First American Title™
NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Adverse Possession

The Plaintiffs sued for trespass and injunctive relief, alleging that the Defendant was blocking their use of the driveway shared by the Plaintiffs and the Defendant, the owner of the adjoining property. The Plaintiffs also sought a judgment that their property was benefitted by a reciprocal easement over the driveway. The Defendant counterclaimed for trespass and for a judgment declaring that he owned the entire driveway by reason of adverse possession. The Supreme Court, Kings County, granted the Plaintiffs' motion for summary judgment, dismissed the Defendant's claim for adverse possession, dismissed the Plaintiffs' and Defendant's claims for trespass, and directed the Defendant to remove a fence and gate from the Plaintiffs' property within thirty days of notice of entry of the Court's Order. The Court further ordered each party to "cease using or accessing the adjoining property's portion of any driveway, alleyway or yard". Claims for relief based on there being a written easement were also dismissed.

The Court ruled that the Defendant had not established that the use of the driveway was exclusive and that the Defendant's use of the driveway was permissive and not hostile. The written easement, which enabled access to garages on the parties' properties, was no longer valid; the garages were demolished for the construction of the Gowanus Expressway. Yee v. Panousopoulos, Index No. 4817/2014, was decided on July 2, 1018 by Acting Justice Devin P. Cohen of the Supreme Court, Kings County. It has been reported that the decision is being appealed and the Appellate Division, Second Department, has granted a stay pending appeal. (See Mollen, "Realty Law Digest", New York Law Journal, October 2, 2018).

Contracts of Sale

The Plaintiff and the Defendant executed two contracts of sale, pursuant to which the Plaintiff would purchase the Defendant's home and the Defendant would purchase the Plaintiff's home. The transactions were subject to the Defendant obtaining mortgage financing. The Defendant's application for a mortgage was denied and her attorney sent a letter to the Plaintiff's attorney, dated July 18, 2012, cancelling the contracts. Although neither the Plaintiff nor her attorney responded in writing, they did not object when the Defendant's attorney sent a check to reimburse the Plaintiff for her title search expenses as required if the contracts were terminated.

In 2013, both parties again listed their houses for sale. The Defendant received an offer from a third party to purchase her property; the Defendant offered to purchase the Plaintiff's property for more than the amount in the original contract. The Plaintiff, however, asserted that the contract for the Plaintiff to purchase the Defendant's property remained in effect and sued the Defendant for specific performant and for damages for breach of contract.

The Supreme Court, Kings County, holding that the Plaintiff's conduct after receiving the letter of July 18, 2012 indicated that she had accepted the termination of the contract, dismissed the complaint and canceled the notice of pendency. The Appellate Division, Second Department, affirmed the lower court's ruling, stating that

> *"…we agree with the Supreme Court's determination that the plaintiff accepted the defendant's termination of the contracts. The credible evidence adduced at trial established that neither the plaintiff nor her attorney objected to the termination, the plaintiff later placed her property on the market, and she made an offer to purchase the defendant's property for more than double the purchase price set forth in the parties' contracts. The first time the plaintiff took steps to enforce her rights under the contract was after such conduct and nearly one year after the defendant's letter of cancellation. The plaintiff's conduct evidences an intent to abandon the contracts".*

Brisk v. Bloch, 2018 NY Slip Op 06712, decided October 10, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_06712.htm.

Contracts of Sale/Installment Land Contracts

A contract to sell property in Sullivan County, executed in July 2015, required that the contract vendee make a down payment and then twelve non-refundable payments, with the balance of the purchase price being paid on the transfer of title. The vendee was given possession to enable the making of repairs and improvements and he was required to pay the real estate taxes. If the real estate taxes were not timely paid the seller could cancel the contract and retain all nonrefundable payments made.

In February 2016, the seller gave notice that the vendee had defaulted in the payment of real estate taxes and cancelled the contract. The seller further advised that all amounts paid by the contract vendee would be retained as liquidated damages. The contract vendee sued for specific performance or, in the alternative, for an equitable lien against the property in the amount of all the payments that were made. The Supreme Court, Sullivan County, denied the Defendant's motion for summary judgment dismissing the complaint, granted the Plaintiff's cross-motion for summary judgment, and ordered specific performance of the contract. The Appellate Division, Third Department, reversed the lower court's ruling, According to the Appellate Division,

> *"[p]laintiff's failure to pay the property taxes on the date specified constituted a material breach of the contract precluding him from obtaining specific performance…[However, and] notwithstanding plaintiff's material breach, defendant is not entitled to relief in the form of cancellation of the contract and retention of all payments made by plaintiff thereunder…Plaintiff, having made substantial payments to defendant… ,acquired equitable title to the property and an equitable lien in the amount of all payments made under the contract. Thus, despite plaintiff's default under the contract, defendant cannot obtain relief under the provisions of the [contract] rider that provides for cancellation of the contract and forfeiture of all monies paid by the plaintiff as liquidated damages…Defendant's remedies are, instead, limited to foreclosing plaintiff's equitable title or bringing an action at law for the purchase price of the property, neither of which defendant has sought". [citations omitted]*

The Court further held that because the contract could not be summarily cancelled, the Plaintiff was entitled to remain in possession until the Defendant obtained such other relief. Cloke v. Findlan, 2018 NY Slip Op 07220, decided October 25, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_07220.htm.

Contracts of Sale/Specific Performance

The seller notified the Plaintiff, the contract vendee, that the seller was terminating the contract because, inter alia, the Plaintiff had not tendered the full down payment. The Plaintiff sued for specific performance. The Supreme Court, Orange County, granted the Defendant-seller's motion for summary judgment dismissing the complaint and canceled the notice of pendency. The Appellate Division, Second Department, affirmed, holding that the Defendant, as a matter of law, was entitled "prima facie" to a judgment dismissing the complaint. According to the Appellate Division,

> *"[b]efore specific performance of a contract for the sale of real property may be granted, a plaintiff must demonstrate that it substantially performed and that it is ready, willing and able to satisfy those obligations not yet performed'... Here, the defendant established that the plaintiff only tendered $30,000 of the $125,000 down payment. This default constituted a material breach of the contract preventing the plaintiff from obtaining specific performance". [citations omitted]*

Patel v. S. & S. Properties, Inc., 2018 NY Slip Op 06757, decided October 10, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_06757.htm.

Contracts of Sale/Time of the Essence

A contract for the sale of real property, as amended, provided for a time of the essence closing on October 18, 2013. All parties appeared at the closing on that date and the Defendants-sellers were "ready, willing and able to close", but the contract vendee lacked the funds to pay the purchase price. The contract vendee sued to recover its down payment under the contract. The Supreme Court, Bronx County, granted the sellers' motion for summary judgment dismissing the complaint and granted their counterclaims to retain the deposit. The Appellate Division, First Department, affirmed the lower court's ruling, holding that "[s]ince the real estate contract provided that the time of closing is of the essence, performance on the specified date was a material element and plaintiff's failure to perform on that date constituted [a] material breach". Ward Capital Management LLC v. New Pelham Parkway North LLC, 2018 NY Slip Op 06797, decided October 11, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_06797.htm.

Another decision dealing with time of the essence was issued on November 7, 2018 by the Appellate Division, Second Department. MB Shtetl 1 Corp. v. Singh, 2018 NY Slip Op 07422, involved contracts of sale for two adjoining parcels with different sellers and a single purchaser, the Plaintiff. The contract vendee's attorney advised the sellers' attorney that February 23, 2015 was being set as the date of closing, with time being of the essence. The sellers' attorney responded that there would be no sale. The contract vendee then sued for specific performance and for damages. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment and directed the Defendants to sell the properties to the Plaintiff within thirty days of the date of the Court's Order. The Appellate Division reversed and vacated the Supreme Court's Order. According to the Appellate Division,

> *"[t]o prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed on its contractual obligations and was ready, willing and able to convey the property, and that there was no adequate remedy at law' [citations omitted]…Here, the plaintiff failed to establish, prima facie, that it was ready, willing and able to proceed with the sale on the initial closing date or on the subsequent law day [citations omitted]. The evidence submitted by the plaintiff failed to eliminate triable issues of fact as to whether it had the financial ability to purchase the subject properties".*

The Appellate Division's decision, 2018 NY Slip Op 07422, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_07422.htm.

Deeds/Fraud in the Inducement

Plaintiffs sought to recover their property, alleging that they had conveyed their property to the Defendant based on the misrepresentation that the Defendant would assist them in effectuating a short sale to relieve them from a defaulted mortgage debt. The Plaintiffs asserted causes of action for deed reversion, quiet title, unjust enrichment, accounting and fraud in the inducement. The Supreme Court, Kings County, granted the Plaintiffs' motion for summary judgment on their claims for fraudulent inducement, unjust enrichment and quiet title, held that the deed from the Plaintiffs to the Defendant was "void and of no effect", and directed the City Register, on presentation of a certified copy of the Court's Order, "to strike the deed from the record". According to the Court,

> *"…the evidence shows that defendant convinced plaintiffs to transfer property, worth at least $300,000, for only $6,000, and there is no evidence to support such a drastically reduced value. Accordingly, the evidence shows that defendant misrepresented the transaction to plaintiffs to induce them to transfer the property, that plaintiffs justifiably relied on defendant, and that plaintiffs have been injured as a result… Plaintiff's proof of fraudulent inducement entitles plaintiffs to recover ownership of the property".*

The Court noted that while there can be no cause of action for "deed reversion", the "plaintiffs' [sic] are entitled to recover ownership of their property". Holder v. Folsom PL Realty Inc., 2018 NY Slip Op 32677, decided September 13, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_32677.pdf.

In a similar case, the Plaintiff alleged that he was fraudulently induced to convey his property being foreclosed to a Defendant in reliance on the Defendant's promise that the Plaintiff would be able to repurchase the property. When the Plaintiff learned that there was a contract to sell the property, he sued to set aside his conveyance to the Defendant. The Supreme Court, Kings County, denied the Defendants' motion to dismiss the complaint. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division,

> *"…the complaint adequately states a cause of action to cancel the deed and set aside the conveyance…[The Defendants] did not demonstrate that the doctrine of 'unclean hands' bars the plaintiff from seeking equitable relief…Here, the complaint alleges that the plaintiff, a vulnerable and unsophisticated homeowner facing foreclosure, was the victim of a foreclosure rescue scam, from which he was trying to extricate himself…".*

Ortiz v. Silver Investors, 2018 NY Slip Op 07135, decided October 24, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_07135.htm.

Encroachments

A survey showed that a building under construction encroached up to 3.75 inches onto the Plaintiff Church's property. Justice Modica of the Supreme Court, Queens County, serving as an Emergency Justice, held that the encroachments were not de minimis under the circumstances. The Court issued a temporary restraining order, pending a hearing on the Plaintiff's motion for a preliminary injunction, barring the Defendants, the owners of the property being developed and their contractor, from performing any further work on or above the foundation wall of the new building where it adjoined the Plaintiff's property. An undertaking by the Plaintiff was not required because "[t]he defendants' retaining wall was…constructed with complete indifference to the property rights of the plaintiff". The Court took into account the Plaintiff's religious status; its Church building has a cupola or a bay window sitting above but not over the property line. According to the Court,

> *"[i]n an attempt to build aggressively on almost every square inch – indeed fraction on an inch – of this property, the defendants carelessly intruded, not merely on the plaintiff's property, but on an object of religious worship. The defendants should have shown some respect to the plaintiff and its worshipers and pursued avenues of cooperation rather than employ aggressive expansion".*

Saint Mary Romanian Orthodox Church v. 73 M & C Realty LLC, 2018 NY Slip Op 51490, decided October 25, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_51490.htm.

Financial Crimes Enforcement Network ("FinCEN")

As reported in Current Developments, FinCEN has issued Geographic Targeting Orders ("GTOs") requiring certain U.S. title insurance companies to identify the natural persons behind companies used to pay all cash for high-end residential real estate in New York City, Broward, Palm Beach and Miami-Dade Counties in Florida, Bexar County, Texas, Los Angeles, San Diego, San Francisco, San Mateo and Santa Clara Counties in California, and in the City and County of Honolulu in Hawaii.

On November 15, 2018, FinCEN issued a revised GTO which expanded the number of locations impacted by the GTOs to also include Tarrant and Dallas Counties in Texas, Clark County in Nevada, King County in Washington, Suffolk and Middlesex Counties in Massachusetts, and Cook County in Illinois. The new GTO also reduced the monetary threshold for the purchase of residential real property for all of the affected jurisdictions to $300,000 or more. Purchases made with virtual currencies are now included. The new GTO is available at https://bit.ly/2qX4TOf.

Lien Law/Mechanics' Liens

The Appellate Division, Second Department, affirmed an Order of the Supreme Court, Westchester County, granting a property owner's motion to cancel a mechanic's lien because the lien, as filed, failed to comply with Lien Law Section 38 ("Itemized statement may be required of lienor"). The Petitioner commenced a proceeding under Section 38 to compel the lienor to provide a revised itemized statement complying with the requirements of the Lien Law. Section 38 provides, in part, that,

> *"[a] lienor who has filed a notice of lien shall, on demand in writing, deliver…a statement in writing which shall set forth the terms of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which the items were furnished…If the lienor shall fail to comply with such a demand…or if the lienor delivers an insufficient statement, the person aggrieved may petition [a court] for an order directing the lienor...to deliver to the petitioner the statement required by this section…In case the lienor fails to comply with the order [or the court directing such compliance] the court…may make an order canceling the lien".*

According to the Appellate Division, "[i]nasmuch as the work on the project was not completed when the notice of lien was filed and the nature and cost of the work performed under the contract were in dispute, an itemized statement was necessary to enable [the owner] to check [the lienor's] claim…The revised itemized statement, among other things, failed to sufficiently set forth 'the items and cost of labor, or the items and cost of materials'" [citations omitted]. Matter of Plain Avenue Storage, LLC v. BRT Management, LLC, 2018 NY Slip Op 07312, decided October 31, 2018. Is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_07312.htm.

Mortgage Foreclosures/Abandonment

Under paragraph (c) of Civil Practice Law and Rules Section 3215 ("Default judgment") "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the date of default, the court shall not enter judgment but shall dismiss the complaint as abandoned , without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed…".

In March of 2012, an Action was brought to foreclose a mortgage. The Defendant did not answer the complaint. In September of 2013, the Plaintiff moved for the issuance of an Order of Reference and, on August 16, 2014, the Supreme Court, Suffolk County, referred the matter to a referee to compute. In October 2015, the Plaintiff moved for a judgment of foreclosure and sale. The Court granted the Plaintiff's motion, issued a judgment of foreclosure and sale, and denied the Defendant's cross-motion to dismiss the complaint as asserted against him under CPLR Section 3215(c). The Appellate Division, Second Department, modified the lower court's Order, denying the Plaintiff's motion, reversing the issuance of the judgment of foreclosure and sale, and granting the Defendant's cross-motion to dismiss the complaint as asserted against him as abandoned. According to the Appellate Division,

> *"…it is undisputed that the plaintiff did not take proceedings for entry of judgment until it moved for an order of reference more than one year after the defendant's default. Moreover, the plaintiff submitted no opposition to the defendant's cross motion...and, thus, failed to make the requisite showing of sufficient cause to excuse its delay [citations omitted]".*

HSBC Bank USA, N.A. v. Jean, 2018 NY Slip Op 06517, decided October 3, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_06517.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 January 1, 2019 – March 31, 2019 on late payments and assessments of Mortgage Recording Tax and the State's Real Estate Transfer Tax will be 10% per annum, compounded daily. The interest rate to be paid on refunds will be 5% per annum, compounded daily. The notice issued by the Department is posted at https://www.tax.ny.gov/pay/all/int_curr.htm.

Mortgages/One Action Rule

Paragraph "1" of Real Property Actions and Proceedings Law Section 1301 ("Separate action for mortgage debt") states, in part, that "[w]hen final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff…and has been returned wholly or partly unsatisfied".

A promissory note and guarantees of the note were secured by a mortgage on a residential condominium unit in Manhattan and by a mortgage on a property in New Jersey. In January 2017, the Plaintiff filed an Action to foreclose the New Jersey mortgage and obtained a final judgment of foreclosure. When the Plaintiff sued to foreclose the New York mortgage, the New Jersey foreclosure had been voluntarily dismissed and the New Jersey mortgages had been discharged. The Defendants in the New York foreclosure opposed the Plaintiff's motion for summary judgment and cross-moved to dismiss the complaint. They asserted that the New York foreclosure was prohibited by RPAPL Section 1301 because the Plaintiff had obtained a final judgment in the New Jersey foreclosure on the same debt.

The Supreme Court, New York County, held that the New York foreclosure did not violate RPAPL Section 1301(1), which Section "only applies where a final judgment has been rendered in the first action on the debt, which is not the case here". In addition, although the Plaintiff did not comply with RPAPL Section 1301(2), requiring that "[t]he complaint shall state whether any other action has been brought to recover any part of the mortgage debt…", no parties' rights were prejudiced by the failure to comply with Section 1301(2). Further as regards Section 1301(3), prohibiting a plaintiff from commencing another action to recover the mortgage debt without leave of the court in the action that was first commenced, that Section did not apply because the other action was not brought in New York.

The Court granted the Plaintiff's motion for summary judgment, rendering judgment against the Defendants, ordering the appointment of a referee co compute, and granting an order of reference. The Provident Bank v. Shah, 2018 NY Slip Op 32719, decided October 22. 2018, is posted at, http://www.nycourts.gov/reporter/pdfs/2018/2018_32719.pdf.

Recording Act/Bona Fide Purchaser

Unaware that the seller under a contract of sale executed in 2013 had died in 2014, the Plaintiff commenced an Action in 2015 against the seller for specific performance. A notice of pendency was filed against the subject property. Later in 2015, the Executrix of the Estate of the decedent sold the property to Sergio and Silvia Lobato. After learning of the death of the decedent and the transfer of title, the Plaintiff filed another notice of pendency and sued, seeking rescission of the deed and specific performance. The Supreme Court, Suffolk County, granted the Lobatos' motion to dismiss the cause of action seeking rescission of the deed and dismissed the complaint as to them, dismissed the cause of action for specific performance, and canceled the notice of pendency. The Appellate Division, Second Department, affirmed, holding that the complaint failed to state a cause of action for either specific performance or rescission of the deed. According to the Appellate Division,

> *"[t]he prior action and the 2015 notice of pendency were legal nullities because of the decedent's death in 2014 [citation omitted]. Thus, the Lobatos were bona fide purchasers for value of the subject property since neither the prior action or the 2015 notice of pendency provided the Lobatos with 'knowledge of facts that would lead a reasonably prudent purchaser to make inquiry'".*

Caldara v. Monti, 2018 NY Slip Op 07283, decided October 31, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_07283.htm.

Right of First Refusal ("ROFR")

Current Developments issued July 26, 2017 reported the case of Clifton Land Company, LLC v. Magic Car Wash, LLC, decided June 19, 2017 and reported at 2017 NY Slip Op 31303 and 2017 N.Y. Misc. LEXIS 235. The Plaintiff held a right of first refusal to purchase land improved by a car wash under an agreement providing that the Plaintiff would have the right to purchase the land "on the same terms as set forth in the third party offer". The Defendants, the owners of the property subject to the ROFR, entered into a purchase and sale agreement, subject to the Plaintiff's ROFR, to sell the property to a third-party, also a Defendant, which owned a car wash on property across the street. Under the purchase and sale agreement, a restrictive covenant prohibiting the operation of a car wash at the property for ten years was to be included in the deed.

The Plaintiff, seeking to exercise the ROFR, but without "a deed that restricted the use of the property for a car wash", commenced an Action for specific performance and for a declaration that the property could not be conveyed to the third party purchaser. The Supreme Court, Broome County, dismissed the complaint, holding that the Plaintiff had waived its ROFR and the sale with the third party could go forward. According to the Court, "[t]he Right of First Refusal does not require that any third party offer be unconditional [citation omitted]… [and the Plaintiff] has not provided evidence that the 2016 Purchase and Sale Agreement was the result of any collusion between the defendants". The Appellate Division, Third Department, reversed the lower court's Order and granted the Plaintiff's cross-motion for summary judgment on its claims for breach of contract and specific performance. According to the Appellate Division, the evidence demonstrated that the Defendant-seller had

> *"…full knowledge that the transaction had been purposely structured to include the 'poison pill'. The inclusion of the deed restriction within the purchase agreement was precisely targeted to prevent plaintiff – which defendants knew was in the car wash business and had entered into the right of first refusal as a means of preserving its opportunity to operate a car wash on the property – from exercising its first refusal rights. We find that this documentation conclusively demonstrates that defendants improperly structured their agreement to defeat plaintiff's first refusal rights…Under the circumstances presented here, the purchase agreement was thus entered into in bad faith as a matter of law (citations omitted)".*

The decision of the Appellate Division in Clifton Land Company, LLC v. Magic Car Wash, LLC, 2018 NY Slip Op 07027, decided October 18, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_07027.htm.

Standing/Mortgage Assignments/MERS

In 2011, the Appellate Division, Second Department held in Bank of New York v. Silverberg, reported at 86 AD3d 274, that the Bank of New York did not have standing to foreclose a mortgage assigned to it by Mortgage Electronic Registration Systems, Inc. ("MERS") because MERS, being the nominee and mortgagee of record for the underlying mortgage instruments, did not have the authority to assign the note. The Plaintiffs, the owners of the property encumbered by the mortgage in question, brought an Action under Real Property Law ("RPL") Section 329 ("Actions to have certain instruments canceled of record") to cancel of record the mortgage assignments from MERS to the Bank of New York and a later assignment from Bank of New York Mellon, formerly known as the Bank of New York, to itself, and to declare the assignments invalid. The Plaintiff also alleged violations of General Business Law Section 349 ("Deceptive acts and practices unlawful").

The Supreme Court, Suffolk County, granted Defendants' motions to dismiss, holding that the Plaintiffs lacked standing to sue because they were neither parties to nor third-party beneficiaries of the assignments. The Appellate Division, Second Department, modified the lower court's Order as to the Defendants with interests in, or which were involved with, the mortgage assignments. According to the Appellate Division, "[t[he plaintiffs, as owners of the subject property, have standing under Real Property Law Section 329 to challenge the recorded assignments and seek to have them removed as a cloud on their title. [citations omitted]".

Under RPL Section 329, "[a]n owner of real property or of any undivided part thereof…may maintain an action to have any recorded instrument in writing relating to such real property or interest therein, other than those required by law to be recorded, declared void or invalid, or to have the same canceled of record as to said real property, or his undivided part thereof or interest therein…".

The Appellate Division also held that the complaint failed to state a cause of action for a violation of General Business Law Section 329. Silverberg v. Bank of New York Mellon, 2018 NY Slip Op 07167, decided October 24, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_07167.htm.

Statute of Frauds

The Plaintiff alleged that he had entered into an oral agreement with Defendant Khaled, pursuant to which properties would be purchased and held for the Plaintiff's benefit in the name of Defendant Anna Development LLC. The Plaintiff further claimed that he provided financing for purchases made by Anna Development LLC in reliance on that agreement. Among other relief, the Plaintiff sought a declaratory judgment holding that he owned certain parcels acquired by Anna Development LLC. The Supreme Court, Bronx County, granted the Defendants' motion to dismiss the complaint for the failure to state a cause of action, holding that the Plaintiff's causes of action were barred by the statute of frauds, General Obligations Law Section 5-703 ("Conveyances and contracts concerning real property required to be in writing"). The Appellate Division, First Department, affirming the lower court's ruling, stated that "any alleged confidential and fiduciary relationship between [the Plaintiff] and defendant Khaled would not preclude the application of the statute of frauds…". There were no facts shown to apply the promissory estoppel exception to the application of the statute of frauds. Aziz v. Anna Development LLC, 2018 NY Slip Op 07235, decided October 30, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_07235.htm.

Waterfront Property

The Plaintiff and the Defendant each own waterfront properties separated by the Henry Street Basin in Brooklyn. The Plaintiff alleged that the bulkhead on the Defendant's property had been allowed to fall into disrepair, resulting in a loss of fill which interfered with the Plaintiff's use of its property. The Plaintiff sought an injunction requiring the Defendant to repair the bulkhead and damages for private and public nuisance. The Supreme Court, Kings County, granted the Defendant's motion to dismiss the complaint and denied the Plaintiff's motion for a preliminary injunction. The Appellate Division, Second Department, affirmed, holding that the Plaintiff had failed to state causes of action for either private or public nuisance. According to the Court, "the defendant had no duty to prevent the natural encroachment of public waters upon [the Plaintiff's] property", and the "plaintiff's mere allegation that '[t] he deteriorated state of the Bulkhead [was] substantially certain to result in an interference with the public's use or enjoyment of the Henry Street Basin and/or may endanger or injure the health of persons using the Henry Street Basin' was too conclusory and speculative…". Sunlight Clinton Realty, LLC v. Gowanus Industrial Park, Inc., 2018 NY Slip Op 06783, decided October 10, 2018, is posted at http://www.nycourts.gov/reporter/3dseries/2018/2018_06783.htm.

Wishing everyone a joyous holiday season and a healthy and prosperous New Year!

Michael J. Berey
Current Developments since 1997
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