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Current Developments

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Easements

Plaintiffs claimed that their property benefitted from an ingress and egress easement over part of the Defendants' land the use of which the Defendants had obstructed by installing a gravel driveway on the easement, which had been covered by hard-packed dirt. The Supreme Court, Saratoga County, held that there was a right-of-way benefitting the Plaintiffs' property, and it ordered the Defendants to remove the gravel driveway. The Appellate Division, Third Department, reversed to the extent that the lower court had ordered the gravel driveway to be removed. According to the Appellate Division, "…in the absence of a demonstrated intent to provide otherwise, a landowner burdened by an express easement of ingress or egress may narrow it, cover it over, gate it or fence it off, so long as the easement holder's right of passage is not impaired.'"[Citations omitted]. In this case, "[a]lthough plaintiffs established that they had a right of passage for the purpose of ingress and egress, they failed to further establish that defendant's [sic] addition of a gravel driveway impaired that right to any extent." Thibodeau v. Martin, decided July 3, 2014, is reported at 990 N.Y.S. 2d 274.

Homestead Exemption

Under Civil Practice Law and Rules ("CPLR") Section 5206 ('Real property exempt from application to the satisfaction of money judgments"), a lot of land with a dwelling thereon, shares of stock in a cooperative apartment corporation, units of a condominium apartment, and a mobile home, owned and occupied as a principal residence, is exempt from the satisfaction of a money judgment to the extent of $150,000 in downstate counties and $125,000 in the counties of Dutchess, Albany, Columbia, Orange, Saratoga and Ulster. In 2005, the homestead exemption in the remaining counties of the State was increased from $10,000 to $50,000 (the "2005 Amendment"), and in 2010 to $75,000. The homestead exemption does not apply to a judgment recovered wholly for the purchase price of property. The homestead exemption is available to debtors in bankruptcy proceedings. See Debtor and Credit Law Section 282 ("Permissible exemptions in bankruptcy") and 11 USC Section 522(b)(3)(A) ("Exemptions").

The Debtor in a Chapter 7 Bankruptcy, claiming the $50,000 homestead

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exemption in effect when she filed for bankruptcy in 2009, moved to avoid two judgment liens totaling $10,655 against her residence in Erie County. One of the judgment creditors asserted that the bankruptcy court should apply the $10,000 exemption in effect when its judgment was perfected in 2003. The Bankruptcy Court ruled that the Debtor was entitled to the $50,000 homestead exemption in effect when the Debtor's bankruptcy case was filed. The United States District Court for the Western District of New York affirmed, and the United States Court of Appeals for the Second Circuit then affirmed the ruling of the District Court.

The 2005 Amendment did not specify whether the increase in the homestead exemption was intended to apply to judgments pre-dating as well as those post-dating its enactment. However, according to the Second Circuit, "…the 2005 Amendment applies to all creditors and all obligations, including pre-existing obligations, regardless of whether the debt was reduced to a judgment lien prior to the statute's enactment; and (2) retroactive application of the exemption does not constitute an unconstitutional taking of pre-enactment judgment liens in violation of the Takings Clause [of the Fifth Amendment to the United States Constitution stating 'nor shall private property be taken for public use, without just compensation.']." 1256 Hertel Avenue Associates, LLC v. Calloway, decided August 1, 2014, is reported at 2014 WL 3765864.

Mortgage Foreclosures

The Referee testified that the foreclosure sale was held on October 18, 2010; the Memorandum of Sale set forth that the sale was held on June 15, 2010. On account of this discrepancy, exercising its equitable powers to prevent fraud, collusion, mistake or misconduct, the Supreme Court, Bronx County, applying CPLR Section 3003 ("Irregularity in judicial sale"), granted the Defendant's motion to vacate the judgment of foreclosure and set aside the foreclosure sale. Under CPLR Section 3003, "[a]t any time within one year after a sale made pursuant to a judgment or order, but not thereafter, the court, upon such terms as may be just, may set the sale aside for a failure to comply with the requirements of the civil practice law and rules as to the notice, time or manner of such sale, if a substantial right of a party was prejudiced by the defect…"

The Appellate Division, First Department, reversed the lower court's ruling and denied the Defendant's motion, which was made "outside the one-year statutory time limit." It further stated that it would have denied the motion even if it had been timely. "The typographical error in the Memorandum of Sale, which was executed following the sale, appears to have been a scrivener's error and does not constitute the kind of irregularity encompassed by CPLR 2003." Further, the claim that the sales price was unconscionably low was unrelated to the scrivener's error, and, in any event, "the alleged inadequacy of price alone 'does not furnish sufficient grounds for vacating a sale" [Citation omitted]. Mooring Capital Fund, L.L.C. v. Bronx Miracle Gospel Tabernacle, Inc., decided July 31, 2014, is reported at 990 N.Y.S. 2d 508.

Mortgage Foreclosures/Affidavits

In support of its motion for summary judgment and the appointment of a referee to compute the amounts due, the foreclosing Plaintiff submitted an affidavit executed before a notary public in the State of Oklahoma. The Supreme Court, Kings County, denied the motion, raising, sua sponte, that the affidavit was submitted without the certificate of conformity required by CPLR Section 2309(c) ("Oaths and affirmations taken without the state"). The Appellate Division, Second Department, reversed and granted the Plaintiff's motion. The acknowledgement accompanying the affidavit "substantially conformed with the template requirement of Real Property Law Section 309-b ["Uniform forms of certificates of acknowledgment or proof without this state"] and constituted a certificate of conformity."

Further, according to the Appellate Division, if a certificate of conformity was required, "…the absence of a certificate of conformity is not, in and of itself, a fatal defect…,as it may be corrected nunc pro tunc or pursuant to CPLR Section 2001 ["Mistakes, omissions, defects and irregularities"], which permits trial courts to disregard mistakes, omissions, defects, or irregularities at any time during an action where a substantial right of a party is

not prejudiced. Thus, even if the certificate of conformity was inadequate or missing, no substantial right of the defendants is prejudiced. As they [the defendants] failed to oppose the plaintiff's motion or raise the issue, it was inappropriate for the Supreme Court to, sua sponte, do so on the defendants' behalf. [Citations omitted]

The Appellate Division also noted that CPLR Section 2309(c), Real Property Law Section 299 ("Acknowledgments and proofs without the state, but within the United States…") and Real Property Law Section 311(5) ("Authentication of acknowledgements and proofs made without the state"), when read together, do not require a separate "certificate of authentication" to confirm the authority of a foreign state notary. Midfirst Bank v. Agho, decided August 13, 2014, is reported at 2014 WL 3929100.

Mortgage Foreclosure/Right of Redemption

Defendants entered into a contract, which was not recorded, to purchase two lots in a planned subdivision. The contract afforded them a right of occupancy prior to closing. Plaintiff, the holder of the mortgage on the property, foreclosed, acquired title and terminated the Defendants' contract of sale. On obtaining subdivision approval, the Plaintiff inquired as to whether the Defendants were still interested in purchasing the two lots and was advised that the Defendants would not be proceeding with the transaction. The Defendants were then evicted.

Plaintiff commenced an action for strict foreclosure under RPAPL Section 1352 ("Judgment foreclosing right of redemption") against the Defendants and others. The Supreme Court, Warren County, granted the Plaintiff's motion for summary judgment against the Defendants and dismissed the Defendants' affirmative defenses and counterclaim. The Appellate Division, Third Department, affirmed the ruling of the lower court. The Plaintiff having terminated the contract with the Defendants, the Defendants' rejection of the Plaintiff's offer to sell the lots, and the Defendants eviction from the property "was more than sufficient to discharge plaintiff's initial burden on the motion for summary judgment." Agility Funding, LLC v. Wholey, decided July 17, 2014, is reported at 990 N.Y.S. 2d 666.

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance announced that the interest rate to be charged for the period October 1, 2014 – December 31, 2014 on late payments and assessments of Mortgage Recording Tax and the State's Real Estate Transfer Tax will be 7.5% per annum, compounded daily. The interest rate to be paid on refunds will be 2% per annum, compounded daily. The notice issued by the Department is posted at http://www.tax.ny.gov/pay/all/int_curr.htm.

Mortgages/Standing

Plaintiffs sought a determination that they owned certain real property. They moved for summary judgment for an Order canceling a mortgage purportedly held by Deutsche Bank National Trust Company, as Indenture Trustee, asserting that the assignment of the mortgage to Deutsche Bank was invalid and it lacked standing to foreclose. The Supreme Court, Orange County, denied the Plaintiffs' motion and the Appellate Division, Second Department. affirmed. According to the Appellate Division, "[e]ven if Deutsche Bank presently lacks standing to commence an action to foreclose the mortgage, the validity of the mortgage itself is not thereby vitiated." Homar v. American Home Mortgage Acceptance, Inc., decided July 30, 2014, is reported at 989 N.Y.S. 2d 856.

Mortgages/Subordination

In the Bankruptcy of the owner of real property in Queens County, the holder of the second mortgage (the "Sperry Mortgage") commenced an adversary proceeding seeking a declaratory judgment that the modification of a first mortgage (the "Chase Mortgage") without the consent of the holder of the Sperry Mortgage

subordinated the Chase Mortgage, at least in part, to the Sperry Mortgage.

The Chase Mortgage, executed in 2005, was modified under the Federal Home Affordable Modification Program ("HAMP") in 2010. The maturity date of the Note was extended by one month; amounts in arrears were deferred, without interest, to the end of the term of the Note; and the interest rate was reduced. No new funds were advanced. The Sperry Mortgage was executed in 2007.

The holder of the Sperry Mortgage asserted that the deferral of principal under the Chase Mortgage prejudiced its position by making the Chase Note and Mortgage more susceptible to default at maturity and would result, on the foreclosure of the Chase Mortgage, in reduced proceeds being available to satisfy the obligation to the holder of the Sperry Mortgage. It claimed that the Sperry Mortgage was entitled to priority over the lien of the Chase Mortgage, at least to the extent of the amount of the deferred principal.

The Bankruptcy Court for the Eastern District of New York granted the Chase Mortgage holder's motion for summary judgment. According to the Court, "[i]n considering whether a modification should cause a senior mortgage to become wholly or partially subordinate to a junior lien, the courts look at the particulars of the modification and scrutinize certain factors of the transaction. The principal factors considered are whether the modification increased the interest rate or the principal amount of the mortgage obligation." In this case, there was no basis on which to subordinate the Chase Mortgage to the Sperry Mortgage. "…[T]he 2010 Modification neither increased the interest rate nor increased the amount secured by the Chase Mortgage, or otherwise impaired the Sperry Mortgage in any other manner."

The Court pointed out that the modification of the Chase Mortgage substantially lowered the interest rate; the deferred principal did not bear interest; the modification of the defaulted Chase Mortgage loan improved the ability of the Debtor to make payments under the Sperry Mortgage; and the Sperry Mortgage matured 14 years before the Chase Mortgage. Sperry Associates Federal Credit Union v. U.S. Bank, National Association, as Trustee, decided August 14, 2014, is reported at 2014 WL 3973825.

Mortgage Recording Tax/New York State Transfer Tax

The Office of Tax Policy Analysis in 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 2013-2014 (April 1, 2013-March 31, 2014). According to the Report, the Real Estate Transfer Tax collected in FY 2013-2014 was $911,351,843, up from $756,354,761 collected in FY 2012-2013. Mortgage recording tax collected statewide in FY 2013-2014 was $1,765,071,336, the mortgage recording tax collected in New York City being $1,216,719,377. As reported in the Annual Statistical Report issued for FY 2012-2013, for that fiscal year the mortgage recording tax collected statewide was $1,481,063,300; the mortgage tax collected in New York City was $964,196,020. The Report for Fiscal Year 2013-2014 is posted at: http://www.tax.ny.gov/research/stats/statistics/new_reports.htm.

Zoning/Development Rights

The Supreme Court, Queens County, ordered that a Certification of Parties-in-Interest, a Zoning Lot Description and Ownership Statement and a Declaration of Zoning Lot Restrictions, recorded to effect a zoning lot merger for the transfer of development rights to a development site within a merged zoning lot, be stricken from the records of the New York City Register for not accounting for the mortgagee of a lot from which development rights were to be transferred.

According to Section 12-10 of New York City's Zoning Resolution, "[e]ach Declaration [of Restrictions] shall be executed by each party in interest…excepting any such party as shall have waived its right to execute such Declaration…" The mortgagee in question was a party-in-interest; as it "did not execute the Declaration and did

not execute a waiver, said the [sic] Declaration, as well as the Certification and Statement were factually inaccurate and the Declaration failed to comply with the provisions of Zoning Resolution 12-10. Said documents, thus, were insufficient to achieve a zoning lot merger."

Part of the motion made by the temporary receiver of the mortgaged property for a preliminary injunction enjoining the Defendants and others from submitting an application for a building permit on the intended development site was denied. The aforementioned documents having been ordered stricken from the record, absent a consent or waiver from the mortgagee, the Defendants "may not, in the future, seek a building permit based on a single zoning lot… [and] [t]he movant has also failed to demonstrate that the Wu defendants [the owners of the intended development site] have or are about to commence construction without a permit." BACM 2006-4 Office 41-60, LLC v. Flushing Landmark Realty L.L.C., decided July 21, 2014, is reported at https://www.nycourts.gov/reporter/pdfs/2014/2014_32184.pdf. A motion to stay the Order of the Supreme Court pending a hearing and a determination of an appeal was denied by the Appellate Division, Second Department, on July 23, 2014 in a Decision and Order posted at http://www.nycourts.gov/reporter/motions/2014/2014_78489.htm.

Zoning/Development Rights

Defendants constructed a building in Manhattan utilizing development rights transferred from the Plaintiff's property. The Plaintiff alleged, however, that the building permit for the Defendants' building was obtained, and the Defendants' building was constructed, based on a survey submitted by the Defendants to the New York City Department of Buildings ["DOB"]. The Plaintiff also alleged that the survey overstated the square footage transferred to the Defendants' parcel by not accounting for floor space being used on a mezzanine level in the Plaintiff's building. The agreements between the Plaintiff and the Defendants did not specifically state how much square footage was being transferred or provide any measurement of what square footage was being purchased.

Among other causes of action, the Plaintiff sought an Order requiring the Defendants to submit an application to the Building Department which did not incorporate development rights utilized on the Plaintiff's property. This cause of action was not dismissed. According to the Court, the Plaintiff "may be able to establish that its rights to further development of the [Plaintiff's property] has been negatively impacted by the alleged error in the survey."

The Court granted the Defendants' motion to dismiss all other causes of action, including actions for conversion, trespass, breach of contract and a request for a mandatory injunction requiring that the Defendants cure their overbuilt building. The Plaintiff asserted that without the granting of injunctive relief its property would suffer permanent irreparable injury with no adequate remedy at law. The Court ruled that "[t]here are insufficient allegations in the complaint to sustain such a drastic claim for injunctive relief…[Plaintiff] cannot compel the defendants to modify its building. That power vests with the DOB." Harmit Realties LLC v. 835 Avenue of the Americas, L.P., decided September 3, 2014, is reported at 2014 WL 4376128.

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