First American Title™
NATIONAL COMMERCIAL SERVICES

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Current Developments

First American Title National Commercial Services

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Condominiums / Common Elements

The owner of the commercial unit in a two-unit condominium leased its unit to a business renting commercial grade kitchens and equipment. To operate its business the tenant had to install a vent exhaust on the building's exterior walls. The building's management did not allow the vent stack to be installed. The commercial unit owner commenced an action seeking equitable and monetary relief, moving for a preliminary injunction enjoining the Defendants, the managing agent, the residential condominium unit owner (a cooperative corporation) and the residential unit's lessees from interfering with the installation of the vent stack and for an Order directing the Defendants to provide access so that the work could be completed. The Supreme Court, New York County, denied the motion for a preliminary injunction and granted the Defendants' cross-motion to dismiss the complaint.

The Court found that under the Declaration of the condominium, the exterior wall of the building above the second floor, where the Plaintiff's tenant sought to install the vent stack, is part of the residential unit, not part of the common elements of the building. Further, although the Declaration states that a unit owner shall have the right "to install any ducts, stacks, chutes, or chases reasonably required in connection with the renovation of either Unit…," "this section only applies to the work performed in each respective Unit." As to the Plaintiff's claim of irreparable harm,

> *"[t]he loss incurred by plaintiff if the vent stack is not installed will be lost rent under the commercial lease, which consists of monetary damages and is not considered irreparable harm…Likewise, plaintiff has failed to show that a balance of the equities favors its position…[T]he harm incurred by plaintiff, as the unit owner, primarily consists of lost rental income, which was caused by plaintiff's own decision to lease the space to this tenant. On the other hand, installation of the vent stack in order to ventilate nine commercial kitchens, will significantly impact the residents of the Residential Unit..."*

Avenue A Associates LP v. Board of Managers of the Hearth House Condominium, 2020 NY Slip Op 30121, decided January 13, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_30121.pdf.

Condominiums and Cooperatives/Offering Plans

New York State's Department of Law's ("DOL") Real Estate Finance ("REF") Bureau issued, as a guidance document, a Memorandum dated January 24, 2020 on "Disclosure Requirements regarding Projected Real Estate Taxes After the First Year of Operation." According to the Memorandum,

> *"[t]his guidance document is intended to clarify sponsors' disclosure requirements regarding projected real estate taxes in offering plans and advertisements. The disclosure requirements detailed herein are effective immediately and apply to all offering plans submitted to the DOL on or after the date of this guidance document as well as all offering plans that the DOL has accepted for submission but not yet accepted for filing as of the date of this guidance document."*

The guidance document is posted at https://ag.ny.gov/sites/default/files/disclosure_requirements_regarding_projected_real_estate_taxes_after_the_first_year_of_operations_01-24-2020.pdf.

Constructive Trusts

The Plaintiff and the Defendant in this case are a brother and his sister. Plaintiff, the brother, allowed his sister to live in a home he purchased in Greenlawn. The Defendant allowed her brother to live in property she purchased in Ronkonkoma. In 1994, the Plaintiff sought imposition of a constructive trust against the Greenlawn property; a judgment was entered on default granting the Defendant title. In 2004, the Plaintiff commenced this action seeking imposition of a constructive trust against the Ronkonkoma property and damages for unjust enrichment. During the pendency of this action, the Ronkonkoma property was sold.

To establish that there is a constructive trust, it must be shown that there is a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, breach of the promise, and unjust enrichment. The Supreme Court, Suffolk County, imposed a constructive trust on all proceeds from the sale being held in escrow and awarded damages to the Plaintiff. The Appellate Division found that the necessary elements to impose a constructive trust had been established and affirmed the lower court's ruling. According to the Appellate Division,

> *"[t]he evidence adduced at trial demonstrated that, although the Ronkonkoma property was titled in the defendant's name, the plaintiff expended money in order to purchase the property, and toward its carrying charges and improvements throughout the years, in reliance upon the agreement between the parties that title to the Ronkonkoma property would eventually be transferred to the plaintiff. The evidence further demonstrated that the defendant breached her promise to transfer the Ronkonkoma property to the plaintiff, and unjustly secured for herself all of the equity gained in the property since its purchase."*

Reingold v. Bowins, 2020 NY Slip Op 00886, decided February 5, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_00886.htm.

Cooperative Units / Unsold Shares

Under an Offering Plan, shares in a cooperative corporation unsubscribed as of the closing of the conversion to cooperative ownership are defined to be "unsold shares". The proprietary leases for the units in the building states that a block of unsold shares "retain their character as such (regardless of transfer) until…the holder of such shares (or a member of his family) becomes a bona fide occupant of the apartment" The Plaintiff, a New York limited liability company, became the owner of a block of unsold shares and the related units. It subleased one of the units to an individual holding a 50% contingent remainder interest in the Plaintiff's sole shareholder; that remainder interest vests on the death of the current holder of 100% of those interests. The Defendant, the coop sponsor, informed the Plaintiff that the shares attributable to the unit would no longer be treated as "unsold shares".

The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment, holding that the subtenant's occupancy did not change the stock from being unsold shares. According to the Court,

> *"…this court sees no principled or practical means of defining when an individual's ties to an LLC should suffice to make them a 'family member' of the LLC for purposes of determining when the individual's occupancy of an apartment strips the apartment's shares of unsold-share status under the lease at issue here. The court therefore concludes that as a matter of law, the only reasonable reading of 'member of his family'…is that this language does not encompass individuals connected to LLCs or corporations that hold unsold shares."*

Bellstell 7 Park Avenue LLC v. Seven Park Avenue Corp., 2019 NY Slip Op 29402, decided December 23, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_29402.htm.

Judgments / Execution

In 2014, the matrimonial court dealing with a divorce directed that monies due to the husband be escrowed. In 2016, David Fischer was awarded two judgments against the husband. Fischer sent a restraining notice under Civil Practice Law and Rules ("CPLR") Section 5222 ("Restraining notice") to the escrow agent, requesting that the escrow be released to him. In June 2017, a divorce judgment was entered. In July 2017, the matrimonial court directed that the funds in escrow be released to the wife.

Fischer sought an Order determining that his interest in the property, by reason of the judgments, was superior to the wife's interest and directing the escrow agent and the wife to turn the funds over to him. The Supreme Court, Kings County, held that Fischer had a superior interest but denied that branch of the petition directing the turnover of the funds. The Appellate Division, Second Department, affirmed the ruling insofar as it directed the turnover of the funds, but it reversed the holding that Fischer had an interest in the property superior to that of the wife.

According to the Appellate Division,

> *"…when the judgments were docketed, Julius's surname was spelled incorrectly. Because the judgments were not docketed under the correct surname, no valid lien against Julius's interest in the subject property was created [citations omitted] … [and the wife's interest] 'vested upon the judgment of divorce' [citation omitted]"*
>
> *"As to the funds in the escrow account…[a] lien on personal property is created when the judgment creditor delivers an execution to a sheriff (see CPLR 5202(a))…Here, Fischer did not deliver a property execution to the sheriff regarding the escrow account, and the judgments and restraining notice were not sufficient to establish a lien prior to entry of the divorce judgment."*

Matter of Fischer v. Chabbott, 2019 NY Slip Op 09002, 178 AD3d 923, decided December 18, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_09002.htm.

Judgments / Renewal Judgments

A money judgment docketed in the office of a County Clerk is a lien against real property in that County for ten years but, under CPLR Section 5014 ("Action upon judgment"), a renewal judgment may be obtained "during the year prior to the expiration of ten years since the first docketing of the judgment…The lien of a renewal judgment shall take effect upon the expiration of ten years from the first docketing of the original judgment."

The assignee of a money judgment docketed on September 15, 2008 commenced an action on December 2, 2019 to renew the judgment nunc pro tunc to September 15, 2018. The Supreme Court, Westchester County, held that the Plaintiff was entitled to a renewal judgment but not effective nunc pro tunc to September 15, 2018. The Court further held that the renewal judgment would be effective on its docketing in the office of the Westchester County Clerk. When this decision was rendered, the renewal judgment had not been submitted to the Clerk's office for entry. According to the Court,

> *"…any potential lender searching the records in Westchester County after September 15, 2018, until such time as the renewal judgment is entered and docketed by the County Clerk would have notice only of the already expired and not renewed 2008 judgment [citation omitted]. In practice, a plaintiff could obtain receipt of this order granting the motion for a renewal judgment and submit the renewal judgment to the clerk's office for signature sixty days from now. Within those 60 days the public would not be on notice of such renewal of the judgment and the lien that it carries."*

Washington Savings Fund Society, FSB v. John, 2020 NY Slip Op 20034, decided February 11, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_20034.htm.

Leaseholds / Consent to Assignment

The Supreme Court, New York County, held that the Plaintiff-landlord unreasonably withheld consent to the Defendant-tenant's proposed leasehold assignment. The Appellate Division, First Department, affirmed. According to the Appellate Division, there was evidence "that plaintiff offered to lease the premises directly to the proposed assignee at a higher rent." It was ruled that the Defendants were "entitled to damages for the amounts paid after plaintiff unreasonably withheld its consent to the assignment." WG Three Associates, LLC v. Portofino Chelsea, LLC, 2020 NY Slip Op 00548, decided January 28, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_00548.htm.

Lien Law / Industrial Development Agencies

Although a mechanic's lien is not properly fileable against a "public improvement' (as defined in Lien Law Section 2), under the definition of a public improvement "if the beneficial interest if an improvement is in an entity other than the state or a public corporation notwithstanding legal title being vested in an industrial development agency…then such improvement shall be considered an improvement of real property subject to mechanics' liens…"

The record owner of a shopping mall in upstate New York is owned by the Syracuse Industrial Development Agency ("SIDA"). Destiny USA Holdings, LLC ("Destiny") is the developer of the property and its beneficial owner. AJA Destiny LLC, which leased space in the mall from Destiny, engaged the Plaintiff to perform architectural and other professional services. The Plaintiff, claiming it was not paid, filed a mechanic's lien naming only SIDA, as the fee owner. The Supreme Court, Onondaga County, granted the Defendants' motion to dismiss the complaint. According to the Court, "a notice of mechanic's lien identifying only the ownership interest of one part owner is not enforceable against the unidentified interest of another part owner." Further, the SIDA's fee interest was not the proper subject of the lien; it should have been filed and could have been foreclosed against Destiny's beneficial interest in the property.

> *"Plaintiff's lien is facially invalid because it is not filed against an ownership interest that may be the subject of a mechanic's lien…[P]laintiff's failure to properly name Destiny USA constitutes a jurisdictional defect which is not curable by amendments."*

The Court denied the Plaintiff's cross-motion to amend its lien nunc pro tunc. TRM Architecture, Design and Planning, P.C. v. Destiny USA Holdings, LLC, 2018 NY Slip Op 33633, decided December 13, 2018, was posted on January 7, 2020 at http://www.nycourts.gov/reporter/pdfs/2018/2018_33633.pdf.

Mortgage Foreclosures/Interest Accrued

The Supreme Court, New York County, granted the foreclosing Plaintiff's motion for a judgment of foreclosure and sale but, in doing so, the Court disallowed the Plaintiff's request that the judgment include interest which had accrued during the duration of the case. The Court issued an Order of Reference on June 23, 2017; at a conference called by the Court on June 27, 2019 the Court tolled interest as of January 1, 2018 because the Plaintiff had not moved for a judgment of foreclosure and sale. According to the Court,

> *"[a] closer look at the [Referee's] report and plaintiff's motion reveals that plaintiff flatly ignored the Court's order tolling interest. Shockingly, plaintiff seeks interest accrued for the entire duration of this case…It may be that this request was unintentional – in which case it demonstrates an embarrassing lack of attention to detail – but that does not excuse such a mistake."*

HNY Club Suites Owners Association Inc. v. Maodud, 2020 NY Slip Op 30392, decided January 27, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_30392.pdf.

Mortgage Foreclosures/Intervention

The Defendant in a mortgage foreclosure sold the property after the action was commenced. The purchaser moved by order to show cause for leave to intervene and then for the complaint to be dismissed or for leave for it to interpose an answer. The Supreme Court, Kings County, denied the motion. The Appellate Division, Second Department, affirmed the lower court's Order as modified to grant the Appellant's motions to intervene and to interpose an answer.

The Appellant Division, applying CPLR Section 1012 ("Intervention as of right"), held that the Appellant was entitled to intervene because, as provided in subsection (a) of Section 1012, "the representation of the person's interest by the parties is or may be inadequate…[and] the action involves the disposition of…the title…to property and the person [here the Appellant] may be adversely affected by the judgment." Further, according to the Appellate Division,

> *"[t]he fact that the appellant obtained its interest in the premises after the action was commenced and the notice of pendency was filed does not definitively bar intervention [citations omitted], nor does the fact that [the Defendant-mortgagor] defaulted in answering the complaint [citation omitted]. Furthermore, under the circumstances of this case, the appellant's motion, made less than five months after it purchased the premises, was timely [citations omitted]."*

However, the Appellate Division ruled that the Appellant lacked standing, as a stranger to the note and mortgage, to assert non-compliance with the notice requirement of Real Property Actions and Proceedings Law ("RPAPL") Section 1304 and the failure to serve on the borrower a notice of default. US Bank National Association v. Carrington, 2020 NY Slip Op 00173, decided January 8, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_00173.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.

In 2005, Defendant Eitani executed a note secured by a mortgage on his property. In 2011, Eitani transferred title to the property to Defendant Cohan. Plaintiff, the assignee of the mortgage, thereafter commenced a foreclosure. Cohan moved for summary judgment dismissing the complaint as to him on the ground that the Plaintiff failed to comply with the notice requirements of RPAPL Section 1304 as to him. The Supreme Court, Kings County, denied Cohan's motion and granted the Plaintiff's motion for summary judgment and an order of reference. The Appellate Division, Second Department, affirmed, stating that

> *"[c]ontrary to Cohan's contention, he lacked standing to raise the issue of compliance with RPAPL 1304 as a defense herein. '…the notice requirements of RPAPL 1304 were enacted for the benefit and protection of borrowers who are natural persons. The statutory defense created by RPAPL 1302(2) for noncompliance with RPAPL 1304 is a personal defense which could not be raised by [Cohan], a stranger to the note and underlying mortgage' [citations omitted]."*

Wells Fargo Bank, N.A. v. Eitani, 2020 NY Slip Op 00320, decided January 15, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_00320.htm.

Other decisions have been reported on the application of RPAPL Section 1304.

In Charles Schwab Bank v. Winitch, the Appellate Division, Second Department, held in, that the borrower's spouse, who executed the mortgage but not the note, was not entitled to receive a RPAPL Section 1304 notice. According to the Appellate Division,

> *"the subject credit line mortgage, which was signed by both Charles and Janet, as mortgagors, contained the following provision: 'If Mortgagor signs this Security Instrument but does not sign an evidence of debt, Mortgagor does so only to mortgage Mortgagor's interest in the Property to secure payment of the Secured Debt and Mortgagor does not agree to be personally liable on the Secured Debt'. Under these circumstances, Janet cannot be deemed a 'borrower' for purposes of RPAPL 1304, since she did not sign the [Home Equity Credit Line Agreement], and the credit line mortgage otherwise makes clear that she is only a mortgagor, not a borrower [citation omitted] and is not personally liable for the debt…"*

This case, decided January 29, 2020, is posted as 2020 NY Slip Op 00564 at http://www.nycourts.gov/reporter/3dseries/2020/2020_00320.htm.

In Citimortgage, Inc. v. Erani, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Kings County; the Plaintiff had not established that it had strictly complied with the requirements of Section 1304. "[T]he plaintiff failed to provide evidence of the actual mailing, or evidence of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure…" This case, decided February 5, 2020, is posted as 2020 NY Slip Op 00843 at http://www.nycourts.gov/reporter/3dseries/2020/2020_00843.htm.

Similarly, the Appellate Division, Second Department, in Goshen Mortgage, LLC v. Giertl, held that the Supreme Court, Nassau County, should have denied the Plaintiff's motion for summary judgment because "the plaintiff failed to submit an affidavit of service, admissible business records, or sufficient evidence of mailing by the post office to demonstrated that it properly served the defendant pursuant to RPAPL 1304 [citation omitted]." This case, decided February 5, 2020, is posted as 2020 NY Slip Op 00847 at http://www.nycourts.gov/reporter/3dseries/2020/2020_00847.htm.

Mortgage Foreclosures / Standing

Affirming the entry of a judgment of foreclosure and sale by the Supreme Court, Bronx County, the Appellate Division, First Department, held that a defendant lacked standing to contest the judgment of foreclosure. According to the Appellate Division, "because [the Defendant] conveyed her interest in the property while the foreclosure action was pending [citations omitted]...[h]er attempt to reconvey the property to herself and her son as joint tenants after the notice of pendency was filed does not avail her." Totaram v. Gibson, 2020 NY Slip Op 00089, decided January 7, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_00089.htm.

Other decisions have been reported on the issue of standing.

In Deutsche Bank National Trust Company v. Benson, the Supreme Court, Westchester County, granted the Defendant-borrower's motion to dismiss the complaint insofar as asserted against him for lack of standing. The Appellate Division, Second Department, reversed and denied the Defendant's motion. According to the Appellate Division,

> *"[t]he consolidated note [secured by the mortgage being foreclosed] was endorsed by Countrywide Bank, N.A. [the original mortgagee] to Countrywide Home Loans, Inc., and, in turn, by Countrywide Home Loans, Inc., in blank. The evidence establishes that the plaintiff was in physical possession of the consolidated note at the time this action was commenced [citations omitted]. Under these circumstances, the validity of the purported assignments of the note and mortgage is irrelevant to the issue of the plaintiff's standing [citation omitted]."*

This case, decided January 15, 2020, is posted as 2020 NY Slip Op 00259 at http://www.nycourts.gov/reporter/3dseries/2020/2020_00259.htm.

In Gluckstern v. Arklow-FBF LLC, the Defendant asserted that the Plaintiff, the assignee of the note and mortgage, did not have standing to foreclose because the allonge was not firmly attached to the Note. The Supreme Court, New York County, granted the Plaintiff's motion to strike the Defendant's affirmative defenses and granted summary judgment. Plaintiff's counsel represented, on personal knowledge, that "the original Note and Allonge were sent to Plaintiff in care of his attorneys…and was received by counsel as a single document, with the allonge 'firmly affixed' to the Note at the back by a staple and that the staple was removed by counsel so the document could be necessarily scanned and included as an exhibit in this e-filed case…"

This case, decided December 16, 2019, is posted as 2019 NY Slip Op 33735 at http://www.nycourts.gov/reporter/pdfs/2019/2019_33735.pdf.

Mortgages / Fire Insurance Proceeds

In the foreclosure of a mortgage, the Defendants alleged that the Plaintiff acted in bad faith by refusing to release fire insurance proceeds for the repair of the mortgaged property. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment and for an order of reference; the Appellate Division, Second Department, affirmed the lower court's order.

Because the mortgaged property was not insured, as required by the mortgage, the Plaintiff obtained forced place insurance. After a fire destroyed the property the Plaintiff received proceeds from its insurer; the Defendants requested that the funds be used to repair the property. The Plaintiff agreed on condition that the Defendants enter into a property restoration agreement, allowing for funds to be disbursed as work was completed, and also that the Defendants pledge additional collateral as security. No agreement was reached, insurance proceed were not released to the Defendants, and the loan went into default.

The Appellate Division, Second Department, applied Real Property Law Section 254 ("Construction of clauses and covenants in mortgages and bonds or notes"), construing a clause in a mortgage requiring the "mortgagor to keep buildings insured". Section 254(4) provides, in part, as follows:

> *"…upon presentation to the mortgagee within three years after the fire, proof that the damage has been fully made good...the mortgagee, unless he rejects the proof submitted to him as insufficient, shall pay over to the mortgagor so much of said insurance money theretofore received by the mortgagee as dos not exceed the lesser of (1) the reasonable cost of such repairs, restoration and rebuilding or (2) the total amount actually paid therefor by the mortgagor, together with the reasonable value of any part of the work done by him [or her]."*

According to the Appellate Division, "[t]he statute's plain language cannot be read to *require* the mortgagee to advance all or part of the insurance proceeds before repairs have been carried out' [citations omitted]. Accordingly, the plaintiff was entitled to retain the insurance proceeds and disburse them as work on the restoration of the [mortgaged] property was completed." Emigrant Funding Corporation v. Kensington Realty Group Corporation, 2019 NY Slip Op 09255, decided December 24, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_09255.htm.

Mortgage Recording Tax / Madison County

Madison County has, effective for mortgages recorded on and after February 1, 2020, imposed a county mortgage recording tax of $.25 for each $100 secured. The total combined rate of mortgage recording tax in the County will, therefore, be $1.00 for each $100 secured by a mortgage. MT-19-1, "Changes to the Mortgage Recording Tax Rates Affecting Madison County", is posted to the New York State Department of Taxation and Finance's website at https://www.tax.ny.gov/pdf/notices/mt-20-1.pdf.

Notice of Pendency / Foreclosure of Equitable Mortgage

In November 2015, the Defendants, a husband and his wife, executed a mortgage on their property to James Julius. In December 2015, Sharestates Investments LLC ("Sharestates") brought an action to impose an equitable lien against the property; a notice of pendency was filed. In January 2016, the mortgage to Julius was recorded. In May 2016 the Supreme Court, Westchester County, awarded Sharestates an equitable lien for $1,500,000 effective as of the date on which the lis pendens was filed.

Sharestates commenced an action to foreclose its equitable lien and, in April 2017, a judgment of foreclosure and sale was entered. The Supreme Court denied Julius' cross-motion to dismiss the part of the complaint seeking a judgment directing that the Sharestates' lien be given first priority in the proceeds of a foreclosure sale. The Appellate Division, Second Department, affirmed the issuance of the judgment of foreclosure and sale and dismissed Julius' appeal. According to the Appellate Division,

> *"[e]ven assuming that Julius established that he lacked knowledge of the plaintiff's action for an equitable lien, he did not 'win the race to the recording office' [citation omitted] and, thus, could not 'cut off' the plaintiff's equitable lien, which, pursuant to the default judgment dated May 9, 2016, in the action to impose an equitable lien, was retroactive to December 18, 2015, the date of the filing of the notice of pendency."*

Sharestates Investments, LLC v. Hercules, 2019 NY Slip Op 09315, decided December 24, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_09315.htm.

Recording Act / Block Index

Tax lot 56 (the "Base Lot") in Block 2041 in Manhattan was converted to condominiums in May 2007 on the recording of a Declaration of condominium. The Base Lot was converted into individual tax lots in July 2007.

In June 2007, the Plaintiff made a loan to Defendant Hafeez Giwa secured by a mortgage on the condominium unit identified as tax lot 1307 in Block 2041. However, the mortgage, recorded in February 2008, was indexed against only the Base Lot. In 2014, an agreement modifying the mortgage was also recorded against only the Base Lot. When the Plaintiff commenced to foreclose its mortgage in 2016 it requested that the court "reform" the mortgage to include a legal description setting forth the tax lot attributable to the unit. The notice of pendency was filed against the Base Lot.

In 2018, while the foreclosure was pending, City West Capital LLC ("City West") purchased the unit at a sheriff's sale enforcing a judgment obtained by the condominium for non-payment of common charges. The deed to City West was indexed against Lot 1307. City West argued that it was a bona fide purchaser for value protected by the Recording Act, RPAPL Section 291 ("Recording of conveyances"). The Supreme Court, New York County, denied the Plaintiff's motion for summary judgment and granted City West's cross-motion to dismiss the complaint. According to the Court,

> *"…City West was a bona fide purchaser for value and it takes title to the property free and clear of plaintiff's mortgage because of the improper recording. Plaintiff is certainly correct that at the time Giwa executed the mortgage, the new condo lots has been designated but had not yet been formed by the City. But that does not absolve plaintiff of its responsibility to ensure its mortgage was recorded against the correct lot in the intervening time since the mortgage was executed… City West performed the requisite search [of title] to discover mortgages and it found none. City West was entitled to rely on that search.*
>
> *"To impose the additional obligation on City West to search the Base Lot or do a title search [of the Base Lot] is not supported in the case law cited by plaintiff nor does it come close to what a reasonable purchaser should have done."*

Bank of America, N.A. v. Giwa, 2019 NY Slip Op 33644, decided December 13, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_33644.pdf.

Recordings/Notice / Residential Real Property

Real Property Law Section 291 ("Recording of conveyances") was amended by Chapter 641 of the Laws of 2019, effective March 11, 2020, requiring that a recording office send a notice of the conveyance of residential real property to its owner of record. Amended Section 291 includes the following text:

> *"The clerk of the county or city registrar where such conveyance of residential real property is recorded and maintained shall mail a written notice of such conveyance to the owner of record. The notice shall have the heading printed in 20 point bold type and read as follows:*
>
> ***NOTICE OF SALE OR TRANSFER OF OWNERSHIP OF YOUR RESIDENTIAL PROPERTY.***
>
> ***To:*** _____
>
> ***Our records show that you are listed as the current owner of record for residential property:***
>
> ***Block #***_____ ***Lot #***_____
>
> ***Located At:*** _____ ***County of*** _____ ***New York***
>
> ***On*** _____***, documents were filed at this office to change ownership and transfer title of your property.***
>
> ***To:*** _____
>
> *If you have any questions regarding the validity of the documents, and wish to dispute the recording of the transfer, you should obtain legal counsel. If you believe you are a victim of a crime related to this recording, contact your local law enforcement agency or, if in the City of New York, the office of the sheriff.*
>
> *The party seeking to record such conveyance shall bear the cost of such written notice. The clerk of the county or city registrar is entitled to charge a reasonable fee to cover the cost of mailing the envelope to the owner of record. Failure to mail such notice or the failure of any party to receive the same, shall not affect the validity of the conveyance of the property."*

Restrictive Covenants

In 2003, Plaintiffs sold the property adjoining their home to the Defendant. To preserve the Plaintiffs' view of the ocean, the conveyance was made subject to a restrictive covenant preventing the Defendant from making "additions or alterations" to the house rising "above one story or 17.00 feet to the top of the roof of any structure as measured from the existing basement floor elevation." In 2016, the Defendant began to construct a gazebo in the backyard of his property, converted a gas fireplace in his home and added a chimney. The Plaintiffs alleged that the construction of the chimney and the gazebo violated the restrictive covenant.

The Supreme Court, Richmond County, enjoined the construction of the chimney and directed that it be removed. The Court further held that the gazebo did not violate the restrictive covenant. The Appellate Division, Second Department, affirmed. It found that the chimney violated the restrictive covenant but, as to the gazebo, the restrictive covenant is ambiguous. Therefore, it "must be interpreted in a manner favorable to [the Defendant] rather than [the Plaintiffs] who are seeking to enforce the restrictive covenant." Matter of Fiore v. Fabozzi, 2020 NY Slip Op 00858, decided February 5, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_00858.htm.

Rockland County/Recording Fee

The Rockland County Clerk has announced that a new fee of $10 will be applied to each "residential deed document" executed on or after March 11, 2020 which is received by that office either over the counter or by mail, including through the use of an overnight delivery service. For deed documents recording electronically, the additional fee will apply to such documents submitted on or after March 11. The fee applies to residential and not commercial real property. A notice is posted on the County Clerk's website at http://rocklandgov.com/files/6215/8315/9488/ADDITIONAL_RECORDING_FEE.pdf.

Zoning Lots / New York City

A "zoning lot" is defined in Section 12-10(d) of the Zoning Resolution ("ZR") of the City of New York, in relevant part, as "a tract of land, either **unsubdivided** or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which…is declared to be a tract of land to be treated as one zoning lot for purposes of this Resolution". (emphasis added) On formation of an expanded zoning lot, combining what had been separate zoning lots, development rights can be transferred within the new zoning lot for development. The definition in ZR Section 12-10 also states that "[a] zoning lot…may or may not coincide with a lot as shown on the official tax map of the City of New York…".

As reported in Current Developments dated May 28, 2019, in May of 1978 Irving E. Minkin, the then Acting Commissioner of the Department of Buildings ("DOB"), issued a Departmental Memorandum (the "Minkin Memo") with the subject line "Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution". The Minkin Memo stated the following:

> *"Under this [1977] amendment [to the zoning resolution, which amended the definition of a zoning lot] an applicant for new development or enlargement who desires to permit the use of a tract of land within a single zoning lot, which may consist of one or more tax lots* ***or parts of tax lots****, as shown on the official tax maps whether in common ownership or not…is required to furnish certain information which is to be certified by a title company…before he can obtain a building permit or certificate of occupancy". (emphasis added)*

In reliance on the Minkin Memo, and on generally accepted practice, the DOB issued a building permit for the construction of a 55-story tower at 200 Amsterdam Avenue on a 110,794 square foot development site within a tax block in Manhattan bounded by Amsterdam Avenue, West 66th Street, West End Avenue and West 70th Street. Development rights for the project were acquired though the creation of a combined zoning lot which included several partial tax lots. New York City's Board of Standards and Appeals ("BSA") issued a Resolution affirming the issuance of the permit.

Petitioners, the Committee for Environmentally Sound Development and the Municipal Arts Society, challenged the issuance of the building permit. After the BSA determination, Petitioners commenced an Article 78 proceeding seeking a judgment vacating the BSA Resolution. They claimed the building permit was invalid because the zoning lot assembled by the developer was not a proper zoning lot; in including several partial tax lots the zoning lot was not, as required by the ZR, either "unsubdivided" or "consisting of two or more lots of record".

The Supreme Court, New York County, annulled the BSA Resolution because it was "unreasonable and inconsistent with the plain language of the governing statute" which requires a zoning lot to be "a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block…" The Court remanded the matter to the BSA, which was directed to review DOB's approval of the building permit application "in accordance with the plain language of the [zoning resolution] and in accordance with this decision and order". The Committee for Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates LLC, 2019 NY Slip Op 30621, decided March 14, 2019, is posted http://www.nycourts.gov/reporter/pdfs/2019/2019_30621.pdf and at 2019 N.Y. Misc. LEXIS 1047.

On June 25, 2019, the BSA issued a Revised Resolution affirming the issuance of the building permit because of the "uncertainty" regarding DOB's interpretation of "zoning lot" under Zoning Resolution Section 12-10(d). However, the Supreme Court, in a decision dated February 13, 2020, nullified and vacated the BSA's Revised Resolution, and ordered the DOB to revoke its permit and compel the property owner to "to remove all floors that exceed bulk permitted under the Zoning Resolution." According to the Court, although

> *"[i]t appears that Owner completed much of the construction work by the time the [court's prior] Decision was rendered… Owner must bear the responsibility for any harsh results arising from invalidation of the permit. 'When a permit is wrongfully issued in the first instance, the vested rights doctrine does not prevent the municipality from revoking the permit to correct its error' [citation omitted]."*

This decision, also The Committee for Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates LLC, Index No. 157273/2019, is not published as of the date of this Bulletin.

On March 2, 2020, the Buildings Department issued Bulletin 2020-003 stating the following:

> *"Departmental Memorandum dated May 18, 1978 from Acting Commissioner Irving E. Minkin, P.E. to Borough Superintendents is superseded in part to the extent that a zoning lot may not consist of parts of tax lots unless a permit has been issued in reliance on such zoning lot prior to the date of issuance of this bulletin."*

The Department's Bulletin is posted at https://www1.nyc.gov/assets/buildings/bldgs_bulletins/bb_2020-003.pdf.

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