First American Title™
NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Acknowledgments/Affidavit in Mortgage Foreclosure

The affidavit of the Vice-President – Document Control of the foreclosing mortgagee was executed before a notary public in Kentucky, as allowed by Real Property Law Section 299 ("Acknowledgment and proofs without the state, but within the United States…"). Under Civil Practice Law and Rules Section 2309 ("Oaths and Affirmations"), however, "[a]n oath or affirmation taken without the state [of New York] shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state…". Real Property Law Section 299-a (Acknowledgment to conform to law of New York or of place where taken; certificate of conformity") further provides that an "acknowledgment or proof, if taken in the manner prescribed by such state [other than New York] must be accompanied by a certificate to the effect that it conforms with such laws". In this case, the Defendants requested that the Supreme Court, Suffolk County, reject the affidavit because a certificate of conformity was not attached.

The Court denied the Defendants' request for relief, including their request for a stay, submitted because they alleged they were submitting an application to modify the mortgage loan, granted the Plaintiff's motion for an order and judgment confirming the referee's report, and issued a judgment of foreclosure and sale. According to the Court,

> *"the Appellate Division [Second Department] [has] held that a lack of a certificate of conformity was immaterial where an out of state affidavit submitted in support was in substantial compliance with New York statutory requirements [citation omitted]. Similarly, in the case at bar, the absence of a CPLR Section 2309(c) certificate of conformity from the affidavit…which document was signed before a Kentucky State Notary Public, is not a fatal defect. Upon examination of that affidavit it is found to be in compliance with New York statutory requirements but for a certificate of conformity. The Court notes that the oath was duly administered and taken before a Notary Public in good standing in the State of Kentucky. The defect does not rise to the level complained of by Defendants".*

Citimortgage, Inc. v. Petrush, 2018 NY Slip Op 32202, decided August 30, 2018, is posted at: http://www.nycourts.gov/reporter/pdfs/2018/2018_32202.pdf.

Condominium Common Elements/Mechanics' Liens

Under Real Property Law Section 339-l ("Liens against common elements…"), "…no lien of any nature shall [after recording of the condominium declaration] thereafter arise or be created against the common elements except with the unanimous consent of the unit owners…No labor performed on or materials furnished to the common elements shall be the basis for a lien thereon, but all common charges received and to be received by the board of managers, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor or materials performed or furnished at the express request or with the consent of the manager, managing agent or board of managers, and the same shall be expended first for such purpose before expending any part of the same for any other purpose".

Applying Section 339-l, the Supreme Court, New York County, ordered the discharge of a mechanic's lien filed against condominium units for work performed on the common elements of the condominium, noting that common charges are deemed trust funds for the payment of such work. Board of Managers of the St. Tropez Condominium v. Central Construction Management, LLC, 2018 NY Slip Op 32223, decided September 11, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_32223.pdf.

Contract of Sale/Time of the Essence

On June 21, 2016, the seller sent a "time of the essence" letter to the buyer setting a closing date of June 30, 2016. The buyer rejected that closing date and did not appear at the closing, alleging that certain outstanding administrative proceedings involving the property violated the terms of the contract of sale. The seller sought to retain the down payment as liquidated damages; the buyer sought the return of its down payment, asserting that the seller had breached the contract. The Supreme Court, Queens County, denied the seller's motion for summary judgment; the Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division,

> *"…the seller failed to establish, prima facie, that the time of the essence letter provided the buyer with a reasonable time within which to close…Furthermore, the seller's submission failed to eliminate triable issues of fact as to whether the property was the subject of ongoing administrative proceedings, in violation of the contract of sale, which could be resolved at the scheduled closing or within a reasonable time thereafter…Under these circumstances, the seller failed to sustain its burden of demonstrating that it was ready, willing, and able to convey title in accordance with the contract of sale". [citations omitted]".*

Rodrigues NBA, LLC v. Allied XV, LLC, 2018 NY Slip Op 06129, decided September 19, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_06129.htm.

Equitable Title/Installment Sale Contracts

In 2013, the Plaintiffs entered into a contract to sell real property to the Defendant. The contract of sale provided for the Defendant to make a down payment, take possession of the property and pay the balance of the purchase price over thirty years, at the end of which period the Plaintiffs would deliver a warranty deed. The Defendant was required to pay insurance premiums and real estate taxes until title was conveyed. If the Defendant defaulted in his payment obligations, and the default was not cured, the Defendant would forfeit all monies paid as liquidated damages.

In 2015, the Plaintiffs became aware that the Defendant was using the premises to grow marijuana. The Plaintiffs alleged that they had incurred expenses due to damage to the property and commenced an Action to recover damages for breach of contract. In 2016, the Defendant ceased making payments under the contract of sale; after the Defendant failed to cure his default, the Plaintiffs moved for summary judgment. The Supreme Court, Rockland County, granted the Plaintiffs' motion. The Appellate Division, Second Department, reversed the lower court's Order. According to the Appellate Division,

> *"[t]he defendant, having executed a contract for the purchase of real property from the plaintiffs, and having made substantial payments to the plaintiffs pursuant to the contract, held equitable title to the property….Under these circumstances, upon the defendant's default in making payments under the contract, the plaintiffs could not seek relief pursuant to the provisions of the rider that provided for the contract to be deemed null and void, the premises vacated, and the defendant to forfeit all monies paid as liquidated damages. The plaintiffs were required to proceed to foreclose the defendant's equitable title or bring an action at law for the purchase price". [citations omitted]*

Russell v. Pisana, 2018 NY Slip Op 05789, decided August 15, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_05789.htm.

Federal Housing Act

The federal district court for the Eastern District of New York affirmed the findings of a United States Magistrate Judge and held that Section 263-4(D)(1) of the Code of the Town of Riverhead, prohibiting "transient rentals", defined in the Code as rentals for "[a] rental period of 29 days or less", did not violate the Fair Housing Act (42 U.S.C. Section 3601 et seq.). The Fair Housing Act prohibits, among other actions, discrimination in the rental of housing which constitutes a "dwelling", defined at 42 U.S.C. Section 3602 ("Definitions") as including "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families…". The Court held that the transient rental apartments in question were not "dwellings" under the Act. According to the Court,

> *"although plaintiffs identify the subject properties as 'residential houses'…, since the function of the subject properties was commercial, and neither plaintiffs nor their potential guests used or intended to use the properties as a residence, Magistrate Judge Locke correctly concluded that the subject properties are not 'dwellings' within the meaning of the FHA".*

The Plaintiffs' Fair Housing Act claims were dismissed, with prejudice. Luxurybeachfrontgetaway,com, Inc. v. Town of Riverhead (17-CV-4783), decided July 27, 2018, is reported at 2018 WL 3617947, and at 2018 U.S. Dist. LEXIS 127045; the decision can be located at https://bit.ly/2P4rbbq.

Foreclosure/Tax Liens

The Appellate Division, Second Department, affirmed an Order of the Supreme Court, Westchester County, vacating a judgment of foreclosure and sale entered on the default of the Defendant in the foreclosure of a tax lien by the lien's purchaser, provided that all arrears were paid within thirty days of the date of the Order. The Defendant, on learning of the judgment, moved pursuant to Civil Practice Law and Rules ("CPLR") Section 317 ("Defense by person to whom summons not personally delivered") to vacate its default, alleging that it never received notice that it was delinquent, of its right to redeem, or of the foreclosure action. The Defendant asserted that it was ready, willing and able to pay the outstanding taxes as well as the Plaintiff's expenses in acquiring and enforcing the tax lien.

CPLR Section 317 authorizes a court to vacate a default in appearing by a person served other than by personal service "upon a finding of the court that [the person served] did not personally receive notice of the summons in time to defend and has a meritorious defense". According to the Appellate Division, a determination of whether to grant a motion under Section 317 "is addressed to the sound discretion of the trial court" and, in this case, "the Supreme Court did not improvidently exercise its discretion". Service of the summons and complaint was made upon the Defendant by service on the Department of State and its submissions in support of its motion established that it did not receive actual notice of the foreclosure in time to defend; that the Defendant had not updated its service address while its principal offices were being renovated was not a deliberate attempt to avoid receiving notice. Further, the Defendant had set forth a potentially meritorious defense. Acqua Capital, LLC v. 510 West Boston Post Rd, LLC, 2018 NY Slip Op 05991, decided September 12, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_05991.htm.

Mortgage Foreclosures

The Supreme Court, Suffolk County, granted the foreclosing Plaintiff's motion for an Order granting a judgment of foreclosure and sale but denied the Plaintiff a judgment for mortgage interest, costs and fees, totaling $106,903, for the period June 1, 2014 through and including March 18, 2017. Although summary judgment was granted in December 2013 and a referee was appointed at that time, there was a four year delay in finalizing the foreclosure. The Defendants contended that the Plaintiff failed to act in good faith in settling the case and that the Plaintiff "failed to expeditiously pursue its remedy of foreclosure and sale"; the Defendants therefore requested relief from any obligation to pay interest and costs during that period. The Defendants did not oppose the foreclosure sale.

Noting that the "Plaintiff did not contend that the [Defendants] in any way were "dilatory or uncooperative or evasive", the Court found that "the delays attributable to Plaintiff [constituted] a lack of good faith, and that the equitable relief provided by CPLR Rule 3408(j) was warranted. Section j of Rule 3408 ("Mandatory settlement conference in residential foreclosure actions"), added in 2016, reads, in relevant part, as follows:

> *"Upon a finding by the court that the Plaintiff failed to negotiate in good faith…the court shall, at a minimum, toll the accumulation and collection of interest, costs, and fees during any undue delay caused by the Plaintiff, and, where appropriate, the court may also…(4) Award any other relief that the court deems just and proper".*

One West Bank v. Coffey, 2018 NY Slip Op 32012, decided August 14, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_32012.pdf.

Mortgages/Acceleration/De-acceleration of Indebtedness

In 2015, the Plaintiff commenced an Action to have a mortgage on her property canceled and discharged of record under Section 1501 of Real Property Actions and Proceedings Law ("RPAPL") Article 15 ("Action to compel the determination of a claim to real property"), under which a mortgage may be canceled "[w]here the [six-year] period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage…has expired". The mortgage debt was accelerated by the Defendant's commencing a foreclosure in 2008, which Action was discontinued in 2012. The Defendant asserted that the Plaintiff revived the statute of limitations under General Obligations Law Section 17-101 ("Acknowledgment or new promise must be in writing") when she signed a writing acknowledging the debt.

The Supreme Court, Nassau County, granted the Plaintiff's motion for summary judgment, directing the County Clerk to cancel and discharge the mortgage. The Appellate Division, Second Department, affirmed the lower court's Order and dismissed the Defendant's appeal. According to the Appellate Division,

> *"[c]ontrary to the defendant's contention, the plaintiff's letter accompanying her request for the defendant to authorize a short sale of the property, and the other documents relied on by the defendant, did not constitute an unqualified acknowledgment of the debt sufficient to reset the statute of limitations…The plaintiff's letter, while arguably acknowledging the existence of the mortgage, disclaimed any intent to pay it with the plaintiff's own funds [citations omitted".*

Yadegar v. Deutsche Bank National Trust Company, 2018 NY Slip Op 05957, decided August 29, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_05957.htm.

The Appellate Division, Second Department, in Karpa Realty Group, LLC v. Deutsche Bank National Trust Company, 2018 NY Slip Op 05921, held that "a letter written by [the borrower] that accompanied his second short sale package submitted to Deutsche Bank's loan servicer did not constitute an unqualified acknowledgment of the debt or manifest a promise to repay the debt sufficient to reset the running of the statute of limitations". This decision, on August 29, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_05921.htm.

In another case involving the statute of limitations, the Appellate Division, Second Department, held that a notice of default given by the mortgage lender did not accelerate the mortgage debt, even though the default was not cured and a mortgage foreclosure, later dismissed, was commenced. The default notice stated that "[i]f the default is not cured on or before August 7, 2006, the mortgage payments will be accelerated with the full amount…becoming due and payable in full, and foreclosure proceedings will be initiated at that time". According to the Court, the Plaintiff, which brought a proceeding to have the mortgage discharged because more then six years had elapsed since the foreclosure was commenced in 2006, "cannot establish that the notice of default letter was a clear and unequivocal acceleration of the mortgage". FBP 250 LLC v. Wells Fargo Bank, N.A., 2018 NY Slip Op 06082, decided September 19, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_06082.htm.

Plaintiff, the owner of residential property in Staten Island, brought an Action on January 13, 2015 to cancel and discharge a mortgage pursuant to RPAPL Section 1501. The mortgage was held by US Bank National Association, to which the mortgage was assigned in 2007.

By a letter dated November 16, 2008, America's Servicing Co., then the mortgagee's loan servicer, informed the Plaintiff that if her default in making loan payments was not cured within thirty days it "will result in the acceleration of your Mortgage Note" and a foreclosure of the mortgage "may be initiated". The delinquency not having been cured, a foreclosure was commenced on January 13, 2009; it was dismissed on February 29, 2012. On October 21, 2014, Wells Fargo Bank, N.A., representing itself as the loan servicer, sent a letter to the Plaintiff which, while noting that the Plaintiff remained in default, stated that Wells Fargo "hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the loan as an installment loan". The Plaintiff alleged that more than six years had passed since the letter of November 16, 2008, which letter, it claimed, accelerated the mortgage debt.

The Supreme Court, Richmond County, granted US Bank's motion to dismiss the complaint with prejudice and denied the Plaintiff's cross-motion for summary judgment. The Appellate Division, modified the lower court's Order, holding that the court should have denied US Bank's motion to dismiss. First, the Appellate Division, Second Department, found that the letter of November 16, 2008 did not accelerate the indebtedness; the text "will result in the acceleration" of the note was "merely an expression of future intent that fell short of an actual acceleration".

The Court measured the six-year statute of limitations from January 13, 2009, the date on which the foreclosure was commenced, and "]s]ince U.S. Bank withdrew its original foreclosure action and did not commence a new action before [the date on which the Plaintiff commenced its lawsuit], the plaintiff…submitted evidence that the six-year statute of limitations had expired and that she was entitled to summary judgment…". However, although the de-acceleration notice was "clear and unambiguous", and therefore "valid and enforceable", there remained a triable issue of fact as to whether the de-acceleration notice, sent within six years from the date on which the foreclosure was commenced, was effective in that it had not been established that US Bank had standing to de-accelerate the indebtedness. According to the Appellate Division,

> *"[w]e hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well. Here, the de-acceleration notice dated October 21, 2014, does not establish that US Bank had standing to de-accelerate the earlier demand that the plaintiff's mortgage debt be paid in its entirety, and no other evidence…demonstrates that it has standing….Had US Bank provided documentary evidence in support of its CPLR 3211(a)(1) motion establishing, inter alia, its standing to accelerate and de-accelerate the plaintiff's mortgage debt, it might have been entitled to dismissal of the complaint".*

Milone v. US Bank National Association, 2018 NY Slip Op 05760, decided August 15, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_05760.htm.

Mortgages/FAR/Inclusionary Housing

In 2013, the Plaintiff entered into a Regulatory Agreement with New York City's Department of Housing Preservation and Development, under which the Plaintiff received a floor area ratio bonus ("FAR Bonus") allowing it to increase the floor area ratio of its building in exchange for an agreement to construct affordable housing units. The regulatory agreement allowed the Plaintiff to transfer the FAR Bonus, or any part of it, to other developers.

In 2016, the Plaintiff obtained a mortgage loan; the mortgage was subordinated to the Regulatory Agreement. In 2016, the Plaintiff informed the mortgagee that the Plaintiff intended to sell part of the unused FAR Bonus (the "Remaining FAR Bonus"). The lender objected to the sale, asserting that the FAR to be sold was collateral for the loan, and that the lender would only agree to the sale if the lender was compensated. The Plaintiff commenced an Action against the assignee of the mortgage for a determination of the parties' rights, contending that the mortgage was not a lien on the Far Bonus being sold. Under the terms of the mortgage, collateral for the loan included "[a]ll …air rights and development rights…in any way now or hereafter **belonging, relating or pertaining** to the Land and the Improvements…" (emphasis added)

The Supreme Court, New York County, found that the FAR Bonus was a development right under the mortgage because the rights could be used to develop more floor area at a building than would be allowed as of right under the zoning laws. The FAR Bonus, however, not being attached to the land and being transferable for use at another property, did not "belong" or "pertain" to the property. Further, the Court held that the Remaining FAR Bonus in this case did not "relate" to the property. According to the Court,

> *"[t]here is no dispute that the [Plaintiff's] Property was built to its maximum FAR permitted by the zoning laws before negotiations for the Mortgage commenced and the Remaining FAR Bonus could not be used on the Property at the time the Mortgage was executed…Once the maximum FAR Bonus was used on the Property, the Remaining FAR Bonus cannot be used to benefit the Property and the Remaining FAR Bonus only has value if [the Plaintiff] can convey it to other developers to use on other properties…Thus, the term 'relating to' refers to rights that can be used on the property or affect the use of the Property".*

The Court granted the Plaintiff's motion for summary judgment, holding that the mortgage was not a lien on, and that the holder of the mortgage had no legal interest in, the Remaining FAR Bonus. In a footnote, however, the Court advised that it had not addressed "whether the FAR Bonus would 'relate to' the Property if the Mortgage had been executed prior to the issuance of the FAR Bonus". CB Frontier LLC v. Wilmington Trust, National Association, 2018 NY Slip Op 32045, decided August 20, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_32045.pdf.

Notices of Pendency/Foreign Actions

Although litigation was not commenced in New York State, the Plaintiffs in a lawsuit filed in an Illinois state court involving five parcels in Stony Point, New York e-filed a notice of pendency against each parcel in Rockland County. The Supreme Court, Rockland County, granted the Defendants' motion to dismiss the notice of pendency. Under CPLR Section 6501 ("Notice of pendency…"), "[a]notice of pendency may be filed in any action in a court of the state of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property…". The Court held that "of the state" in Section 6501 referenced New York courts. Therefore, "[p]laintiffs have improperly invoked a provisional remedy that is not available to them because they do not have any actions pending in any court in New York". New Planet Energy Development, LLC v. MBC Contractors, Inc., 2018 NY Slip Op 28281, decided September 11, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_28281.htm.

Restrictive Covenants

Property owned by the Estate of Marjory D. Rockwell was subdivided into three separate lots when the Estate executed three deeds to separate grantees. Parcel A, now owned by the Plaintiffs, was conveyed subject to a covenant running with the land restricting the land to being used for a single-family dwelling. Parcel B, now owned by the Defendant, was conveyed subject to a covenant running with the land stating that "[t]he land shall be forever wild and shall be used as a research, education and management area for urban wildlife conservation and water resource protection…". The Plaintiffs, alleging that the Defendant had cut trees and removed vegetation on Parcel B, sought to enforce the "forever wild" restriction; they moved for partial summary judgment seeking a declaration that the Defendant was bound by the "forever wild" restriction. The Supreme Court, Albany County, held that the Plaintiffs lacked standing to enforce the restriction and granted the Defendant's cross motion for summary judgment. The Appellate Division, Third Department, affirmed the lower court's ruling. According to the Appellate Division,

> *"…the record is bereft of evidence suggesting that [the Estate and the immediate grantees] intended that parcel A benefit from the restriction…Nor is enforcement of the forever wild restriction by the owners of parcels A and C necessary to ensure compliance with the stated purpose of the covenant because it may be enforced by the Estate or its assigns.*
>
> *Finally, the forever wild restriction does not fall within the category of restrictive covenants that is recognized as being enforceable by an owner of a parcel that derives from a common grantor. In that regard, covenants that are entered into to implement a general, or common, scheme for the improvement or development of real property are enforceable by any grantee…Here, there is no scheme of development or covenant that is common to all three parcels…".*

Gorman v. Despart, 2018 NY Slip Op 05795, decided August 16, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_05795.htm.

Standing/"REBNY"

Local Law 50 ("A Local Law to amend the administrative code of the city of New York, in relation to the preservation of certain hotels…"), enacted in 2015, placed a moratorium on the conversion to full-time residential use of more than twenty percent of "primary hotel space" in Manhattan hotels with at least 150 units. A waiver from the limitation on conversions may be issued by the Board of Standards and Appeals. Local Law 50 can be found on the City Council's web site at https://on.nyc.gov/2P1Zekw.

The Real Estate Board of New York ("REBNY") commenced an Article 78 proceeding seeking an Order annulling Local Law 50 and permanently enjoining New York City from enacting similar legislation without complying with the Uniform Land Use Review Procedure ("ULURP") and New York State's Environmental Quality Review Act ("SEQRA"). REBNY asserted that at least 29 of its members own hotels adversely affected by the local law. The Supreme Court, New York County, granted the City's motion to dismiss, holding that REBNY lacked standing. The Appellate Division, Second Department, reversed, holding that the motion to dismiss should have been denied except as to REBNY's SEQRA claim. According to the Appellate Division,

> *"…REBNY's assertion that its member hotel owners are currently negatively affected by the moratorium is sufficient to establish standing in the plenary action and in the article 78 proceeding under ULURP... REBNY's status as a real estate industry advocate organization makes it an appropriate representative of those members' interests. No individual participation by any of its members is required for it to assert its claims of the statute's facial invalidity [citation omitted]…[As to the SEQRA claim, however] REBNY has not shown that environmental concerns are germane to REBNY's organizational purposes, which focus on the economic and political health of the real estate industry".*

Matter of Real Estate Board of New York, Inc. v. City of New York, 2018 NY Slip Op 05906, decided August 23, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_05906.htm.

First American News

S.H. Spencer Compton, Vice-President and Special Counsel, and David L. Wanetik, Chief Operating Office of First American's Uniform Commercial Code Division, have published "A Breakdown of Title Insurance for Mezzanine Financing". The article can be located at https://bit.ly/2pnrjaE.

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Current Developments since 1997
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