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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Cemetery Lands

The Appellate Division, Second Department, in Matter of Ferncliff Cemetery Association v. Town of Greenburgh, held that "the sale of land designated for cemetery purposes to persons or entities with no affiliation to the cemetery, and with no authority of their own to operate a cemetery, constitutes an unequivocal act of abandonment of the right to use that land for cemetery purposes…[T]he right to use land as a cemetery is only a 'privilege or license' to make interments, which may be abandoned [citations omitted]." This case, 2020 NY Slip Op 02925, decided May 20, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02925.htm.

Commercial Leases/"Yellowstone" Injunction

A landlord of premises served a notice of default on its tenant because of odors at the leased premises resulting from a fire and debris resulting from the fire. The tenant sought a Yellowstone injunction, to maintain the status quo until the dispute with its landlord was resolved. Asserting that Building Code violations were issued, the landlord claimed that the defaults could not be cured; therefore, the injunction should not issue. The Supreme Court, Kings County, granted the Yellowstone injunction, conditioned on the filing of an undertaking for $9,000. According to the Court,

> *"…if the tenant engaged in conduct that required prior landlord consent without such consent then an incurable breach would occur, especially where the breach cannot be undone [citation omitted]… [H]ere there are questions of fact whether the Building Code Violations refer to actual work being performed improperly or whether the tenant was merely cleaning up the premises following the fire as they assert. Thus, when there are questions of fact a Yellowstone should not be denied since that would be 'tantamount to adjudicating the merits of the underlying case, which is beyond the scope of the application' [citations omitted]."*

Fusulag Corp. v. Bock Realty Corp., 2020 NY Slip Op 31727, decided June 2, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31727.pdf.

Condominiums/Limited Common Elements

In an action commenced by a condominium's Board of Managers on behalf of the Board and all unit owners, the Supreme Court, New York County, granted a preliminary injunction enjoining the Defendants, the owners of a unit in the condominium, from preventing the Board and individual unit owners from accessing the roof deck appurtenant to the Defendants' unit to repair and maintain HVAC condensers servicing various Units. The roof deck in question, a private roof terrace, is under the condominium's Declaration a limited common element for the exclusive use of the Unit owned by the Defendants' and another Unit. As to utilities serving the building, the Declaration grants the Board an easement "for the proper operation and maintenance of the Building or any portion thereof or for the general health or welfare of the owners, tenants and occupants of the appropriate Units…"

A preliminary injunction could be granted on showing a likelihood of success and irreparable injury if the injunction is denied, and if the equities are in the Plaintiff's favor. According to the Court, the Board demonstrated a likelihood of success on the merits.

> *"[The Defendants] cannot refuse access for this purpose because even if the HVAC condensers [needing to be serviced] are not considered a limited common element, Article 11(b) of the Condominium's Declaration grants the Board and individual unit owners an easement for the maintenance at issue…*

The Board also established that there would be irreparable injury if the injunction was not granted.

> *"Here, the Board has demonstrated that continued denial of access to the roof deck adjacent to [the Defendants' Unit] for HVAC repair and maintenance has and can continue to cause irreparable harm to the individual unit owners."*

Further, the balance of the equities favored the Plaintiff.

> *"With no other practical method of gaining access to the HVAC condensers, the potential for great harm to individual unit owners who do not have functioning air conditioning outweighs the minor inconvenience of allowing occasional access to [the Defendants'] unit, with notice, and the lack of any actual harm to [the Defendants]."*

The Court required that one day's notice be given to the Defendants prior to entry to their Unit for HVAC maintenance and repairs. Board of Managers of Carriage House Condominium v. Healy, 2020 NY Slip Op 31241, decided May 8, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31241.pdf.

Contracts of Sale/Breach

A contract of sale allowed for a structural inspection of the Plaintiff's home prior to closing. If there were structural defects that would cost over $1,500 each to repair, the Defendant-purchaser could cancel the contract or have 10 days to enter into a further agreement with the seller. The Defendant provided notice of defects which would allow her to cancel, but she elected to defer the cancellation of the contract by 10 days. During that period, the seller indicated that she would not make any repairs or provide any concessions; the property would be sold "as is". The Defendant attended the closing but refused to close.

The Plaintiff sued for breach of contract, and other causes of action. The Supreme Court, Schenectady County, granted the Plaintiff's motion for summary judgment on the breach of contract claim. The Court awarded the Plaintiff damages representing the difference between the price under the Plaintiff's contract with the Defendant and the price under the contract with the subsequent purchasers who took title, and additional interest accrued on the mortgages which had been outstanding. The Appellate Division, Third Department, affirmed the relief granted. According to the Appellate Division, when proceeding to a scheduled closing, the parties

> *"…agreed to be bound by the original contract and - notwithstanding defendant's assertions to the contrary – defendant waived her right to demand concessions related to any of the defects revealed by the prior inspections [citation omitted]…Defendant's refusal to complete the transaction constituted a breach of contract."*

Prendergast v. Swiencicky, 2020 NY Slip Op 02686, decided May 7, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02686.htm.

Contracts of Sale/Escrow/Interest

The Supreme Court, New York County, held that the Plaintiff-contract vendor was, due to the contract vendee's default under the terms of the contract, entitled to retain the deposit which was held by the escrow agent in an interest-bearing IOLA account. The Court further held that the Plaintiff was, under the contract, entitled to recover its attorneys' fees. However, the Court declined to award the Plaintiff prejudgment interest under subsection (a) of Civil Practice Law and Rules Section 5001("Interest to verdict…").

"The terms of the purchase agreement, requiring that the deposit be placed in an interest-bearing account, so that the party entitled to the deposit would receive compensation for the deprivation of its use of the money in the form of the accrued interest, sufficiently demonstrates that additional interest paid at the statutory rate was not contemplated by the parties at the time the contract was formed, and that the interest accrued should be the exclusive remedy of the wronged party [citations omitted]." HFZ 301 West 53rd Street Owner LLC v. Xiuli Xue, 2020 NY Slip Op 31338, decided April 17, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31338.pdf.

Contracts of Sale/Letter Agreement

A contract of sale provided that "none of the representations…or other obligations of Seller hereunder shall survive the closing, except as expressly provided herein and then only for a period of one year from the Closing Date." The Defendant-seller and the contract vendee also entered into a Letter Agreement under which the seller deposited $300,000 in escrow pending the obtaining of a certificate of occupancy by June 30, 2019. The contract, but not the Letter Agreement, was assigned to the Plaintiff. The certificate of occupancy was not obtained by June 30, 2019; the Plaintiff sued to recover the escrow. The Defendant moved to dismiss the complaint because the Plaintiff had no rights under the Letter Agreement. Further, claimed the Defendant, there was no cause of action because the Letter Agreement was not enforceable more than one year after the date of the closing. The closing took place on June 28, 2018.

The Supreme Court, Kings County, denied the Defendant's motion to dismiss and held that the funds would remain in escrow. According to the Court,

> *"...the Letter Agreement was clearly entered into 'upon and subject to all of the terms, covenants and conditions as are more particularly described in the Agreement' (see, Letter Agreement). Thus, surely, all the obligations of the seller flowed to the plaintiff. Although the Letter Agreement was not actually assigned to the plaintiff that does not prevent the plaintiff from exercising any rights contained therein since the Letter Agreement was merely an amendment to the contract which was validly assigned."*

Regarding the contract provision that the Seller's obligations could survive the closing "only for a period of one year from the Closing Date",

> *"[this limitation] can clearly not refer to the requirement the seller obtain the certificate of occupancy. [Under the Letter Agreement] it was possible for the seller to secure the certificate of occupancy by June 30, 2019 and yet that date is outside the one year upon which the seller's obligations cease. Thus, pertaining to the certificate of occupancy, [the contract's one-year limitation] is an impossibility and cannot bar this lawsuit."*

1034 Flatbush Avenue LLC v. Maddd Properties LLC, 2020 NY Slip Op 31831, decided June 11, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31831.pdf.

Contracts of Sale/Religious Corporations

Current Developments dated January 13, 2020 reported a October 11, 2009 decision of the Supreme Court, Bronx County in which involving an agreement to sell St. James Episcopal Church, in Bronx County to the Plaintiff. The Defendant, The Corporation of the Rector, Churchwardens, and Vestrymen of Saint James Episcopal Church, holds title to the property in trust for the Episcopal Diocese. The Agreement, in part, states that

> *"Seller will as expeditiously as possible take all steps required under the Canons of the Episcopal Diocese of New York, The Episcopal Church in the United States, the New York Religious Corporations Law, Section 511 of the New York Not-For-Profit Corporation Law (the 'Consent') for the approval of this Agreement, and the transactions contemplated hereby, a justice of the Supreme Court of the State of New York (jointly, the 'Consenting Parties'), including without limitation, application to the Standing Committee and to the Bishop of the Episcopal Diocese of New York and commencement of a proceeding in the Supreme Court of the State of New York for approval thereof…"*

After the Standing Committee and the Bishop refused to approve the proposed sale, the Plaintiff sued for specific performance and to recover damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. The Supreme Court, Bronx County, in granting the Defendant's motion for summary judgment, stated that

> *"[t]his court cannot substitute its judgment for that of the Diocese Canons. St. James complied with the terms of the Agreement, which required that it undertake to obtain the approval for the proposed sale by submitting a Notice of Intention to the Bishop and the Standing Committee…[I]t could not guarantee that approvals would be obtained…"*

As to the cause of action for breach of the covenant of good faith and fair dealing, the Court found that "[p]laintiff has failed to show that St. James prevented performance of the Agreement or that it withheld any benefits of the Agreement from plaintiff, thus, it has not proved that St. James breached the covenant of good faith and fair dealing…" As to unjust enrichment, that cause of action "contemplates an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties."

The Appellate Division, First Department affirmed the lower court's ruling in a decision entered July 9, 2020. According to the Appellate Division,

> *"…the motion court was correct that it could not order specific performance of the contract where the Bishop, Standing Committee and Diocese had refused to approve the sale (Religious Corporations Law Section 12(2) [citations omitted]. Furthermore, plaintiff's claim for breach of the covenant of good faith and fair dealing was properly dismissed as duplicative of it breach of contract claim [citations omitted], and the claim for unjust enrichment was precluded by the existence of a valid express agreement with regard to the same subject matter [citations omitted]."*

2520 Jerome Avenue, LLC v. The Corporation of the Rector, Churchwardens and Vestrymen of Saint James Episcopal, 2020 NY Slip Op 03844 is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03844.htm.

Contracts of Sale/Warranties

The day after the Defendant-builder transferred title to the Plaintiffs, the house on the property conveyed was substantially destroyed by a fire. The Plaintiffs' losses were not insured because their insurance agent allegedly failed to obtain homeowner's insurance. The Plaintiffs sued the Defendant claiming negligence in the design and construction of the home, seeking to recover for damages to the house and to their personal property, and for consequential damages to cover the cost of their temporary living arrangements.

The contract of sale contained a standard new construction limited warranty (a "2-10 limited warranty") and expressly excluded and disclaimed all other warranties, including the housing merchant implied warranty in General Business Law Section 777-a ("Housing merchant implied warranty"). The housing merchant warranty can be excluded or modified by a limited warranty written in plain English, including the disclosures set forth in General Business Law Section 777-b ("Exclusion or modification of warranties"). The 2-10 limited warranty in the contract excluded damage caused or made worse by a fire.

The Supreme Court, Suffolk County, dismissed the complaint, holding that the Plaintiffs did not have a cause of action against the developer. (The action would continue as to the insurance agent). According to the Court,

> *"…the parties' relationship is governed exclusively by the contract of sale, the rider and the 2-10 warranty…Nor is the fire exclusion void as against public policy as the plaintiffs contend…[T]he risk of damage was allocated to the plaintiffs as part of [a] bargained-for arrangement wherein all parties to the contract of sale and riders that incorporated the 2-10 warranty were represented by counsel; … the limitation on consequential damages in this case is not unconscionable or void as against public policy."*

Maddock v. Haines, 2020 NY Slip Op 31657, decided May 7, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31657.pdf.

Deed an Equitable Mortgage

In 2009, Defendant Grigg obtained purchase money financing from the Plaintiff, The loan provided that if the loan was not repaid within ninety days the lender could "file a joint deed in the property records…instead of following a regular foreclosure proceedings [sic]." The Defendant executed a deed from himself to himself and the Plaintiff. In 2010, the Defendant executed an allegedly fraudulent deed to himself from the Plaintiff and, then, a deed (the "Romond Deed") to the Romond Defendants. Defendant Grigg defaulted under the loan.

The Plaintiff commenced an action for repayment of the note, seeking also rescission of the Romond Deed and a judgment holding that deed null and void. The Supreme Court, Nassau County, granted the Romond Defendants' motion for summary judgment dismissing the complaint as to them. The Appellate Division, Second Department, affirmed the lower court's ruling but also declared that the Romond Deed was valid. According to the Appellate Division,

> *"…the Romond defendants established, prima facie, that the joint deed was given as security for the loan from [the Plaintiff] to Grigg. Therefore, pursuant to Real Property Law Section 320 ["Certain deeds deemed mortgages"], the joint deed must be considered a mortgage, and [the Plaintiff's] sole remedy for Grigg's breach of its terms was to commence an action sounding in foreclosure. Moreover, under the circumstances at bar, the Romond defendants established that they were good faith purchasers of the subject property (see Real Property Law Section 290 et seq.; [citation omitted])."*

American Lending Corp. v. Grigg, 2020 NY Slip Op 03211, decided June 10, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03211.htm.

Development Rights/Professional Malpractice

Relying on a report issued by Defendant Milrose Consultants, Inc. ("Milrose"), whom the Plaintiff engaged for "zoning consulting" services, the Plaintiff purchased 17,650 square feet of excess development rights from the owners of two adjacent properties. After closing, Milrose determined that since the seller's parcels were not entirely within a certain zoning district, as had been believed to be the case; its report therefore had overestimated the total available development rights by 3,000 square feet. The Plaintiff, claiming that it had overpaid for non-existent development rights, sued Milrose for grossly negligent professional malpractice, breach of contract and negligent misrepresentation, and also sued the sellers. The Supreme Court, New York County, granted Milrose's motion to dismiss the complaint as to it, with leave to replead its claim for breach of contract.

The Court held that to maintain a claim for professional malpractice Milrose had to be a professional and Milrose, a zoning consultant and not a licensed engineer or architect, was not a professional. As to the claim for negligent misrepresentation, the Plaintiff had not alleged a legal duty separate from the contact for consultant services Milrose entered into with the Plaintiff. As to the claim of breach of contract, Milrose did not breach its obligations under its contract with the Plaintiff. This claim was dismissed with leave to replead the nature of the agreement allegedly breached. 14 LLC v. J & R 240 LLC, 2020 NY Slip Op 31528, decided May 20, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31528.pdf.

Homeowners' Associations

In an action brought by a homeowner and member of a Homeowners' Association, the Supreme Court, Nassau County, denied the Defendant's motion to dismiss the cause of action to annul a license agreement entered into between the Defendant and the Homeowners' Association, which granted the Defendant the exclusive right to affix his private docks to the Association's community docks, and annulled the license agreement. The Appellate Division, Second Department, affirmed the lower court's rulings. According to the Appellate Division,

> *"[h]ere, entering into the license agreement was outside the Board's authority because the [Property Owner's Association's] Amended Declaration states that each member of the POA is privileged to use the POA's recreational facilities in common with other members, and that the modification or cancellation of that privilege is not permitted. By granting [the Defendant] the exclusive right to affix his private docks to the POA's community dock, the Board prevented other members from docking their boats at the portion of the POA's community dock to which [the Defendant's] private docks are affixed."*

Matter of Beckerman v. Lattingtown Harbor Property Owners Association, Inc., 2020 NY Slip Op 02923, decided May 20, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02923.htm.

Leases/Guarantees

A lease agreement incorrectly identified the name of the property owner and the address of the leased premises. In an email sent to the two guarantors of the lease, which email recited that when it was signed the email it would be deemed "an amendment to the Lease", the Plaintiff-lessor corrected the name of the landlord and the address of the property. The email was signed by a representative of the Plaintiff and by the President of the lessee. The Plaintiff commenced an action alleging that the lease was in default and seeking to enforce the guaranty. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Kings County, granting the Plaintiff's motion for summary judgment on the causes of action to recover on the guaranty. According to the Appellate Division,

> *"[h]ere, the plaintiff established, prima facie, that [the two guarantors] were liable under the guaranty for [the tenant's] breach of the lease [citations omitted]. The guaranty provided, inter alia, that no amendments of the lease would relieve the guarantors or the guarantors' obligations, and that notice to or consent by the guarantors was not required for amendments respecting the lease. Contrary to the contentions of [the guarantors], the October 2012 email provided by its own terms that it was to be deemed an amendment to the lease."*

2402 East 69th Street, LLC v. Corbel Installations, Inc., 2020 NY Slip Op 02996, decided May 27, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02996.htm.

In another case involving the guarantee of lease obligations, leases of commercial property each for a one-year term provided that holding over by the tenant after expiration or termination of a lease would not extend or renew the lease absent a written agreement and, absent such agreement, the tenant would continue in possession as a month-to-month tenant paying an increased monthly rent. Guarantees of the obligations under the leases provided that they unconditionally guaranteed the tenants' obligations "under the Lease and all extensions or renewals thereof."

After the leases expired the tenants remained in possession as holdover tenants. It was alleged that approximately one year later the tenants ceased to pay rent but remained in possession. The lessor sued for, among other relief, rent and additional rent. The Supreme Court, New York County, dismissed the claim against the guarantor. According to the Court, the guarantor had no obligation to pay these sums under the terms of the leases and the guarantees. "…Plaintiffs are sophisticated commercial entities – if they wanted to ensure that the tenant obligations being guaranteed would persist until surrender irrespective of the expiration of the lease term, they could easily have said so in writing. They did not." Delazzero Realty Corp. v. Port Morris Tile & Marble LP, 2020 NY Slip Op 50657, decided June 8, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_50657.htm.

Lien Law/Trust Fund Diversion

Under Lien Law Section 70 ("Definition of Trusts), "[t]he funds described in this section received by an owner for or in connection with the improvement of real property in this state…shall constitute assets of a trust for the purposes provided in section 71 of this chapter." Lien Law Section 71 ["Purpose of the trust…"] provides, in part, that "[t]he trust assets …shall be held and applied for payment of the cost of improvement." Lien Law Section 70(5) identifies categories of funds, received by an owner which is a trustee, which are deemed to be held in trust, including monies received under a building loan contract.

The Supreme Court, Onondaga County, granted the Plaintiff's motion for a default judgment and awarded damages in an action claiming the diversion of trust assets. The Plaintiff alleged that $2,250,000 received by the owner of the property on which work was done from Defendant Robert Genovese and from entities he controlled were trust funds and that they were contributed for the benefit of those supplying labor or materials for the project. The Appellate Division, Fourth Department, reversed and denied the motion for summary judgment.

According to the Appellate Division, the lower court should have denied the application for a default judgment; the statements made by the Plaintiff in the complaint were not "proof of facts constituting the claim" for the diversion of trust assets, as required by subsection (f) of Civil Practice Law and Rules Section 3215 ("Default judgment"). Further, "[i]n this case, the record establishes that 'the [$2,250,000] that [plaintiff] contends was a trust asset was actually a capital contribution of the owner. Therefore, [those] funds were not trust assets [citation omitted]'". Rand Construction Corporation v. Cowboys Saloon Syracuse, LLC, 2020 NY Slip Op 03366, decided June 12, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03366.htm.

Mechanics' Liens/Bonding/Quasi-Contract

A subcontractor commenced an action seeking to foreclose on a mechanic's lien and to obtain other relief. The defendants were the property owner, the general contractor and a mortgagee. The mechanic's lien being bonded, the owner and the mortgagee moved for summary judgment dismissing the complaint as to them, claiming that they were no longer necessary parties to the action. The Supreme Court, Kings County, granted the motion. Under Lien Law Section 37 ("Bond to discharge all liens"), the parties to be joined as defendants in an action to enforce a bond are "the principal and surety on the bond, the contractor, and all claimants who have filed notices of claim."

The Plaintiff argued that causes of action against the property owner for unjust enrichment and quantum meruit should be heard. However, according to the Court, "a property owner has no liability to a subcontractor on a quasi-contract theory unless it expressly consents to pay for the subcontractor's performance [citations omitted]… [T]here is no allegation that [the owner] promised to pay plaintiff for any work it performed at the property." JL Construction of New Milford, LLC v. Stewart Purchaser, LLC, 2020 NY Slip Op 31646, decided May 26, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31646.pdf.

Mortgage Foreclosures/Abandonment

Under 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 default, the court shall not enter judgment but shall dismiss the complaint as abandoned…upon its own initiative or on motion, unless sufficient cause is shown why the complaint should be dismissed."

In Federal National Mortgage Association v. Greenfeld, the Appellate Division, Second Department, reversed the ruling of the Supreme Court, Kings County, which granted the foreclosing Plaintiff's motion for summary judgment, and granted the Defendant's motion to dismiss on the grounds that the action was "abandoned". According to the Appellate Division,

> *"…the plaintiff failed to take proceedings, including preliminary steps, for the entry of a default judgment for more than five years after [the Defendant's] default. [citations omitted]. Further, the plaintiff's vague, conclusory, and unsubstantiated assertions that periods of delay were attributable to compliance with a then newly adopted administrative order, changes in the loan servicer, and various natural disasters were insufficient to excuse the lengthy delay in moving for leave to enter a default judgment [citations omitted]."*

The Appellate Division's decision, 2020 NY Slip Op 02673, dated May 6, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02673.htm.

Mortgage Foreclosures/NYS Office of Court Administration

On June 23, 2020, the Chief Administrative Judge of New York State's Unified Court System issued a Memorandum captioned "Procedure for Addressing Residential and Commercial Foreclosure Proceedings" setting forth "temporary protocol for handing of residential and commercial foreclosure proceedings, effective June 24, 2020." Noting the suspension, with certain exceptions, of "foreclosure matters" by Governor Cuomo's Executive Order, the Memorandum requires that foreclosure proceedings include the following two additional documents:

> *"1. A form plaintiff's attorney affirmation, indicating that counsel has reviewed the various state and federal restrictions and qualifications on foreclosure proceedings and believes in good faith that the proceeding is consistent with those restrictions and qualifications (Attach B., Exh. 1); and*
>
> *2. A form notice to defendants-tenants (in English and Spanish) informing them that they may be eligible for an extension of time to respond to the complaint in light of legal directives related to the COVID-19 pandemic, and directing them to a website link for further information (Attach B, Exhs. 2, 3)."*

The OCA Memorandum is posted at https://www.nycourts.gov/LegacyPDFS/admin/opp/Foreclosure-Proceedings.pdf.

Mortgage Foreclosures/Notices - RPAPL Section 1304

RPAPL Section 1304 ("Required prior notices") requires that "a lender, an assignee or a mortgage loan servicer [commencing] legal action against the borrower, including [a] mortgage foreclosure" send a notice, in the form specified in Section 1304, to the borrower at least ninety days before litigation on a "home loan" is commenced. The notice is required to be sent by registered or certified mail and by first class mail to the last known address of the borrower.

In Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC v. Williams, the Appellate Division, Second Department, reversed the grant of a judgment of foreclosure and sale by the Supreme Court, Nassau County, for the failure to comply with the requirements of Section 1304. According to the Appellate Division,

> *"[t]he lender must submit proof of mailing (such as an affidavit of service or domestic return receipts with attendant signatures) or an affidavit either from the individual who performed the actual mailing or an individual with personal knowledge of the lender's standard office mailing procedure [citations omitted]. Here, the unsubstantiated and conclusory statement of the plaintiff's attorney in an affidavit submitted in support of the motion that RPAPL 1304 notice was properly mailed to the defendant is insufficient to establish compliance with the statute as a matter of law [citations omitted]."*

This case, 2020 NY Slip Op 03561, decided June 24, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03561.htm.

Mortgage Foreclosures/One-Action Rule

Real Property Actions and Proceedings Law ("RPAPL") Section 1301 ("Separate action for mortgage debt") provides, in part, that "[w]hile the action [to recover any part of a mortgage debt] is pending…no other actions shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." The Supreme Court, New York County, denied the Defendant's motion to dismiss a mortgage foreclosure on the ground that there was another action pending; a foreclosure of the same mortgage was not formally discontinued when it was dismissed in 2013 against the Defendants in the prior foreclosure. The Appellate Division, First Department, affirmed. According to the Appellate Division,

> *"RPAPL 1301(3), a statute 'which must be strictly construed' was not applicable to this action [citation omitted]…[D]efendants are not facing 'the expense and annoyance of two independent actions at the same time with reference to the same debt,' and thus, any failure on the part of the plaintiff to comply with RPAPL 1301(3) [by not formally discontinuing the prior foreclosure] could also be 'properly disregarded as a mere irregularity' [citation omitted]."*

U.S. Bank National Association v. Beymer, 2020 NY Slip Op 02871, decided May 14, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02871.htm.

Mortgage Foreclosures/Statute of Limitations/Acceleration

The Appellate Division, Fourth Department, modified an Order of the Supreme Court, Oneida County, to reinstate the complaint in a mortgage foreclosure to the extent that recovery was sought of amounts due within six years prior to September 15, 2017, the date on which the action was commenced. In doing so, the Appellate Division noted that laches was not a defense to the enforcement of the note and mortgage to recover those amounts. The Court further ruled that the debt secured by the mortgage did not accelerate automatically on the death, in 2009, of one of the mortgagors. According to the Court,

> *"[t]he mortgage provides that there is a default upon decedent's death, but it does not provide that the death of decedent would automatically accelerate the debt. Rather, the mortgage provides that the lender may accelerate the debt upon a default and, here, defendants did not establish that plaintiff chose to accelerate the debt at any time before the complaint was filed [citations omitted]."*

Wilmington Savings Fund Society FSB v. Deliberto, 2020 NY Slip Op 03297, decided June 12, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03297.htm.

In another case dealing with acceleration of a loan, the Appellate Division, Second Department, held that a notice of default, advising that the loan would be accelerated if the default was not cured by a certain date, "was 'nothing more than a letter discussing acceleration as a possible future event, which [did] not constitute an exercise of the mortgagee's optional acceleration clause' [citation omitted]." U.S. Bank National Association v. Mongru, 2020 NY Slip Op 03137, decided June 3, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03137.htm.

In a decision finding that there was a valid acceleration of the mortgage loan, the Appellate Division, Third Department, held that a notice from the lender to the borrower in December 2010, stating that "[i]f the default is not cured on or before January 21, 2011, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time" was sufficient to accelerate the loan on that date. "As such", according to the Court, "plaintiff was required to commence the current action prior to January 21, 2017, which it failed to do." The complaint was dismissed. MTGLQ Investors, LLP v. Lunder, 2020 NY Slip Op 02690, decided May 7, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02690.htm.

Mortgage Foreclosures/Statute of Limitations/MERS

In 2006, the Plaintiff executed a note to BNC Mortgage, Inc. and a mortgage to MERS, as nominee for BNC. The mortgage was assigned to Defendant U.S. Bank National Association, as Trustee, in 2007. A foreclosure commenced by the Defendant in 2007 was dismissed and later discontinued in 2010. A second foreclosure in 2010 was discontinued in 2018. In 2018, the Plaintiff sued to have the mortgage cancelled and discharged; the Plaintiff alleged that the obligation secured was not enforceable because the debt was accelerated by the 2007 foreclosure and, therefore, the statute of limitations had expired. In 2019, the holder of the mortgage, in its Answer, counterclaimed for the mortgage to be foreclosed.

The Supreme Court, Kings County, denied the Plaintiff's motion for summary judgment. The mortgage did not authorize MERS to assign the note. "Since no proof was submitted that MERS was the lawful holder or assignee of the Note on December 7, 2007 or that MERS had the authority to assign the Note on behalf of BNC, Plaintiff failed to demonstrate that the Note was effectively transferred to U.S. Bank prior to the commencement of the First Action. [citations omitted]. Consequently, the Plaintiff failed to show by admissible proof that U.S. Bank had the authority to accelerate the Note in December of 2007." Iqbal v. U.S. Bank National Association, as Trustee, 2020 NY Slip Op 31356, decided May 11, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31356.pdf.

Mortgage Foreclosures/Statute of Limitations/Note

The Supreme Court, Kings County, issued an Order cancelling and discharging a mortgage on the ground that the statute of limitations to foreclose the mortgage had expired. The Court also, sua sponte, cancelled the note secured by the mortgage. The Appellate Division, Second Department, reversed the lower court's Order insofar as it cancelled the note. "…[T]he plaintiff only sought cancellation and discharge of the subject mortgage, not cancellation of the note. The Supreme Court should not have granted additional relief sua sponte [citation omitted]." Trenton Capital, LLC v. Bank of New York Mellon, 2020 NY Slip Op 03416, decided June 17, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03416.htm.

Mortgage Foreclosures/Surplus Monies

New York City's Department of Housing Preservation and Development ("HPD"), which was the holder of a first mortgage, and Igal Stell, the property's former owner, who was the holder of the equitable right of redemption, each claimed the surplus monies generated by a tax lien sale. The referee appointed to report on the amount due to any person having a lien on the surplus concluded that HPD's claim was barred by the statute of limitations. The tax sale deed was delivered in 2000 and the HPD mortgage loan was to be paid in full in 2003, but HPD had not sought to enforce its lien in a surplus money proceeding before the statute of limitations had expired. Therefore, according to the referee, Stell, the only other claimant, was entitled to the surplus. The Supreme Court, Richmond County, denied the motion to confirm the referee's report, holding that HPD's claim was not barred by the statute of limitations, and the Court directed that the surplus be distributed to HPD. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division,

> *"[a]s a party to the foreclosure action, HPD was not required to file a notice of claim to the surplus money in order to preserve its right to satisfaction of its lien from the surplus [citation omitted]…HPD's appearance in the tax lien foreclosure action put Stell and anyone else interested in a potential surplus on notice of HPD's claims. To require HPD to commence a separate foreclosure action, when the action to foreclose the tax lien was already pending, would serve no useful purpose."*

NYCTL 1997-1 Trust v. Stell, 2020 NY Slip Op 02802, decided May 13, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02802.htm.

Mortgages/Lenders' Equitable Remedies

After a mortgage foreclosure was dismissed for delays in prosecution, the property owner commenced an action under RPAPL Article 15 ("Action to compel the determination of a claim to real property") to have the mortgage cancelled and discharged. The then holder of the mortgage asserted numerous affirmative defenses and counterclaims, discussed below. The Supreme Court, Kings County, granted the Plaintiff's motion to dismiss the counterclaims.

The first counterclaim was to recover amounts paid for real estate taxes and hazard insurance premiums on the ground of unjust enrichment. The Court held that recovery on this ground was barred. According to the Court, "the recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact are barred by the voluntary payment doctrine [citations omitted]." No fraud or mistake of material fact or law was alleged.

The second counterclaim sought a declaration that the Defendant had an equitable mortgage and to recover all unpaid loan payments and amounts advanced for real estate taxes and hazard insurance. "Where a legal, written mortgage exists, the doctrine of equitable mortgage is inapplicable [citations omitted]." This counterclaim therefore failed to state a valid cause of action.

The Court ruled that the third counterclaim, for the imposition of an equitable lien in the amount of all unpaid loan payments and amounts advanced for real estate taxes and hazard insurance premiums, did not apply in this case. An essential element of an equitable lien is that "the improver of property made such improvements in good faith and under a color of right…[T]here are no allegations that defendant made any improvements to the property as a result of the plaintiff's promise" to grant the Defendant an interest in the property.

The fourth counterclaim sought to impose a constructive trust and to have the ownership of the property transferred to FEMA, the last assignee of the mortgage. This was not a valid cause of action. "Defendant has not alleged the existence of a confidential or fiduciary relationship and…cannot demonstrate unjust enrichment."

The Defendant also sought to have a lien imposed for amounts paid by the original mortgagee to satisfy liens and judgments that existed at the time of closing and for advances later made to pay charges against the property by governmental authorities, and to have that lien subrogated to any existing liens. This counterclaim was also dismissed for the failure to state a valid cause of action. According to the Court, the Defendant did not

> *"specifically allege that the funds of its predecessor-in-interest were used to satisfy any existing lien that was junior to the rights of an unknown, more senior incumbrances at the time the transaction occurred. Even assuming those facts, that portion of the claim would be time-barred as the statute of limitations would have accrued on December 30, 2005 (the date the note and mortgage were executed) and expired on December 31, 2011. [Further], [t]he doctrine of equitable subrogation does not apply…where defendant is attempting to recover payments advanced to prevent an assessing authority from placing a lien on property that would be senior to other liens."*

Rodriguez v. Federal National Mortgage Association, 2020 NY Slip Op 31632, decided May 29, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31632.pdf.

Pandemic/Executive Order/Mezzanine Loans

The sole member of a limited liability company sought an Order preliminarily enjoining the lender to whom it had pledged its membership interest from conducting a UCC sale of its interest. The Plaintiff asserted that the lender was precluded from foreclosing under Governor Cuomo's Executive Order No. 202.8 ("Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency") issued March 20, 2020. The Executive Order provides in part that "[t]here shall be no…foreclosure of any residential or commercial property for a period of ninety days." The Supreme Court, New York County, vacated the temporary restraining orders issued by the Court on April 30, 2020, holding that the matter "is not essential" under the Executive Order. According to the Court,

> *"[w]hile the terms of Executive Order No. 202.8 prohibit foreclosure of any commercial property for a period of ninety days without limitation to mortgages, that provision addresses enforcement of a judicially ordered foreclosure. The sale of the pledged interest in this matter results from the parties' agreement, as guided by the UCC."*

This decision, 1248 Associates Mezz II LLC v. 12E48 Mezz II LLC, Index No. 651812/2020, was issued by Justice Frank P. Nervo on May 18, 2020.

Pandemic/Rent Relief

On June 17, 2020, Governor Cuomo signed into law the Emergency Rent Relief Act of 2020, Chapter 125 of the Laws of 2020. This law, effective "immediately", establishes a rental assistance program for "Eligible Households". It expires July 31, 2021. According to the Memorandum In Support of the legislation, "[t]he purpose of this bill is to support rental households impacted by the COVID-19 pandemic." Chapter 125 can be found at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10522&term=2019&Summary=Y&Actions=Y.

Under Chapter 127 of the Laws of 2020, signed into law on June 30, 2020, effective immediately, "[n]o court shall issue a warrant of eviction or judgment of possession against a residential tenant or other lawful occupant that has suffered a financial hardship during the COVID-19 covered period [as defined in the legislation] for the non-payment of rent that accrues or becomes due during the COVID-19 covered period." In addition, "[a] tenant or lawful occupant may raise financial hardship during the COVID-19 covered period as a defense in a summary proceeding" under RPAPL Article 7. Factors to be accounted for in determining financial hardship are set forth in the legislation. The statute states that a Court is not prohibited from awarding a judgment for rent due in a summary proceeding under RPAPL Article 7. Chapter 127 can be found at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10290&term=2019&Summary=Y&Actions=Y.

Statute of Frauds/Leases

Under paragraph 2 of New York's statute of frauds, General Obligations Law Section 5-703 ("Conveyances and contracts concerning real property required to be in writing"), "[a] contract for the leasing for a longer period than one year…is void unless the contract or some note or memorandum thereof, expressing the consideration is in writing…" Paragraph 4 of Section 5-703 recognizes the power of courts "to compel the specific performance of agreements in cases of part performance."

Plaintiff had owned certain lands adjacent to its rectory which were acquired by Defendant New York City by condemnation for use as a park. After the acquisition, however, the Plaintiff continued to use a portion of the land for parking and for ingress to and egress from the rectory. After the Defendant issued a notice to quit, the Plaintiff sought a judgment that the parties had entered into a 99-year, rent-free lease to the disputed parcel, for specific performance of the lease, and for related injunctive relief. The Supreme Court, Kings County, granted the Defendant's motion to dismiss. The Order of the Supreme Court was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"…the plaintiff's causes of action are barred by the statute of frauds, as there was no written contract between the parties establishing the existence of a 99-year, rent-free lease for the disputed parcel (see General Obligations Law Section 5-703(2). Moreover, contrary to the plaintiff's contention, there is no evidence in the record of conduct by the plaintiff which is 'unequivocally referable' to a purported 99-year, rent-free lease and inconsistent with any other explanation [citation omitted]."*

Roman Catholic Church of the Epiphany v. City of New York, 2020 NY Slip Op 02818, decided May 13, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02818.htm.

UCC/"Commercially Reasonable" Sale

The Supreme Court, New York County, issued a preliminary injunction, conditioned on the Plaintiff's posting of an undertaking, stayed the Defendant's sale of a mezzanine interest in the Mark Hotel in Manhattan for thirty days from the scheduled sale date, and required the sale to be re-noticed. The Court held that the Plaintiff, the owner of the mezzanine interest, had established it was likely it would prevail on its claim that the notice of sale was not commercially reasonable as is required under subsection (b) of Uniform Commercial Code Section 9-610 ("Disposition of collateral after default"). That subsection provides that "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." According to the Court, "36 days' notice to the market is unreasonable as are other procedures" for bidding which were set forth in the notice of sale.

> *"Plaintiff has established likelihood of success on its claim that defendants' notice of 36 days may be unreasonable during a global pandemic as the Mark Hotel was closed until June 15, 2020 making inspection impossible for 27 of the 36 days of notice [first published on May 22], which deprives interested bidders of the chance to do due diligence…There is no recognized market here; defendant must make the market which is why the procedures defendant implements are crucial to create a commercially reasonable sale… [The] defendant will re-notice the sale, giving the market at least 30 additional days of notice and develop a plan for a commercially reasonable sale to be reflected in the new notice."*

D2 Mark LLC v. Orei VI Investments LLC, 2020 NY Slip Op 32057, decided June 23, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32057.pdf.

Zoning/Short-Term Rentals

In 2012, the Plaintiff, the Petitioner on appeal, purchased a single-family residence in the Town of Grand Island, in Erie County, for the purpose of renting it out for periods of less than thirty days. In 2015, the Town enacted Local Law 9, prohibiting in certain zoning districts short-term rentals unless the owner resided at the property. Having been denied a use variance, the Plaintiff sought a declaration that the Local Law unconstitutionally effected a regulatory taking. The Supreme Court, Erie County, granted the Town's motion for summary judgment, dismissing the complaint and enjoining the Plaintiff from using the premises in violation of the Local Law. The Appellate Division, Fourth Department, affirmed the ruling of the lower court. According to the Appellate Division,

> *"…plaintiff did not submit evidence establishing that, due to the prohibition under Local Law 9 on short-term rentals, the subject premises was not capable of producing a reasonable return on his investment or that it was not adaptable to other suitable private use. Instead, plaintiff's submissions showed a 'mere diminution in the value of the property…[which] is insufficient to demonstrate a [regulatory] taking' [citations omitted]. Indeed, plaintiff's submissions demonstrated that he had some economically viable uses for the subject premises…"*
>
> *"'[E]ven if [Local Law 9] effected a regulatory taking, the appropriate relief would be a hearing to determine just compensation, not a declaration that the law is invalid [citation omitted]'"*

Matter of Wallace v. Town of Grand Island, 2020 NY Slip Op 03301, decided June 12, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03301.htm.

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