of paying the applicable real estate taxes, neither Balbo Management nor Balbo Realty had any further control over these funds, and Wells Fargo, as servicing agent, did not maintain any discretion as to how these funds were to be utilized – they were specifically earmarked for the payment of the real estate taxes...Accordingly, in our view, under the particular circumstances of this case, the manner in which Balbo Management made the subject tax payments should be deemed to be the functional equivalent of a direct payment to the taxing authority...”*

Matter of Balbo v. New York State Tax Appeals Tribunal, 2018 NY Slip Op 05540, decided July 26, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_05540.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_05540.htm).

## Religious Corporations

Petitioner, a religious corporation, sought authorization under Religious Corporations Law Section 12 (“Sale, mortgage and lease of real property of religious corporations”) and Not-for-Profit Corporation Law Sections 510 (“Disposition of all or substantially all assets”) and 511 (“Petition for court approval”) for the redevelopment of the property on which its synagogue is located into a mixed-use synagogue and residential condominium. Appellant, the plaintiff in a pending lawsuit against the Petitioner, and thus a potential judgment creditor, opposed the petition. The Supreme Court, New York County, dismissed the Appellant’s objection for lack of standing; the Appellate Division, First Department, affirmed.

Under Not-for-Profit Corporation Law Section 511(b), notice of an application may be given “to any person interested therein, as member, officer or creditor or the corporation...Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted”. According to the Appellate Division, “[a]ppellant’s status as a potential creditor, by virtue of the fact that he is the plaintiff in a pending action against petitioner, does not confer status as a judgment creditor or otherwise suffice to confer standing”. *Matter of Congregation Shaare Zedek v. Leventhal*, 2018 NY Slip Op 04284, decided June 12, 2018, is posted at [http://www.nycourts.gov/reporter/3dseries/2018/2018\\_04284.htm](http://www.nycourts.gov/reporter/3dseries/2018/2018_04284.htm).

## Title Insurance/NYS Department of Financial Services

In an Article 78 proceeding brought by the New York State Land Title Association and two title agents in New York State, the Supreme Court, New York County, issued an Order annulling Regulation 208 (“Title Insurance Rates, Expenses and Charges”), which was adopted by New York State’s Department of Financial Services (“DFS”) on October 18, 2017 and effective December 18, 2017. Regulation 208 prohibited title insurance companies and their agents from incurring most marketing expenses, set maximum permissible charges for ancillary services when dealing with residential real property, prohibited the payment of gratuities to title closers, and limited the payment to closers of what is commonly referred to as “pick-up” charges. As to marketing expenses, the Court held that “Insurance Law Section 6409(d) (“...Commissions and rebates prohibited”) “was not intended to prohibit ordinary marketing and entertainment expenses” and stated that “the Legislature is in the best position to balance any social and economic ramifications purportedly created by certain practices in the Title Insurance Industry”. The DFS has filed a notice of appeal but it has not sought a stay of the Court’s Order. *Matter of New York State Land Title Association, Inc. v. New York State Department of Financial Services*, 2018 NY Slip Op 31465, decided July 5, 2018, is posted at [http://www.nycourts.gov/reporter/pdfs/2018/2018\\_31465.pdf](http://www.nycourts.gov/reporter/pdfs/2018/2018_31465.pdf).

## Title Insurance/Municipal Searches

The Plaintiffs, the purchasers of a home in Pelham, sued the sellers, the seller’s attorney, the real estate brokers, and the title insurance agent which issued an Owner’s policy of title insurance, claiming that they had not disclosed that there was lead paint in the residence. Although municipal searches provided by the title agent indicated that a report from the Health Department was “N/A”, the public records of Westchester County’s Department of Health disclosed that the property had been cited for lead contamination. The Plaintiffs sought damages for the cost of repairs to their home and for medical expenses incurred due to the hazardous condition. The United States District Court for the Southern District of New York dismissed the Action as against the seller’s attorney because there was no contractual privity between the Plaintiffs and the attorney.

The Court granted the title agent's motion for summary judgment on the Plaintiff's negligence claim. It noted that the first page of the title agent's report of the municipal searches conducted stated that "[a]ny searches or returns reported herein are furnished FOR INFORMATION ONLY. They will not be insured and the Company assumes no liability for the accuracy thereof"; the Certificate of Title stated that the accuracy of municipal department searches was "not guaranteed" and it also included a merger provision providing that on issuance of a title policy claims could be brought only under the terms of the policy. Further, citing case law in New York, environmental hazards did not give rise to issues concerning the marketability of title. The Court also dismissed the sellers' cross-claim against the title agent for contribution.

The title agent's motion for sanctions against the Plaintiffs for its costs and attorney's fees was denied. It had not been demonstrated that the Plaintiffs had "actual knowledge that the filing constituted wrongful conduct [citation omitted]". Sanctions were, however, granted against the Plaintiffs' attorney. "It should have been apparent from the outset of this litigation that Plaintiffs' negligence claim against [the title agent] was baseless". *Ilkowitz v. Durand*, 17 Civ. 773, decided March 27, 2018, posted at 2018 WL 1595987 and 2018 U.S. Dist. LEXIS 51946, can also be found at <https://bit.ly/2KDTuu6>.

Michael J. Berey  
Current Developments since 1997  
No. 191, August 27, 2018