



First American Title™
NATIONAL COMMERCIAL SERVICES

Current Developments

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Condominiums/Cooperatives

"Requests Made Under the New York Freedom of Information Law for Access to Documents that Have Been Accepted for Submission, but Not Yet Accepted for Filing", a Memorandum dated May 8, 2015, has been issued by New York State Department of Law's Real Estate Finance Bureau. According to the Memorandum, "...FOIL requests for pending plans [for the initial offering of condominium units or of shares in a cooperative apartment] shall be denied as exempt under Public Officers Law Section 87(2)(a) and GBL Section 352-e." Tenants and their representatives, however, will continue to be able to inspect and copy proposed offering plans for their buildings. The Memorandum is posted on the Department's website under <http://www.ag.ny.gov/real-estate-finance-bureau/hot-topics>.

Condominiums/Right of First Refusal

A condominium Board of Managers exercised its right of first refusal to purchase a unit and assigned its right to purchase to a limited liability company (the "Designee"), the principal of which owned another unit. The Designee's principal agreed to pay approximately \$400,000 to license the hallway between the two units. His wife, a member of the Board, was alleged to have not participated in any related deliberations or discussions. The Plaintiff Board of Managers sought to enforce the right of first refusal.

The selling unit owner, the Defendant, objected, arguing that the Condominium's By-Laws did not permit the Board to designate a third-party entity to purchase the unit. The Defendant also sought discovery to ascertain if the assignment to the Designee "was made in bad faith, and involved self-dealing and unequal treatment." The Supreme Court, New York County, directed the Defendant to convey his unit to the Designee. The Appellate Division, First Department, affirmed.

The Condominium's By-Laws provide that the giving of a notice of a sale to the Board constituted an offer to sell to the Board "or its designee." According to the Appellate Division, the By-Laws "do not require the designee to be an entity organized and owned by [the Board of Managers]." As to whether the Plaintiff was entitled to the protection of the business judgment rule, the Court ruled that that no prejudice to the Defendant was shown. "[T]he defendant will receive the same amount of money it would have received had the unit been sold to the party with whom defendant had contracted." That the Defendant could have sold the unit for a greater amount if there had been a legitimate bidding process was "speculative." *The South Tower Residential Board of Managers of Time Warner Center Condominium v. The Ann Holdings, LLC*, decided April 9, 2015, is reported at 2015 WL 1565871.

Cooperative Units

Plaintiff, a residential low income housing cooperative, was granted a judgment of possession for a unit owned by the corporation and evicted the unit's tenant-shareholder. To sell the unit to a new tenant-shareholder, the Plaintiff commenced an Action under Real Property Actions and Proceedings Law ("RPAPL") Article 15 ("Action to compel the determination of a claim to real property") to terminate a recorded UCC-1 financing statement that had been assigned to Defendant US Bank. Under Section 5-1501(a), "[w]here a person claims an estate or interest in real property...such person...may maintain an action...to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make..."

The Supreme Court, New York County, granted US Bank's cross-motion to dismiss the complaint. According to the Court, "[t]his action by plaintiff to terminate US Bank's security interest in the shares of the Cooperative Unit is in effect an action to determine the priority of plaintiff and US Banks' [sic] interests in the shares of the Cooperative Unit. Therefore, just as in [Matter of State Tax Comm. V. Shor, Court of Appeals, 43 N.Y.2d 151 (1977)], the UCC should apply rather than the RPAPL, which governs only adverse claims with respect to real property." 523-527 West 143rd Street Housing Development Fund Corporation v. U.S. Bank National Association as Trustee, decided April 7, 2015, 2015 NY Slip Op 30-516, is posted at http://www.nycourts.gov/reporter/pdfs/2015/2015_30516.pdf

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Deeds

Beatrice, one of two tenants-in-common owning real property in Kings County, died in 2007. She was survived by her husband John, her grandson Gregory, and her granddaughter Victoria, the Petitioner. Beatrice's Last Will and Testament, filed with the Surrogate's Court, Kings County, but not probated, left John a life estate in her tenant-in-common interest with the remainder to Gregory. Beatrice's daughter Nympha, the other tenant-in-common, died intestate in 2006, survived by Gregory and Victoria, her children.

In 2008, Gregory and John conveyed the property to Gregory, subject to a life estate for the benefit of John. Gregory executed the deed as the "sole surviving heir of Nympha" and John executed the deed as the "sole surviving heir of Beatrice". Petitioner, to whom limited letters of administration for Beatrice's estate had been issued, claimed that the representations in the deed as to heirship were fraudulent, and she petitioned the Surrogate's Court, Kings County, to hold that the 2008 deed and the subsequent mortgage were void.

Gregory argued that under Real Property Law Section 245 ("Estate which passes by grant or devise") the deed was still effective to transfer the interest in the property that he did have. Section 245 provides, in part, "[a] greater estate or interest does not pass by any grant or conveyance than the grantor possessed or could lawfully convey, at the time of delivery of the deed..." The Surrogate's Court, Kings County, however, held that the misrepresentations as to heirship in the 2008 deed rendered the 2008 deed, and the subsequent mortgage executed by Gregory, void ab initio. Matter of Victoria Rattiner, as Administrator, decided April 22, 2015, 2015 NY Slip Op 50575 is posted at http://www.nycourts.gov/reporter/3dseries/2015/2015_50575.htm

Easements

The Long Island Power Authority ("LIPA") has the benefit of an easement over property of the Defendant Long Island Yacht Club ("LIYC"), through which property pass LIPA power lines. Bamboo vegetation on the LIYC property caught fire from sparks emanating from the power lines; the fire spread to property of the Plaintiff, the casualty company's insured. The Plaintiff sued LIPA and LIYC to recover insurance benefits paid to its insured. The Supreme Court, Suffolk County, denied LIYC's motion for summary judgment dismissing the complaint as to it, but the Appellate Division, Second Department, reversed the lower court's Order. The Appellate Division held that LIYC, the owner of the servient estate, "had no duty to trim the bamboo vegetation around LIPA's power lines." The Court cited Tagle v. Jakob (97 N.Y.2d 165), in which New York's Court of Appeals stated "[o]rdinarily, 'a servient owner has no duty to maintain an easement to which its property is subject.'" Encompass Insurance Company of America v. Long Island Power Authority, decided May 6, 2015, is reported at 2015 WL 2079224.

Mortgages

At the closing of a mortgage loan, one of the three members of a limited liability company represented that he was the company's sole member with the authority to execute the mortgage. In the foreclosure of the mortgage, the limited liability company and another of its members, who had a 50% interest in the company, moved for summary judgment dismissing the complaint as to them. The foreclosing Plaintiffs cross-moved for a summary judgment dismissing affirmative defenses which claimed that the mortgage was invalid. The Supreme Court, Nassau County, dismissed the Defendants' motion and granted the cross-motion. The Appellate Division, Second Department, affirmed. According to the Appellate Division, documents were presented at the closing indicating that the member executing the mortgage was the sole member of the limited liability company; the Plaintiffs had "established, prima facie, that the circumstances presented would not lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue." 334 Corp. v. Jericho Plaza, LLC, decided May 6, 2015, is reported at 2015 WL 2079585.

Mortgage Foreclosures

Plaintiff moved to intervene in an Action to foreclose a mortgage on property in which she claimed a non-record interest in the title. The Supreme Court, Kings County, denied her motion without an explanation, stating that the Court was not determining whether she was a necessary or indispensable party. The Plaintiff then commenced an Action for a judgment that she owned the real property, seeking a stay of the mortgage foreclosure. The Supreme Court, Kings County,

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dismissed the cause of action seeking a stay of the foreclosure on the basis of collateral estoppel and directed that the purchaser at the foreclosure sale was to take title free and clear of any interest that might be held by the Plaintiff.

The Appellate Division, Second Department, reversed; the lower court should not have dismissed the cause of action seeking a stay of the foreclosure. According to the Appellate Division, the Plaintiff's "interest, if any, in the subject property was neither litigated nor determined in the foreclosure action, and the order denying her motion to intervene as of right in the foreclosure action was not an adjudication of her rights on the merits." *Jamison v. Aquai*, 2015 NY Slip Op 04097, decided May 13, 2015, is posted at http://www.courts.state.ny.us/reporter/3dseries/2015/2015_04097.htm

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 July 1, 2015 – September 30, 2015 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/Securitization

The Defendant-mortgagor contended that the purported assignment of the note and mortgage to the foreclosing Plaintiff, the Trustee under a REMIC Trust, was void under New York law for not having complied with requirements of the Trust's Pooling and Servicing Agreement ("PSA"); therefore, the Plaintiff lacked standing to foreclose. The Supreme Court, Kings County, held that there was a triable issue of fact as to whether the assignment violated certain provisions of the PSA and, if it did, whether it was void under Estates, Powers and Trusts Law Section 7-2.4 ("Act of trustee in contravention of trust"). Under Section 7-2.4, "every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void."

The Appellate Division, Second Department, reversed the ruling of the lower court and granted the Plaintiff's motion for summary judgment on the complaint as against the Defendant- mortgagor. According to the Court, the Defendant, "as a mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the PSA." *Wells Fargo Bank, N.A. v. Erobobo*, decided April 29, 2015, is reported at 2015 WL 1915161.

Powers-of-Attorney

Pursuant to a power of attorney executed by their father the Defendants, two of his children, conveyed their father's land to themselves without consideration by a deed recorded November 20, 2008, reserving to their father a life estate. Their father, however, executed a deed to the property, recorded November 26, 2008, conveying ownership to his other child, the Plaintiff in an Action commenced under RPAPL Article 15, while reserving to himself a life estate. The Supreme Court, Essex County, held that the deed transferring title to the Plaintiff was valid and the deed to the Defendants was null and void; the Appellate Division, Fourth Department, affirmed.

When an agent under a power of attorney makes a gift to himself or herself, there is a presumption of impropriety that can "'be rebutted [only] with a clear showing that the principal intended to make the gift' or that the gift was in the principal's best interest." [citations omitted] According to the Appellate Division,

"Here, the parties' father transferred title of the parcel to plaintiff while reserving a life estate to himself, thus demonstrating that he did not wish to give the remaining interest in the parcel to defendants. Furthermore, the evidence submitted by defendants in support of the deed transferring title to them, including the fact that there was no consideration given for the transfer, indicates that the intent of [the Defendants] in executing the deed was not to protect their father but, rather, to protect defendants' future inheritance from their brother and his creditors."

Borders v. Borders, decided May 8, 2015, is reported at 2015 WL 2145512.

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Recording Act

Plaintiff commenced an Action to foreclose a purchase money mortgage executed in 2006 and recorded on December 6, 2007. Between the date of the execution and the recording of that mortgage, the Defendant-mortgagors also executed a mortgage to Defendant Conroy to secure outstanding loans and future advances. That mortgage was recorded in August 2007. Conroy asserted a counterclaim alleging that his mortgage had priority over the Plaintiff's mortgage. The Supreme Court, Essex County, denied Conroy's motion for summary judgment, holding that the Plaintiff's mortgage had priority as a purchase money mortgage. The Court also concluded that there were issues of fact as to whether Conroy's mortgage was given for valuable consideration and whether Conroy was aware of the Plaintiff's mortgage.

The Appellate Division, Second Department, affirmed the Order of the lower court. Although the Supreme Court erred in holding that the Plaintiff's mortgage had priority because it was a purchase money mortgage and there was no evidence that Conroy should have known of the Plaintiff's mortgage, there were issues of fact as to whether Conroy's mortgage was given for valid consideration. Conroy did not establish as a matter of law that the antecedent debt was valid consideration and it was not adequately established that future advances intended to be secured by the mortgage were made. *Rottner v. Conroy*, decided May 14, 2015, is reported at 2015 WL 2236681.

Statute of Limitations/Fraud

Plaintiff, the decedent's daughter, was the Administrator of her father's Estate. As the Administrator, the Plaintiff commenced an Action to have an allegedly forged deed, purportedly executed by her father, and a mortgage executed by the grantee of that deed, declared null and void. The Supreme Court, Kings County held that the complaint was time barred under Civil Practice Law and Rules ("CPLR") Section 213(a)(8); the Court granted the Defendants' motion to dismiss the complaint. CPLR Section 213(a)(8) provides, in part, that in "an action based upon fraud, the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." The Appellate Division, Second Department, held that the forgery-based claim against the mortgagee was subject to the statute of limitations. The Appellate Division also modified the lower Court's Order, denying the motion to dismiss as against the individual Defendants and the Bank of America, the mortgage lender, on procedural grounds.

The Court of Appeals, having granted the Plaintiff leave to appeal as to the Bank of America, reversed the Order of the Appellate Division, denying the Bank of America's motion to dismiss the complaint by reason of CPLR Section 213(a)(8). According to the Court of Appeals, "...a statute of limitations cannot validate what is void at its inception. Therefore, a void deed is not subject to a statutory time bar." *Faison v. Lewis*, decided May 12, 2015, is reported at 2015 WL 2183712.

Southampton, Suffolk County

Two decisions of the Appellate Division, Second Department, each dated April 22, 2015, dealt with the authority of the Trustees of the Town of Southampton over the ocean beach areas within the Incorporated Villages of Quogue and West Hampton Dunes. The Trustees sought a judgment declaring that they had the sole authority to regulate activities on the ocean beach lands based on the Dongan Patent of 1686. The Trustees asserted that the Defendant Villages were required to comply with the Town's permit requirements for activities such as dune restoration and ocean control projects.

As stated by the Appellate Division, in *Semlear v. Incorporated Village of Quogue*:

"(a) the Trustees of the Freeholders and Commonalty of the Town of Southampton have no lawful governmental or regulatory power to grant or deny permits in connection with (i) the placement and grading of sand and earth, and (ii) the development, construction, maintenance, and use of structures and lands anywhere upon or in the ocean beaches located within the boundaries of the Incorporated Village

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of Quogue, except for the management of the specific activities and uses reserved to the inhabitants of the Town of Southampton by L. 1818, ch 155, and L. 1831, ch 283 for 'taking seaweed from the shores of any of the common lands of said down, or carting or transporting to or from, or landing property on said shores, in the manner heretofore practiced' (L 1818, ch 155, Section IV)..."

Semlear v. Incorporated Village of Quogue is reported at 2015 WL 1810015, The companion decision, Incorporated Village of West Hampton Dunes v. Semlear, holding the same as to the regulation of activities on ocean dunes within the Incorporated Village of West Hampton Dunes, is reported at 2015 WL 1819475.

Title Insurance

The Title Insurance Rate Service Association, Inc.'s ("TIRSA") Rate Manual has been amended effective August 1, 2015 to reduce the rate charged by companies which are members of TIRSA for the refinancing of mortgages on 1-4 family residential property.

Transfer Tax/City of Yonkers

A transfer tax of 1.5% of the selling price is payable by the seller of real property in the City of Yonkers. This tax is required to be paid before the deed will be accepted for recording by the Westchester County Clerk. The Municipal Real Estate Transfer Tax Receipt issued by the City of Yonkers to confirm to the County Clerk that transfer tax has been paid has been revised. The updated form is posted at <http://www.cityofyonkers.com/live/taxes-water/real-estate-transfer-tax>

Transfer Tax/New York City

An Administrative Law Judge for the New York City Tax Appeals Tribunal, applying the step transaction doctrine, ruled that the transfer of a 45% member's interest in a newly-formed LLC was transfer taxable. A tenant-in-common interest of 45% was transferred to an LLC in exchange for a 45% interest as a member of the LLC; the member interest was then transferred to the other member of the LLC, which was the other former tenant-in-common. Determination TAT (H) 13-25, dated April 1, 2015, is posted at <http://www.nyc.gov/html/tat/downloads/pdf/1325DET0415.pdf>

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An article, "Step Transaction Doctrine Applied to New York City Transfer Tax", by Michael J. Berey, was published in the New York Law Journal on June 9, 2015.

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