



First American Title™
NATIONAL COMMERCIAL SERVICES

CURRENT DEVELOPMENTS

NEWSLETTER ▶ NO. 200 | SEPTEMBER 10, 2019



200TH
EDITION

First American Title
National Commercial Services

By Michael J. Berey
Senior Underwriting Counsel

Condominiums and Cooperatives/“Housing Stability and Tenant Protection Act of 2019”

On June 14, 2019, Governor Cuomo signed into law Chapter 36 of the Laws of 2019, the “Housing Stability and Tenant Protection Act of 2019”. The Chapter includes, among other things, provisions relating to rent increases, rent adjustments and overcharge complaints, the expansion of protections for rents and as to evictions, and contains a “Statewide Tenant Protection Act.” Part N of Chapter 36, “relating to conversions to cooperative or condominium ownership in New York City”, amends General Business Law Section 352-eeee (“Conversion to cooperative or condominium ownership in the city of New York”) to provide that a non-eviction plan “may not be declared effective until written purchase agreements have been executed and delivered for at least fifty-one percent of all dwelling units in the building or group of buildings or development by bona fide tenants who were in occupancy on the date a letter was issued by the attorney general accepting the plan for filing.” The law has required the execution and delivery of purchase agreements by at least fifteen percent of all dwelling units by bona fide tenants “in occupancy or bona fide purchasers who represent that they intend that they or one or more members of their immediate family intend to occupy the unit when it becomes vacant.”

Section 352-eeee was also amended to add subsection (c)(xii), providing that “tenants in occupancy on the date the attorney general accepts the plan for filing shall have the exclusive right to purchase their dwelling units or the shares allocated thereto for ninety days after the plan has been accepted for filing..., during which time a tenant’s dwelling unit shall not be shown to a third party unless he or she has, in writing, waived his or her right to purchase.” After the ninety-day period, a tenant in occupancy has an additional six-month period in which to exercise a right of first refusal to purchase his or her unit on the same terms as are contained in a contract of sale with a bona fide purchaser. Part N took effect on June 14, 2019 and applies to offering plans submitted after that date.

The legislation enacted as Chapter 36 can be located on the New York State Assembly website at <https://nyassembly.gov/leg/?bn=A08281&term=2019>.

Constructive Trusts

The Plaintiff alleged that in 2006 the Defendant and he agreed that the Defendant would transfer title to property in Brooklyn to the Plaintiff when the Plaintiff obtained permanent residency status, achieved “good financial credit”, and if the Plaintiff, in the interim, made all payments on the mortgage and the property’s carrying costs. The Plaintiff claimed that in reliance on that promise he paid approximately \$550,000 toward the mortgage and for carrying costs for the property. The Plaintiff sued for the imposition of a constructive trust and to recover damages for unjust enrichment. The Supreme Court, Kings County, denied the Defendant’s motion to dismiss; the Appellate Division, Second Department, affirmed the lower court’s ruling.

The Appellate Division held that the allegations of the complaint sufficiently stated a cause of action for the imposition of a constructive trust. According to the Appellate Division,

“[t]he complaint, as amplified by the plaintiff’s affidavit in opposition to the defendant’s motion, alleged that the plaintiff made significant expenditures of time and money with respect to the subject property for more than 10 years in reliance upon the defendant’s promise, and that the defendant was unjustly enriched by the plaintiff’s payments toward, inter alia, the mortgage, electric, and water bills for the subject property.”

The Court noted that the statute of frauds was not a defense to a properly pleaded cause of action to impose a constructive trust. It further held that complaint sufficiently pleaded a cause of action for unjust enrichment. *Hernandez v. Florian*, 2019 NY Slip Op 05111, decided June 26, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_05111.htm.

In another decision of the Appellate Division, Second Department, dealing with the imposition of a constructive trust, the Plaintiff conveyed title to two parcels of real property in Kings County (the “Decatur and Clarkson parcels”) to the Defendant, reserving a life estate to himself in each parcel. The Plaintiff and the Defendant agreed that the Defendant would not mortgage, sell, lease or otherwise transfer or encumber either property without the express consent of the Plaintiff. The Plaintiff alleged that the Defendant, without his consent, mortgaged the Decatur and Clarkson parcels and used the loan proceeds to purchase another parcel in Brooklyn (the “Putnam property”). The Plaintiff further alleged that the Defendant failed to account to the Plaintiff for income received from the Decatur and Clarkson properties. The Plaintiff sought an accounting with respect to the Decatur and Clarkson parcels and the imposition of constructive trusts on the Decatur and Clarkson parcels and the Putnam property.

The Supreme Court, Kings County, held that the Plaintiff was entitled to a constructive trust with respect to the Decatur and Clarkson parcels and directed the Defendant to reconvey them to the Plaintiff. The Court dismissed causes of action to impose a constructive trust on the Putnam property, for an accounting, and for punitive damages. The Appellate Division, Second Department, affirmed the lower court’s ruling, holding that the Putnam property was not subject to a constructive trust “since the plaintiff never had any interest in that property”, as modified to allow for an accounting. According to the Appellate Division,

“[t]he imposition of a constructive trust...without also granting an accounting to determine the amount to which the plaintiff is entitled, was not ‘appropriate to the proof received (CPLR 3017[a]; [citation omitted]). The trial evidence established that the Decatur and Clarkson properties remaining encumbered by several mortgages improperly given by the defendant. An accounting to ascertain the values of the properties, the mortgages, and any rental or other income derived from the properties that was improperly withheld by the defendant was necessary to grant complete relief to the plaintiff in accordance with the equities of the case [citation omitted].”

The matter was remitted to the Supreme Court for further proceedings on the cause of action for an accounting. *Burns v. Burns*, 2019 NY Slip Op 05513, decided July 10, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_05513.htm.

Contracts of Sale/Doctrine of Merger

Property in Staten Island was sold in June of 2012. In three separate Actions commenced in 2018, the Plaintiff sued to recover monies it claimed should have been disbursed to it out of escrows held for the closing. However, the title insurance agent represented that all escrowed funds were disbursed, and the attorneys for the purchaser asserted that they never had the money alleged to have been in their possession. The Supreme Court, Richmond County, granted the Defendant-purchaser’s motion to dismiss the Action as to it and denied the Plaintiff’s cross-motion to consolidate the three Actions, one against the purchaser, one against the purchaser’s law firm, and the other against the title insurance agent. The Court held that the Plaintiff’s claims, “in their entirety”, were barred by the merger doctrine. According to the Court,

“[t]he obligations and provisions of the Purchase Agreement were merged in the deed and extinguished by the closing. The Court finds that Plaintiff has not shown that there was a clear intent by the parties that a particular provision relating to Plaintiff’s claims was to survive the deed. Additionally, none of Plaintiff’s claims are collateral undertakings which would allow this Action to survive Defendant’s Motion... Since Plaintiff’s claims are regarding an integral part of the principal purpose of the contract, namely the conveyance of title to real property, such claims cannot be considered collateral undertakings.”

The Court held that the Plaintiff could not rely on the fraud exception to the merger doctrine. The Plaintiff had “failed to allege that a legal duty independent of the contract itself has been violated.” *Vetro Asset Corp. v. Veterans Realty Corp.*, 2019 NY Slip Op 31836, decided May 9, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_31836.pdf.

Contracts of Sale/Statute of Frauds

The Defendant and non-party Aron Froimovits signed a one-page handwritten agreement pursuant to which the Defendant was to sell to Froimovits or his assignee two properties. A single purchase price and a requirement for a contract deposit was included in the agreement. Plaintiff, Froimovits' assignee, sued for specific performance as to one of the parcels and for damages for breach of contract. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Kings County, granting the Defendant's motion for summary judgment. According to the Appellate Division, to satisfy the statute of frauds, General Obligations Law Section 5-703,

"...the essential terms of a contract typically include the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities [citations omitted]...Here, ...[t]he agreement did not state all of the essential terms, including allocation of the price between the two properties, whether one property could be sold without the other, the terms of payment, and the risk of loss during the sale period, and did not mention the adjustments for taxes and utilities which would customarily be included in a transaction of this nature [citations omitted]. In addition, the agreement did not include the necessary parties because not all of the owners of the properties executed the agreement [citation omitted]."

443 Jefferson Holdings LLC v. Sosa, 2019 NY Slip Op 05376, decided July 3, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_05376.htm.

False Pretenses/Equitable Mortgages

Rapsil Corporation, controlled by Defendant Rafael Pantoja, conveyed real property to Pantoja, who obtained a mortgage from foreclosing Plaintiff CitiMortgage. The grantor's signature on the deed was unacknowledged. Proceeds of the mortgage loan were applied to pay off a mortgage held by the Chase Mortgage Company. Rapsil Corporation thereafter conveyed the same property to a bona fide purchaser. CitiMortgage commenced an Action to foreclose the Pantoja mortgage. The Supreme Court, Bronx County, granted the Plaintiff's motion for summary judgment. The Appellate Division, First Department, reversed, however, holding that the Plaintiff had only an equitable lien in the amount of the Chase mortgage because its mortgage was invalid. According to the Appellate Division,

"[a]lthough the deed that conveyed the property from Rapsil to Pantoja was unacknowledged, which ordinarily would render it only voidable, because Pantoja controlled Rapsil, the deed was made under false pretenses and was therefore void ab initio [citations omitted]. Accordingly, the CitiMortgage mortgage was invalid as well [citation omitted]."

CitiMortgage, Inc. v. Pantoja, 2019 NY Slip Op 05481, decided July 9, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_05481.htm.

Lien Law/Mechanics' Liens

The Supreme Court, New York County, dismissed a cause of action brought against a condominium and its management company to foreclose a mechanic's lien for façade work performed under a contract the Plaintiff had entered into with the condominium's Board of Managers. All of the units of the condominium were objects of the Action. The Court, vacating and canceling the mechanic's lien, held that the mechanic's lien was an invalid "blanket lien" on the entire property, not limited to units that were claimed to be subject to the lien, that the mechanic's lien encumbered common elements without the consent of all unit owners, and that the lien, in identifying only the condominium as the owner, did not specify the correct names of the unit owners. According to the Court,

"[w]hile Lien Law Section 12-a ["Amendment"] permits amendment of the notice of lien nunc pro tunc, the notice at issue contains more than one defect and thus there has not been substantial compliance with the Lien Law to warrant such an amendment."

The Court granted the Plaintiff's motion to serve a supplemental summons and an amended complaint adding the Board of Managers as a Defendant. *Jerrick Associates, Inc. v. Rudd Realty Management Corp.*, 2019 NY Slip Op 31958, decided July 9, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_31958.pdf.

Mortgage Foreclosures/Entry of Judgment After Default

Under subdivision (c) of Civil Practice Law and Rules ("CPLR") Section 3215 ("Default"), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default [of a defendant for the failure to appear, plead or proceed to trial], 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. A motion by the defendant under this subdivision does not constitute an appearance in the action."

A mortgage foreclosure was commenced in November 2008. In August 2009, the Plaintiff moved for an Order of Reference, which motion was denied without prejudice by the Supreme Court, Suffolk County. In April 2013, noting that the case had been inactive, the Court directed the Plaintiff to move for summary judgment and for an Order of Reference within 90 days; if the Plaintiff did not do so the Action would be dismissed. In August 2017, the Supreme Court vacated the 2013 Order and restored the foreclosure to the calendar. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division,

"[a]s long as the plaintiff has initiated proceedings for the entry of a judgment within one year of the default, there is no basis for dismissal of the complaint pursuant to CPLR 3215(c) [citations omitted]. Here the plaintiff moved for an order of reference within one year of the default. Thus, there was no basis for dismissal under CPLR 3215(c)."

The Appellate Division also held that the Supreme Court did not have the authority to dismiss pursuant to CPLR Section 3216(b) ("Want of prosecution"); a 90-day notice had not been served and the issue had not been joined. *US Bank National Association v. Myer*, 2019 NY Slip Op 06014, decided July 31, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06014.htm

Mortgage Foreclosures/Intervenors

A mortgage foreclosure was commenced in 2013 and a judgment of foreclosure and sale was issued in 2014. In 2017, non-party occupants of the property under foreclosure, claiming a right in the property, moved to intervene and, thereupon, to have the judgment vacated and the complaint dismissed for the failure to join them as necessary parties. The Supreme Court, Queens County, denied the intervenors' motion. The Appellate Division, Second Department, affirmed. According to the Appellate Division,

"...the appellants' motion was untimely since it was made more than 4 years after a notice of pendency was filed and the action was commenced on April 9, 2013, more than 2½ years after the judgment of foreclosure and sale was issued on October 29, 2014, and more than 19 months after a notice of sale, advising that the premises were to be sold at public auction, was served on the occupants of the premises, among others, on November 4, 2015 [citations omitted]."

US Bank NA v. Osuji, 2019 NY Slip Op 06013, decided July 31, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06013.htm.

Mortgage Foreclosures/Statute of Limitations

The Supreme Court, Nassau County, denied the Defendants' motion to dismiss the foreclosure of a mortgage commenced in October 2015 as being barred by the six-year statute of limitations under CPLR Section 213 ("Actions to be commenced within six years..."). The Plaintiff first commenced the foreclosure of its mortgage in 2009; that proceeding was discontinued without prejudice in 2013. The Appellate Division, Second Department, reversed the lower court's Order, and granted the Defendants' motion to dismiss. According to the Appellate Division,

"[t]he filing of the summons and complaint in the prior action on April 29, 2009, constituted a valid election by the plaintiff to accelerate the mortgage debt [citation omitted]. Thus, the six-year limitations period had expired when the plaintiff commenced this action on October 29, 2015...The plaintiff's contention that it affirmatively revoked its election to accelerate the debt by voluntarily discontinuing the prior action, without more, is without merit [citation omitted]."

"A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action' [citations omitted]."

HSBC Bank, N.A. v. Vaswani, 2019 NY Slip Op 05393, decided July 3, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_05393.htm.

In another case involving the application of the statute of limitations to a mortgage foreclosure, the Defendant-mortgagor alleged that the foreclosure was commenced more than six years after a previous foreclosure of the same mortgage was dismissed. In response, the Plaintiff moved for summary judgment, asserting that it sent a notice de-accelerating the mortgage to the Defendant and moved for summary judgment and for the appointment of a Referee to compute. The notice stated the following: "To the extent that any previous acceleration may be applicable, we hereby revoke any prior and currently applicable acceleration of the loan, withdrawing any prior demand for immediate payment of all sums secured by the security instrument and re-institute the loan as an installment loan." The Defendant claimed that the notice was ineffective because both she, as the borrower, and the lender had to consent to a de-acceleration of the loan. The Supreme Court, New York County, denied the motions of both parties.

The Supreme Court, New York County, ruled that the Defendant's "claim that both sides need to consent to de-accelerate the loan is not supported..." As to the Plaintiff's motion, however, there was an issue of fact as to whether the acceleration of the loan was properly revoked. According to the Court,

"[a]lthough the de-acceleration letter mentions that the loan was reinstated as an installment loan, there is no mention of how much [the Defendant] owes or when the payment is due. And plaintiff did not submit the monthly statements it presumably sent to [the Defendant] after it allegedly revoked the prior acceleration. Simply put, attaching only a letter purporting to revoke an acceleration that mentions nothing about the amount due is not enough to establish, as a matter of law, that plaintiff engaged in an affirmative act to de-accelerate...[T]he affirmative act must include sending bills as if the loan was not accelerated."

U.S. Bank Trust, N.A. v. Stewart, 2019 NY Slip Op 31795, decided June 17, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_31795.pdf.

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance announced that the interest rate charged for the period October 1, 2019 – December 31, 2019 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. This information is posted at https://www.tax.ny.gov/pay/all/int_curr.htm.

Notice of Pendency

When the Plaintiff, acting pro se, commenced an Action in 2013 to impose a constructive trust on real property she had owned she filed a notice of pendency. The Plaintiff thereafter sought leave to amend the complaint to add a defendant who the Plaintiff accused of having committed various tortious acts relating to the property, and to file an amended notice of pendency. The Supreme Court, Kings County, granted the Plaintiff's motion insofar as it sought leave to amend the complaint, but the Court denied leave to amend the notice of pendency to reflect the addition of the added defendant. According to the Court,

"[t]he original verified complaint demanded a judgment that would affect title to, or the possession, use or enjoyment of, real property. Therefore, the filing of the original notice of pendency was proper...[T]he complaint as amended does not impair the validity of the original notice of pendency...[and] there is no statutory or case law authority for amending the notice of pendency simply to add a party to the caption...It is a legally unsupported, unnecessary and superfluous act."

Maynard v. Walker, 2019 NY Slip Op 51200, decided July 26, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_51200.htm.

Recording Act/Bona Fide Purchaser

Current Developments dated April 11, 2013 reported on the March 6, 2013 ruling of the Appellate Division, Second Department, in *Beltway Capital, LLC v. Soleil*, reported at 104 AD3d 628 and at 2013 WL 811787. In that case, the Defendant in an Action to foreclose a mortgage (the "Soleil mortgage") moved to dismiss the complaint and cancel the notice of pendency, swearing falsely in an accompanying affidavit that the obligation secured by the mortgage had been paid. On the failure of the Plaintiff to appear and oppose the motion, the Supreme Court, Kings County, issued an Order dismissing the Action, cancelling the notice of pendency, and discharging the mortgage. The Defendant then sold the property; the purchaser, Deborah Hughes, obtained a mortgage from Sperry Associates Federal Credit Union which was later refinanced.

Beltway Capital LLC ("Beltway"), the assignee of the Soleil mortgage, under an assignment executed before the Court's Order was issued but recorded after the Order was recorded, moved to be substituted as Plaintiff, for the Supreme Court to vacate the assignor's default in responding to the motion to dismiss, and for the Court to vacate its Order. The Supreme Court, relying on the misrepresentation that the mortgage debt was paid, agreed that the mortgage was erroneously discharged. It also permitted Beltway to be substituted as Plaintiff. However, it declined to reinstate the mortgage and held, following limited discovery, that to reinstate the mortgage would not be "equitably appropriate" since Deborah Hughes and others had reasonably relied upon the recorded Order of discharge.

The Appellate Division held that the Supreme Court should have granted the motion to vacate the Order and should have reinstated the mortgage. According to the Court, "[o]nly bona fide purchasers and lenders for value are entitled to protection from an erroneous discharge of a mortgage based upon their detrimental reliance thereon [citations omitted]." Given that only limited discovery was conducted, it was improper for the court to determine, on this record, that Hughes established that she was a bona fide purchaser for value." The Appellate Division, in effect, remitted the matter for further discovery.

On further consideration, the Supreme Court held that Deborah Hughes was a bona fide purchaser and that her mortgagee was a bona fide encumbrancer. The Court granted their motions for summary judgment and ordered the discharge of the Plaintiff's mortgage. The Appellate Division, Second Department, affirmed, stating the following:

"Hughes demonstrated that, at the time she purchased the subject property for value..., an order of the Supreme Court dated July 18, 2008, which, inter alia, canceled and discharged the Soleil mortgage... had been duly recorded and that she was entitled to rely upon that order without conducting any further inquiry. Her deed was recorded...well before Beltway moved...to vacate the 2008 order discharging the Soleil mortgage. Thus, Hughes was not on notice at the time of the purchase of any prior lien against the property which would lead a reasonably prudent purchaser to make inquiry, and there was nothing on the face of the 2008 order that would have alerted Hughes to Beltway's claim..."

"Similarly, Sperry met its prima facie burden by demonstrating that, at the time it granted a mortgage to, among others, Hughes, secured against the subject property, the 2008 order had been duly recorded, that a title search did not reveal the prior lien, and that it was entitled to rely upon the title search and 2008 order without conducting any further inquiry into the propriety of the recorded order [citations omitted]."

Beltway Capital LLC v. Soleil, 2019 NY Slip Op 06057, decided August 7, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06057.htm.

In another case involving the Recording Act, the Plaintiffs claimed that a deed executed and recorded in 2009, purporting to transfer title to property in Brooklyn from one of the Plaintiffs to his son, Godfrey, was forged. The Plaintiffs sued the son, claiming that they were deprived of their interests in and the income from this and three other properties in Queens County.

In September 2015, 1822 Nostrand Realty LLC ("Nostrand Realty"), the third-party Plaintiff and intervenor/Defendant, purchased the property from Godfrey. The title report produced for the closing indicated that Godfrey owned the property; it did not set forth any notice of pendency or pending lawsuits. Nostrand Realty asserted that it was a bona fide purchaser and, alternatively, as the holder of an equitable mortgage, an encumbrancer for value. The Plaintiffs' lawsuit was commenced in February 2015, but the notice of pendency was filed after title was transferred to Nostrand Realty.

The Supreme Court, Queens County, granted Nostrand Realty's motion for summary judgment and dismissed the complaint as to it. The Court held that the doctrine of laches precluded the Plaintiffs from setting aside the deed into Nostrand Realty. The Court noted the father's "neglect and delay in addressing Godfrey's blatant, adverse and continuous conduct giving rise to this action."

The Plaintiffs also argued that Nostrand Realty knew or should have known that there was an issue relating to the title to the property because the property was purchased for less than its fair market value. The Court ruled that this argument was unsubstantiated; evidence was not submitted as to the market value of the property or in support of the claim that Nostrand Realty purchased it for less than its fair market value. *Olowofela v. Olowofela*, decided June 17, 2019, was reported in the *New York Law Journal* on July 17, 2019.

Restrictive Covenants

The Plaintiff and the Defendant each own lakefront property within a subdivision in Chautauqua County. Covenants and restrictions ("C&Rs") were filed for the subdivision when it was developed in 1962. The C&Rs afford all owners of land in the subdivision "the right to enforce the same by appropriate court proceedings."

The Plaintiff notified the Defendant that site plans for a house to be constructed on the Defendant's property would violate the C&Rs height, side line and set back restrictions. The Defendant, believing that the construction would comply with the C&Rs, constructed the house. The Plaintiff sought to enjoin the Defendant from violating the C&Rs and to have buildings constructed in violation of its provisions removed. The Supreme Court, Chautauqua County, dismissed the amended complaint; the Appellate Division, Fourth Department, modified the lower court's Order to reinstate, in part, the amended complaint. A new trial was granted.

The Appellate Division affirmed the dismissal of the cause of action alleging that the house violated the provision limiting construction on any lot in the subdivision to single family dwellings "not more than one and one-half stories in height." According to the Court, "[r]estrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable' [citation omitted]" but, here, "there was no clear and convincing proof of what" was meant by use of the term "stories". As to the other causes of action, the Appellate Division found there was clear and convincing evidence that the Defendant's house violated the ten-foot side line limitation and the provision requiring that "[n]o building shall be constructed...closer than 100 feet from the lake line."

The Supreme Court, although finding a violation of at least one of the restrictive covenants, granted the motion to dismiss because the Defendant's home was already built and the Plaintiff, not having sought relief against other property owners who had violated the covenants and restrictions, could not seek equitable relief. However, according to the Appellate Division,

"[p]laintiff is 'entitled to ignore inoffensive violations of the restriction[s] without forfeiting [her] right to restrain others which [she] find[s] offensive [citation omitted]. Moreover, the court's reluctance to grant equitable relief where, as here, the house has already been built was not a valid basis for granting defendant's motion [to dismiss]. Defendant 'proceeded with construction of the [house] with knowledge of the restrictive covenants and of plaintiff[s] intention to enforce them [citations omitted]."

Kleist v. Stern, 2019 NY Slip Op 05888, decided July 31, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_05888.htm.

Zoning Lot Mergers/Parties in Interest

The Appellate Division, Second Department, affirmed a ruling of the Supreme Court, New York County, denying the Defendants' motion to dismiss, holding that a ground lessee is a party in interest whose consent is required for a zoning lot merger. According to the Appellate Division, "[a] ground lease tenant has an interest in a tract of land akin to the fee owner." Little Cherry, LLC v. Cherry Street Owner LLC, 2019 NY Slip Op 05497, decided July 9, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_05497.htm.

Michael J. Berey
Current Developments since 1997
No. 200
September 10, 2019