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NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Common Charge Lien Foreclosure/Surplus Monies

In the foreclosure of a common charge lien, the holder of the first mortgage on the condominium unit claimed that it should be the first paid from surplus monies available for distribution following the foreclosure sale. Judgment creditors asserted that the first mortgagee was not entitled to share in the surplus because adding the mortgagee to the action was in error; the mortgage was not extinguished by the foreclosure and, it could itself be foreclosed. The Supreme Court, Kings County, denied a judgment creditor's motion to reargue the Court's Order and authorized the mortgagee to participate in the surplus money proceeding. According to the Court,

> *"the [Court's Order] held that 'the purchaser at the foreclosure sale took title free and clear of all liens and encumbrances as no one sought to vacate the judgment of foreclosure and sale…' (emphasis added). The Judgment of Foreclosure and Sale provides that all defendants to this action, including [the first mortgagee], 'are forever barred and foreclosed of all right, claim, title, interest and equity of redemption in the said premises and each and every part thereof.' Unless the Judgment of Foreclosure and Sale is vacated, [the mortgagee] is subject thereto, and is, thus, entitled to participate in the surplus money proceeding."*

Board of Managers of the Bergen Homes Condominium v. Ivgi, 2020 NY Slip Op 32612, decided August 10, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32612.pdf.

Condominiums/Federal Forfeiture/Right of First Refusal

The United States, selling a condominium unit in Manhattan that it had acquired in a civil forfeiture, sought a ruling that the judgment in the forfeiture action extinguished the right of first refusal to purchase asserted by the condominium's Board of Managers. The board intended to exercise its ROFR and then sell the unit for a higher price. The Consent Judgment states the following:

> *"Upon entry of this Consent Judgment, all right, title, and interest of the Qubaisi Claimants and the Board of Managers of Walker Tower Condominium in the defendant real property shall be forfeited to the United States, and no other right, title, or interest shall exist therein, unless otherwise provided in this Order."*

The United States District Court for the Central District of California granted the government's motion to enforce the judgment. The Court held that "the ROFR is sufficiently connected to the ownership and alienation of the Property to qualify as a right or interest in the Property extinguished by the Judgment." United States of America v. Real Property Located in New York, New York, CV 16-5376 DSF, decided July 27, 2020, can be obtained at 2020 U.S. Dist. LEXIS 140681.

Contracts of Sale

Plaintiff, the purchaser under a contract of sale, sought an Order declaring that the contract was terminated and directing the return of the down-payment. Under the contract, the purchaser had the right to consent to or reject any proposed leases entered into by the seller between the execution of the contract and the closing date. The seller entered into a lease for a unit at the property without seeking the seller's consent. The seller cross-moved for an Order dismissing the action and directing the escrow agent to release to the seller the down-payment.

The Supreme Court, Kings County, ruled that neither the Plaintiff nor the Defendant had established prima facie their entitlement to summary judgment as a matter of law. The Plaintiff failed to show that it complied with the sections of the contract requiring that the Plaintiff serve a notice of default and afford the seller an opportunity to cure the seller's default. The Defendant, which breached the contract by entering into the lease agreement, was, under the contract, only entitled to retain the down-payment if the Plaintiff defaulted and the Defendant was not in default. 449 Court Street Associates, LLC v. 449-451 Court Street Corporation, 2020 NY Slip Op 32140, decided July 2, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32140.pdf.

Contracts of Sale/Specific Performance

The buyer alleged that after setting a time of the essence date for closing the buyer discovered that the seller had fraudulent misrepresented to New York City the property's tax classification, causing the property value to be artificially inflated. The buyer sued seeking, among other relief, specific performance and damages for breach of contract. The Supreme Court, New York County, granted the Defendant-seller's motion to dismiss the complaint; the Appellate Division, First Department, affirmed. The buyer's performance was conditioned on the seller's correction of the classification of the property and a reduction in the purchase price. "Under these circumstances, the buyer was not ready, willing and able to close, and, as a matter of law, is not entitled to specific performance of the parties' contract." M&E 73-75, LLC v. 57 Fusion LLC, 2020 NY Slip Op 04372, decided July 30, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04372.htm.

Leases/ "Yellowstone" Injunction

The Supreme Court, New York County, granted the tenants' motion for a Yellowstone injunction, tolling the cure periods pending a determination as to whether the Plaintiffs had defaulted under their leases. The Court found that the Plaintiffs were "prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." The Court conditioned the injunction on the posting of a bond in the amount of the monthly fixed rent due for May and June 2020, reduced by ten percent due to the "extraordinary circumstances" of the closing of malls in New York City because of the global pandemic. The Gap, Inc. v. 44-45 Broadway Leasing Co. LLC, 2020 NY Slip Op 32403, decided July 21, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32403.pdf.

In Prestige Deli & Grill Corp. v. PLG Bedford Holdings LLC, the Supreme Court, Kings County, relying on Governor Cuomo's Executive Order No. 202.28 ("Continuing temporary suspension and modification of laws relating to the disaster emergency"), granted the tenant's motion for a Yellowstone injunction even though the EO was issued on May 7, 2020, after the Defendant served on the Plaintiff notices to cure defaults. The EO states, in part, that "[t]here shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for non-payment of rent…facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020." The Court further held that "[t]o the extent the defendant is challenging the authority to restrain private contracts, this motion is not the proper venue for such arguments." This decision, dated July 17, 2020, is posted at 2020 NY Slip Op 32370 at http://www.nycourts.gov/reporter/pdfs/2020/2020_32370.pdf.

In Shack Collective Inc. v. Dekalb Market Hall LLC, the Supreme Court, Kings County, denied the tenant's motion for a Yellowstone injunction. The lessor (or Licensor, it not being determined if there was a license or a lease) issued a notice of default after New York City's Department of Health issued a Letter Grade of "C" for the tenant's restaurant. The agreement for possession required that the premises be maintained as a restaurant with a Letter Grade of "A"; upon any "'change in the quality or caliber of the operation of Licensee's business in the Licensed Area'" possession could be terminated on seven days' notice. The Court relied on the fact that "the agreement did not provide an opportunity for the tenant to cure any default." This decision, 2020 NY 32192, decided July 6, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32192.pdf.

Lien Law

Deeds delivered to the Defendants on March 29, 2019 contained the trust fund clause authorized by subsection (5) of Lien Law Section 13 ("Priority of liens"). Mechanics' liens for work completed prior to March 29 were filed by the Plaintiff on April 10, 2019 and on May 1, 2019. The deed was recorded on April 15, 2019. The Plaintiff sought to enforce its liens, arguing that a lien filed before a deed is recorded is valid. The Supreme Court, New York County, issued an Order vacating and discharging the mechanics' liens, holding that "it is the date of conveyance, not recording, that controls the disposition of a mechanic's lien subject to Lien Law Section 13(5)." Wonder Works Construction Corp. v. Bridgeton Amirian 13th St., LLC, 2020 NY Slip Op 32350, decided July 14, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32350.pdf.

In another case dealing with the application of the Lien Law, Trump Tower Commercial LLC ("Trump") is the lessor of space at 725 Fifth Avenue in Manhattan. A subcontractor, which alleged it was owed money for work performed at the tenant's premises, sued Trump, for unjust enrichment. The Supreme Court, New York County, granted Trump's motion to dismiss. According to the Court,

> *"Nowhere in the complaint does plaintiff allege that it contracted with defendant Trump, that it performed work at Trump's behest, or that Trump assumed the obligation to pay for the services provided…[M]erely receiving a benefit from the plaintiff's labor is insufficient to hold the landlord liable under a quasi-contract theory, such as unjust enrichment [citation omitted]."*

A-Val Architectural Metal Corp. v. Trump Tower Commercial LLC, 2010 NY Slip Op 34084, decided April 8, 2010, was posted on August 17, 2020 at http://www.nycourts.gov/reporter/pdfs/2010/2010_34084.pdf.

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."

After entry of a judgment of foreclosure and sale, the Plaintiff on accepting a partial payment of the debt agreed not to proceed to a foreclosure sale. The Supreme Court, Rockland County, granted the Plaintiff's motion for leave to commence a new action to collect the remainder of the debt due. The Appellate Division, Second Department, affirmed. According to the Appellate Division, "…to prevent the plaintiff from seeking to collect the $4.22 million still owed to it would 'create a windfall for the defendants by allowing them to obtain satisfaction of the judgment by paying'" less than the full amount of the judgment. Stone Mountain Holdings, LLC v. Spitzer, 2020 NY Slip Op 04419, decided August 5, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04419.htm.

Mortgage Foreclosures/Necessary Parties

In 2008, Defendant Esther Lefkowitz, who had executed the mortgage being foreclosed, conveyed the property. In 2013, the Plaintiff commenced a foreclosure of the mortgage and, in 2017, the Supreme Court, Rockland County, entered a judgment of foreclosure and sale. The Supreme Court denied Defendant Lefkowitz's motion to vacate the judgment; she claimed that she was not property served. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division, even if she had not been properly served the judgment of foreclosure and sale would not be vacated

> *"Where, as here, a mortgagor has made an absolute conveyance of all her interest in the mortgaged premises, including her equity of redemption, she is not a necessary party to foreclosure, unless a deficiency judgment is sought against her [citations omitted]. In light of the plaintiff's express waiver of the right to seek a deficiency judgment against the borrower, the borrower is not a necessary party to foreclosure [citation omitted]."*

PNC Bank, National Association v. Lefkowitz, 2020 NY Slip Op 04332, decided July 29, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04332.htm.

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.

The Defendant in a mortgage foreclosure asserted that the Plaintiff failed to send her the notice required by RPAPL Section 1304. The Supreme Court, Westchester County, denied the Plaintiff's motion for summary judgment and granted the Defendant's cross-motion to dismiss the complaint as to her. The Appellate Division, Second Department, modified the lower court's Order, deleting the provision granting the cross-motion to dismiss the complaint. Although compliance with Section 1304 was not established by the Plaintiff, "a mere denial of receipt of the RPAPL 1304 notice…is insufficient to establish entitlement to such relief [citations omitted]." Bank of New York Mellon v. Parker, 2020 NY Slip Op 04376, decided August 5, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04376.htm.

In U.S. Bank Trust, N.A. v. Miele, the Appellate Division, Second Department, affirmed the Supreme Court, Westchester County's denial of the Defendants' motion for summary judgment dismissing the complaint for the failure to comply with RPAPL Section 1304. According to the Appellate Division, an officer of the loan servicer had

> *"set forth [the loan servicer's] standard business practice with regard to sending RPAPL 1304 90-day notices to borrowers, established a foundation for the admission of business records, which included copies of the RPAPL 1304 notices addressed to the defendants, United States Postal Service…certified mail receipts, with USPS 'Tracking' records showing the date of delivery, and a screen shot of [the loan servicer's] business records reflecting relevant servicing notes. This evidence was sufficient to demonstrate the plaintiff's entitlement to judgment as a matter of law as to its strict compliance with RPAPL 1304 [citations omitted]. In opposition, the simple denial of receipt of the RPAPL 1304 notice by the defendant…was insufficient to raise a triable issue of fact [citation omitted]."*

This decision, dated August 5, 2020, is reported as 2020 NY Slip Op 04422 at http://www.nycourts.gov/reporter/3dseries/2020/2020_04422.htm.

Mortgage Foreclosures/Referee's Report

The Supreme Court, Nassau County, granted the foreclosing Plaintiff's motion to confirm the referee's report and enter a judgment of foreclosure and sale. The Appellate Division, Second Department, rejected the referee's report, reversed entry of the judgment and remitted the case to the Supreme Court to have a new report computing the amount due and entry of an appropriate amended judgment. According to the Appellate Division,

> *"[i]n support of its motion, the plaintiff relied upon the affidavit of a representative of its loan servicer, who attested, based on his review of the servicer's books and records, to the amount due under the mortgage loan. However, the plaintiff's affiant failed to annex or otherwise produce the business records. Under the circumstances, the affidavit relied upon by the plaintiff constituted inadmissible hearsay and lacked probative value, and the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record [citations omitted]."*

Bank of New York Mellon v. Fontana, 2020 NY Slip Op 04375, decided August 5, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04375.htm.

Mortgage Foreclosures/Standing

The Appellate Division, Second Department, reversed the entry of a judgment of foreclosure and sale by the Supreme Court, Westchester County, holding that the Plaintiff lacked standing; therefore, the action should have been dismissed. Although the loan servicer, J.P. Morgan Chase Bank, N.A., took possession of the note secured by the mortgage before the action was commenced, the Plaintiff "failed to establish that Chase had the authority to act on its behalf at that time [citations omitted]." A power of attorney between the Plaintiff and Chase was dated May 3, 2013; the foreclosure was filed in 2009. US Bank N.A. v. Cusati, 2020 NY Slip Op 03943, decided July 15, 2020, is posted at http://nycourts.gov/reporter/3dseries/2020/2020_03943.htm.

In another case dealing with standing to foreclose, the Defendant alleged that the Plaintiff, in possession of the mortgage note endorsed in blank by the original lender but not an assignment to the Plaintiff of the note, did not have standing. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment and denied the Defendant's cross-motion to dismiss the complaint. The Appellate Division, Second Department, affirmed the lower court's rulings. According to the Appellate Division, "[s]ince the plaintiff demonstrated its physical possession of the note at the time of commencement of the action by attaching a copy of the note to the complaint, it was not required to offer proof of a written assignment of the underlying note [citation omitted]." Bayview Loan Servicing, LLC v. Leibowitz, 2020 NY Slip Op 03886, decided July 15, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_03886.htm.

Holding that the Plaintiff had not established that it had physical possession of the note secured by the mortgage by the date on which the foreclosure was commenced, the Supreme Court, New York County, dismissed the action without prejudice. "While defendants seek dismissal with prejudice, such relief is not warranted, as a dismissal for lack of standing is not on the merits [citations omitted]." Deutsche Bank National Trust Company v. Morrow, 2016 NY Slip Op 33088, decided July 22, 2016, was posted on July 24, 2020 at http://www.nycourts.gov/reporter/pdfs/2016/2016_33088.pdf.

Mortgage Foreclosures/Statute of Limitations

Plaintiff commenced an action to cancel and discharge a mortgage on his property, claiming that enforcement of the mortgage was barred by application of the six-year statute of limitations under Civil Practice Law and Rules ("CPLR") Section 213 ("Actions to be commenced within six years…"). When the mortgagee first commenced to foreclose on the mortgage in 2009, it elected to call the entire amount owed as due. The Supreme Court, Kings County, denied the Plaintiff's motion for summary judgment and granted the Defendant's cross-motion for summary judgment dismissing the complaint. The Appellate Division, Second Department, affirmed the lower court's Order. "Here, Wells Fargo demonstrated, prima facie, that the debt was never validly accelerated, as the prior action to foreclose the subject mortgage, commenced in 2009, was dismissed upon the Supreme Court's determination that Wells Fargo lacked standing to commence the action [citations omitted]." Mejias v. Wells Fargo N.A., 2020 NY Slip Op 04389, decided August 5, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04389.htm.

A similar holding was rendered in Christiana Trust v. Barua, decided by the Supreme Court, Suffolk County. In that case, a mortgage foreclosure commenced in 2009 was voluntarily discontinued by the lender in 2009. The assignee of the note and mortgage commenced a second foreclosure in 2015. The Defendant sought dismissal of the action as being time-barred. The Court, stating that "an election to accelerate contained in a previously filed complaint is nullified when the plaintiff voluntarily discontinues that prior action [citations omitted]", denied the Defendant's motion. This case, decided September 7, 2017, was posted as 2017 NY Slip Op 33196 on June 29, 2020 at http://www.nycourts.gov/reporter/pdfs/2017/2017_33196.pdf.

In another case, OneWest Bank, FSB commenced the foreclosure of a mortgage in 2009. The foreclosure was discontinued in 2014. Plaintiff, as the alleged holder of the note and mortgage, commenced an action in 2016 to foreclose the same mortgage. The Supreme Court, Kings County, granted the Defendant's motion to dismiss the complaint; the Appellate Division, Second Department, affirmed. According to the Appellate Division,

> *"…the defendant established that the six-year statute of limitations began to run on the entire debt in November 2009, when One West accelerated the mortgage by commencing the prior foreclosure action [citations omitted]. Since the plaintiff did not commence this action until September 2016, more than six years later, the defendant sustained his initial burden of demonstrating, prima facie, that this action was untimely [citation omitted]."*

Federal National Mortgage Association v. Puma, 2020 NY Slip Op 04381, decided August 5, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04381.htm.

A different position was taken by the Appellate Division, Second Department, in Solomon v. HSBC Bank USA, National Association, decided July 15, 2020. In an action commenced to cancel and discharge a mortgage on the ground that the statute of limitations to enforce the mortgage had expired, the Appellate Division held that "the plaintiffs failed to demonstrate that the [prior] first foreclosure action constituted a valid election to accelerate the mortgage, as there was no evidence to demonstrate that First United elected to call due the entire amount secured by the mortgage [citation omitted]." This decision is reported as 2020 NY Slip Op 03938 at http://www.nycourts.gov/reporter/3dseries/2020/2020_03938.htm.

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance has posted its Annual Statistical Report of New York State Tax Collections for the State's fiscal year 2019-2020 (April 1, 2019 - March 31, 2020). According to the Report, Real Estate Transfer Tax collected in the fiscal year was $1,123,766,119. Mortgage recording tax collected statewide in the fiscal year was $2,211,583,913; mortgage recording tax collected in New York City was $1,486,108,430. The report for Fiscal Year 2019-2020 is posted at https://www.tax.ny.gov/research/collections/fy_collections_stat_report/2019_2020_annual_statistical_report_of_ny_state_tax_collections.htm.

In fiscal year 2018-2019 (April 1, 2018 - March 31, 2019), Real Estate Transfer Tax collected was $1,135,270,944. Mortgage recording tax collected statewide was $1,424,110,350, including mortgage recording tax of $1,092,263,652 in New York City.

Mortgages/Erroneous Satisfaction

In 2007, the Defendants executed a mortgage to MERS, as nominee for Tribeca Lending Corporation ("Tribeca"). In March 2009, the Defendants executed a mortgage to Huntington National Bank, and the two mortgages were consolidated into a single lien. On July 6, 2009, MERS, as nominee for Tribeca, executed a satisfaction of the 2007 mortgage, which satisfaction of mortgage was recorded. The consolidated note and mortgage were assigned to the Plaintiff in 2011. The Plaintiff commenced an action to foreclose the consolidated mortgage and to have the satisfaction rescinded. The Supreme Court, Nassau County, granted the Plaintiff's motion for summary judgment and an order of reference. The Appellate Division, Second Department, affirmed. According to the Appellate Division, MERS did not have the authority to discharge the mortgage "since Tribeca was no longer a holder of the first note." Wells Fargo Bank, N.A. v. Douglas, 2020 NY Slip Op 04425, decided August 5, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_04425.htm.

Pandemic/Mezzanine Loan Foreclosures

On July 23, 2020, the Chief Administrative Judge of the Courts of the State of New York issued Administrative Order 157/20 providing, in part, that "[n]o auction or sale of property in any residential or commercial foreclosure matter shall be scheduled to occur prior to October 15, 2020." While stating that the Order does not apply, Justice Schecter of the Supreme Court, New York County, enjoined the UCC foreclosure of a mezzanine loan until October 15, 2020, conditioned on the Plaintiffs, the mezzanine loan borrowers, posting an undertaking. According to the Court,

> *"[t]hough AO/157/20, by its terms, does not apply here, the same logic does. After all, valuation of an equity interest in a company that owns real estate is based on the value of the real estate itself. Severe turmoil in the real estate market due to the pandemic makes the notion of a sale resulting in payment of fair market value highly uncertain…Consequently, it would be unreasonable to permit the foreclosure sale to proceed on August 19, 2020."*

The Court "urged" the parties to "continue negotiating in good faith to reach an amiable resolution, especially as the value of [the] property may be much lower than the total amount due on the loans, making a credit bid inevitable." Shelbourne BRF LLC v. SR 677 Bway LLC, Index No, 652971/2020, was decided on August 3, 2020.

Pandemic/Mortgage Foreclosures

Noting Governor Cuomo's Executive Orders since March 7, 2020, new Banking Law Section 9-x ("Mortgage forbearance") enacted June 17, 2020, Emergency Regulations and Guidance Letters of New York State's Department of Financial Services, Administrative Orders issued by the Chief Administrative Judge of the Courts and the local District Administrative Judge for Suffolk County, the federal Coronavirus Aid, Relief and Economic Security Act ("CARES Act"), Guidance Bulletins issued by Freddie Mac, Circulars issued by the Veterans Benefits Administration, and Mortgage Letters issued by the FHA, Justice Whelan of the Supreme Court, Suffolk County, held, in the foreclosure under consideration, that enforcement proceedings, including entry of a judgment of foreclosure and sale, the scheduling of a foreclosure sale, and/or the issuance of an eviction order were stayed and adjourned, pending a further order of the Court. The Court, stating that "[t]here is no longer any state prohibition of pre-COVID-19 residential foreclosure proceedings.", also announced that

> *"this Court will not address any new cases initialized [sic] after March 7, 2020. New cases will only be addressed to see if they involve vacant or abandoned properties. Additionally, this Court will not address actions concerning FHA insured mortgages or pending motions for a judgment of foreclosure and sale, or eviction. All other motions emanating from the pre-COVID-19 filed cases, will be addressed by the Court."*

Money Source, Inc. v. Mevs, 2020 NY Slip Op 20181, decided July 14, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_20181.htm.

Pandemic/Mortgage Recording Tax/Condominiums

A credit is afforded under Section 339-ee(2) of Real Property Law ("RPL") Article 9-B (the "Condominium Act") for an individual unit mortgage on the first sale of a condominium unit for part of the tax that was paid on recording a construction mortgage or another form of blanket mortgage at the property. To obtain the credit, the proceeds of the mortgage must have been used for either construction of the condominium, for capital expenses for the development or operation of the condominium, or for the purchase of the land or buildings, provided that the purchase occurred no more than two years prior to the recording of the Declaration. In addition, to obtain the credit, a unit, any unit, must be sold within two years following recording of the construction or blanket mortgage. No credit is allowed for the payment of the Special Additional portion of the tax imposed by Tax Law Section 253(1-a).

Under Governor Cuomo's Executive Order No. 202.55, dated August 5, 2020, "provided [the] two-year time periods [in RPL Section 339-ee(2]…have not elapsed before the recordation of the declaration of condominium or the first condominium unit is sold, as the case may be, the running of any such two-year period(s) is hereby suspended for the duration of this Executive Order, any such two-year period is hereby extended for a period equal to the duration of this Executive Order plus an additional period of 120 days."

The Executive Order, which, among other matters, modifies deadlines and fling requirements for condominium and cooperative offering plans and prospectuses, is posted at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.55.pdf.

Partition/Recording Act

Emily Accurso transferred title to her home to her two sons to enable them to obtain a mortgage on the basis of their credit. The brothers agreed in writing to add their sister, Emily Accurso, to the title when they were able to do so, and they agreed that she was to receive one-third of the net profits on a sale of the property. An interest in the property was never conveyed to Emily, who passed away leaving two children, including the Plaintiff. One of the brothers passed away, and the surviving brother sold the property to the Defendants. Emily's children did not receive any portion of the proceeds of the sale. The Plaintiff commenced this action under RPAPL Article 9 ("Action for partition").

The Supreme Court, Kings County, dismissed the complaint and cancelled the notice of pendency filed for the action., awarding the Defendants their costs and disbursements. The Plaintiff was not a party who could seek to partition real property under RPAPL Section 901 ("By whom maintainable") and the Defendants were bona fide purchasers without notice. The Court noted that that Plaintiff, if appointed Administrator of her mother's estate, could sue her brother for breach of contract. Accurso v. Raucci, 2020 NY Slip Op 32575, decided August 4, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32575.pdf.

Sidewalks/Liability

In 2012, MERS assigned a mortgage to The Bank of New York Mellon), formerly known as The Bank of New York (collectively "BONY"). An action to foreclose the mortgage was commenced in 2014, a judgment of foreclosure and sale was entered in 2018, and on March 15, 2019 a Referee's Deed was executed to BONY as the successful bidder at the foreclosure sale. Later in 2019, BONY sold the property. The Plaintiff sued BONY, MERS and the prior owners of the foreclosed property for damages due to injuries he sustained when falling on the sidewalk in front of or adjacent to the property on or about February 13, 2019. The Supreme Court, Bronx County, granted the motions of BONY and MERS to dismiss the complaint as to them. According to the Court,

> *"[a]lthough BONY and Pellerano [the foreclosed property owner] had been engaged in a foreclosure action at the time of the alleged incident, Pellerano retained the title of ownership and interest in the premises. The purpose of [a] judgement of foreclosure and sale is to divest the mortgagor of title which does not occur upon issuance of [a] judgement, but rather on competition [sic] of a sale authorized by [a] judgement. [citation omitted]. The final sale of the premises to BONY subsequent to the judgement of the foreclosure proceeding did not occur until March 15, 2019, which was approximately one month after February 13, 2019, the date on which the alleged incident occurred."*

Barrett v. Pellerano, 2020 NY Slip Op 32026, decided May 29, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_32026.pdf.

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