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NATIONAL COMMERCIAL SERVICES

Current Developments

By ***Michael J. Berey***
Senior Underwriting Counsel
First American Title National Commercial Services

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Adjoining Owners

To demolish the building on its property, the Petitioner was required by New York City's Building Construction Code and New York City's Building Department to conduct a preconstruction survey of an adjacent property. The owner of the other property, the Respondent, denied access and the Petitioner commenced a special proceeding pursuant to Real Property Actions and Proceedings Law ("RPAPL") Section 881 ("Access to adjoining property to make improvements or repairs") seeking an Order granting it, inter alia, access to the Respondent's building to conduct the preconstruction survey, to remove the chimney serving the Petitioner's building which is connected to a wall of the Respondent's building, and to patch the wall after the chimney removal.

Under RPAPL Section 881 "[w]hen an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or its lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license to enter...[t]he licensee shall be liable to the adjoining owner or his lessee for actual damages accruing as a result of the entry."

The Supreme Court, New York County, finding that without access to the Respondent's property the Petitioner would not be able to conduct the required preconstruction survey, and that any hardship imposed on the Respondent "will be slight compared to the hardship Petitioner will incur if the license is refused", granted Petitioner a limited license for access to the Respondent's property to enable Petitioner to conduct a preconstruction photographic survey and a chimney probe, and to replace any bricks to ensure the weatherproof integrity of the adjoining wall of the Respondent's building once the chimney was removed. The Court further required that Petitioner not interfere with the Respondent's "necessary access", that Petitioner maintain an insurance policy with $5,000,000 liability and property damage coverage naming Respondent as an additional insured, and that Petitioner return the license area to its original condition. Matter of West 96th Development LLC v. 7 West 96th Street Corporation, 2016 NY Slip Op 30465, decided March 21, 2016, is posted at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_30465.pdf

Adverse Possession

In order to access the parking lot on the property of Defendant Fradler Realty Corp. ("Fradler") and rear entrances to the retail stores on Fradler's property, vehicles and pedestrians crossed over the parking lot located on the Plaintiff's adjoining property. The Defendants claimed that their agents, tenants and customers had an easement by prescription. The Supreme Court, Nassau County, held that Fradler had no rights of access over the Plaintiff's property and enjoined the Defendants from trespassing. The Appellate Division, Second Department, affirmed. According to the Appellate Division,

> "…while, as the Supreme Court found, it appears undisputed that the defendants' traversing of [the Plaintiff's] lot was open, notorious, and continuous for the prescriptive period, the court properly determined that the presumption of hostility did not arise. [The Plaintiff's manager] testified that he permitted such use to Fradler and the public at large as a matter of willing accord and neighborly accommodation. He further explained how he had, over the years, protected [the Plaintiff's] ownership interest when others had abused the permission he afforded. The court credited this testimony in concluding that the use was permissive and, upon our review, we see no basis to disturb this determination."

Colin Realty Co., LLC v. Manhasset Pizza, LLC, 2016 NY Slip Op 01633, decided March 9, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_01633.htm.

Bankruptcy/Statute of Limitations

Defendant Paavo Raudkivi executed a mortgage in 1998 and, in October 2001, he failed to make mortgage payments. The mortgagee accelerated the debt and commenced a foreclosure. In October 2002, the Defendant filed a Chapter 13 bankruptcy. A Bankruptcy Plan, confirmed in April 2003, provided that the Defendant would pay $22,201 in pre-petition arrears. The Defendant also agreed to make all of his post-petition mortgage payments outside of the Plan. A discharge in Bankruptcy was granted in October 2006. The Defendant made mortgage payments through July 2005.

In July 2012, the Plaintiff, the holder of the mortgage by assignment, commenced a foreclosure.

The Defendant asserted that the foreclosure was barred by the six-year statute of limitations in Civil Practice Law and Rules Section 213(4) ("Actions to be commenced within six years…"). He contended that the statute of limitations, as tolled by the Bankruptcy filing, ended in October 2011. The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Nassau County, granting the Plaintiff's motion for summary judgment and for an Order of Reference. According to the Appellate Division,

> "…Raudkivi's Chapter 13 bankruptcy plan, in which he acknowledged the mortgage debt and promised to repay it, renewed the limitations period. The automatic bankruptcy stay, which was in effect when Raudkivi executed his Chapter 13 bankruptcy plan, tolled the renewed limitations period…,so the renewed limitations period did not begin to run until Raudkivi was granted his discharge in bankruptcy in October of 2006. Since this [foreclosure] action was commenced less than six years later, in July of 2012, this action is not time-barred." [citations omitted]

PSP-NC, LLC v. Raudkivi, decided April 6, 2016, is reported at 2016 WL 1355094.

Condominiums/Common Charges

Adam Plotch, the successful bidder at the foreclosure sale of a condominium unit for unpaid common charges, claimed that a mortgage on the unit was extinguished because the common charge lien was superior to the mortgage. The Appellate Division, Second Department, reversing the ruling of the Supreme Court, New York County, held that the mortgage was superior to the common charge lien under Real Property Law Section 339-z ("Lien for common charges") and, therefore, he "took the property subject to the lien". Board of Managers of Regent's Park Gardens Condo v. Chavez, decided February 24, 2016, is reported at 25 N.Y.S. 3d 655.

Condominiums/Common Charge Lien Foreclosures

In a mortgage foreclosure involving residential real property, the foreclosing party is required by Real Property Actions and Proceedings Law Section 1303 ("Foreclosures; required notices"), when the foreclosure relates to an owner-occupied one-to-four family dwelling, to deliver to the mortgagor with the summons and complaint a notice captioned "Help for Homeowners in Foreclosure". The Supreme Court, New York County, held that this Section 1303 notice applies to the foreclosure of condominium liens for unpaid common charges. Although Section 1303 applies to mortgage foreclosures involving residential property, Real Property Law Section 339-aa ("Lien for common charges; duration; foreclosure") provides that a common charge lien "may be foreclosed by suit…in like manner as a mortgage of real property…" The Court granted the Defendant's motion to dismiss the complaint and directed the New York County Clerk to cancel the notice of pendency. However, the Court also granted the Plaintiff's cross-motion to serve an Amended Summons and Complaint accompanied by the required notice. According to the Court, "[t]here is no indication that permitting plaintiff to serve the RPAPL Section 1303 notice at this juncture…would result in any prejudice to defendant in his ability to defend this matter." Millenium Tower Residences v. Kaushik, 2016 NY Slip Op 30410, decided March 14, 2016, is posted at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_30410.pdf.

Condominiums/NYS Regulation

The New York State Department of Law has revised 13 N.Y.C.R.R. Part 20 ("Disclosure Requirements for Condominium Offerors Renting, Rather than Selling, Unsold Condominium Units"), effective April 15, 2016. According to an email circulated by the Department on March 16, 2016, "the revised regulations clarify that condominium offerors cannot rent units in newly-constructed, vacant, or non-residential condominiums prior to consummation of the offering plan, except pursuant to interim leases or interim rental agreements." A "Summary of Revised Regulations" is posted at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/real_estate_finance/rulemaking/3.15.16_Summary_of_Revised_Regulations.pdf.

Deeds/Covenant Against Grantor's Acts

A deed conveying Brooklyn residential property contained a covenant against grantors' acts, that is, a covenant that the Sellers had not done anything to encumber the property. The Sellers had, however, executed a conservation easement

burdening the property. The Purchasers brought suit seeking damages for violation of the covenant and the Sellers, in turn, filed a third-party complaint against their attorney, who had drafted the deed. The Sellers sought to recover any amounts that would be awarded to the Purchasers. The Supreme Court, Kings County, denied the attorney's motion to dismiss the third-party complaint.

The Appellate Division, Second Department, reversed the ruling of the lower court, holding that the Sellers could not maintain a cause of action against their attorney for indemnification, and that the attorney's motion to dismiss should have been granted. According to the Appellate Division,

> "…in this case, any potential liability of the sellers in the main action would be the result of their own affirmative act of encumbering the property with a conservation easement in 2002, rather than [the attorney's] alleged negligent drafting of the deed. Since the sellers do not allege that [the attorney] played any role in the conveyance of the conservation easement, which is the basis for their potential liability, the third-party complaint does not adequately plead a cause of action for common-law indemnification against him."

The Appellate Division noted that the statute of limitations for legal malpractice had expired. Schottland v. Brown Harris Stevens Brooklyn, LLC, decided March 16, 2016, is reported at 2016 WL 10335522.

Election of Remedies

Real property subject to a mortgage foreclosure was sold for less than what was due under the note secured by the mortgage. The foreclosing Plaintiff accepted the net proceeds of the sale in exchange for releasing the property from the mortgage. The Plaintiff then moved for leave to amend its complaint to substitute for the foreclosure a cause of action to recover on the note and on a guaranty of the obligations under the note. The Supreme Court, Nassau County, denied the motion; the Appellate Division, Second Department, reversed and granted leave to amend the complaint. According to the Appellate Division, the Plaintiff "was not precluded from seeking to recover on the note and guaranty by RPAPL 1301(3)" and such relief could be sought by amending the complaint instead of commencing a new action. Under Real Property Actions and Proceedings Law Section 1303(3) ("Separate action for mortgage debt"), "[w]hile the action [to foreclose a mortgage] is pending, or after final judgment for the plaintiff therein, no other action 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". A foreclosure judgment had not been issued. TD Bank N.A. v. 250 Jackson Ave., LLC, decided March 16, 2016, is reported at 2016 WL 1033474.

Mortgage Foreclosures/Attorneys' Fees

Under Real Property Law Section 282 ("Mortgagor's right to recover attorneys' fees in actions or proceedings arising out of foreclosures of residential property"), "[w]henever a covenant contained in a mortgage on residential real property shall provide that…the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage... there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys' fees and expenses incurred by the mortgagor…in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract…"

The Supreme Court, Suffolk County, granted the Plaintiff's motion to discontinue the Action to foreclose its mortgage without prejudice and denied the Defendant's cross-motion for an award of an attorney's fee under Real Property Law Section 282 or, in the alternative, for leave to amend his answer to assert a counterclaim for an attorney's fee. The Appellate Division, Second Department, affirmed the ruling of the lower Court insofar as appealed from. According to the Appellate Division,

> "[h]ere, the voluntary discontinuance of this action pursuant to CPLR 3217(b) was without prejudice and there was no substantive determination on the merits of either the plaintiff's cause of action or [the Defendant's] defenses. Accordingly, [the Defendant] was not a prevailing party for the purpose of Real Property Law Section 282 and was not entitled to an award of an attorney's fee for a 'successful defense' of this foreclosure action…"

Bank of America, N.A. v. Destino, 2016 NY Slip Op 02601, decided April 6, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_02601.htm.

Mortgage Foreclosures/Standing

The Supreme Court, Ulster County, granted the foreclosing Plaintiff's motion for summary judgment and denied the Defendant's cross-motion to dismiss the complaint on the ground that the Plaintiff lacked standing. The Appellate Division, Third Department, affirmed the lower court's ruling, finding that the note was delivered to the Plaintiff's custodian prior to the commencement of the Action. Further, the Appellate Division noted, the "defendant lacks standing to challenge plaintiff's possession of the note based on a purported noncompliance with certain provisions of the applicable pooling and servicing agreement." U.S. Bank National Association, as Trustee v. Carnivale, 2016 NY Slip Op 02701, decided April 7, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_02701.htm.

Mortgage Foreclosures

A mortgage required that the lender provide the Defendants with a 30-day notice of default and an opportunity to cure any default. The mortgage was modified by a Consolidation, Extension and Modification Agreement ("CEMA"). In an Action to foreclose the consolidated mortgage, the Defendants moved for summary judgment dismissing the complaint, presumably on the grounds that the notice of default and an opportunity to cure were not afforded. The Supreme Court, Bronx County, denied the Plaintiff's motion for summary judgment, granted the Defendants' cross-motion, and dismissed the complaint. The Appellate Division, First Department, reversed, granting the Plaintiff's motion for summary judgment. According to the Appellate Division, the documents consolidating the mortgages did not require the lender to provide a notice of default and the terms of the CEMA expressly "supersede[d] all terms, covenants, and provisions" of the prior mortgage documents. The Appellate Division noted that the record established that the Plaintiff provided a notice of default. Citimortgage, Inc. v. Parris, decided February 25, 2016, is reported at 26 N.Y.S. 3d 46.

Mortgage Foreclosures

Justice Schack of the Supreme Court, Kings County, denied a foreclosing mortgagee's unopposed motion to confirm a referee's report and for a judgment of foreclosure and sale. The Court further, sua sponte, directed vacatur of the order of reference, dismissed the complaint and discharged the notice of pendency. The Appellate Division, Second Department, reversed and remitted the case to the Supreme Court, Kings County, for a new determination on the Plaintiff's motion before a different Justice. According to the Appellate Division,

> "…the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint and discharge of the notice of pendency. Since the defendants did not answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing. [citations omitted]. Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint by the court."

Consumer Solutions, LLC v. Charles, 2016 NY Slip Op 01794, decided March 16, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_01794.htm.

Recording Act

In 2007, the County of Suffolk conveyed property it sold at auction to Gerard A. Pallotta. The deed included a restrictive covenant prohibiting development of the property. Pallotta re-conveyed the property to Pallotta & Associates by a deed which did not reference the restrictive covenant. A two story dwelling was constructed on the property with the proceeds of a loan secured by a mortgage executed by Pallotta & Associates. The County of Suffolk sought a permanent mandatory injunction requiring the removal of the improvements, a judgment voiding the County's conveyance of the property in exchange for the return of the purchase price to Pallotta, and a declaration that the County is the fee owner of the property. The County also sought a ruling that the mortgage was void because the mortgagee facilitated the breach of the restrictive covenant.

The Supreme Court, Suffolk County, granted summary judgment to the County rescinding the sale of the property, declared that the County is the fee owner, and stated that the County "may take all steps necessary to reassert its ownership of the property". The County was required to refund the purchase price paid by Defendant Pallotta. The Action was dismissed as to the mortgagee, but the Court directed the County and the mortgagee to appear for a conference to determine the equities as between them.

According to the Court, "Pallotta & Associates had constructive notice of the restrictive covenant burdening its land inasmuch as the restrictive covenant appeared in the deed of its direct predecessor in title; and therefore, it is bound by, and estopped from denying existence of [the] covenant even though it did not appear in the purchaser's deed." Further, "…the Pallotta defendants had full knowledge of the covenants and restrictions on the subject property and knowingly violated them." The mortgagee was an innocent purchaser without knowledge of the restriction, protected under New York's Recording Act, Real Property Law Section 291 ("Recording of conveyances"). County of Suffolk v. Pallotta & Associates, 2016 NY Slip Op 30418, decided March 7, 2016, is posted at http://www.courts.state.ny.us/reporter/pdfs/2016/2016_30418.pdf.

Social Services Law

Under Social Services Law Section 104 ("Recovery from a person discovered to have property"), "a public welfare official may bring an action or proceeding against a person discovered to have real or personal property, or against the executors, administrators and successors in interest of a person who dies leaving real or personal property, if such person, or any one for whose support he is or was liable, received assistance and care during the preceding ten years, and shall be entitled to recover up to the value of such property the cost of such assistance or care…In all claims of the public welfare official made under this section the public welfare official shall be deemed a preferred creditor." Under Social Services Law Section 369 ("Application of other provisions"), a lien may be imposed in certain cases against property of an individual who has received such assistance.

In 1978, a husband and wife purchased property in the Town of Rotterdam. In 2007, they executed a mortgage on the property. The husband died in 2008 and his wife, who had received Medicaid assistance since 2004, died in 2009. In 2014, the Surrogate's Court, Saratoga County, upheld the Saratoga County Department of Social Services' claim for Medicaid assistance in the amount of $643,436.82.

An Action commenced by Wells Fargo Bank, N.A., the holder of the mortgage by assignment, to foreclose the mortgage was transferred to the Surrogate's Court. The Saratoga County Commissioner of Social Services sought a ruling from the Surrogate Court that the Department was a preferred creditor under Social Service Law Section 104 and, as such, the Department's claim had priority over the mortgage.

The Appellate Division, Third Department, granted summary judgment to Wells Fargo, holding that the mortgage had priority over the claim of the Department because the mortgage was recorded before the Surrogate's Court issued its decree validating the Department's claim. The term "preferred creditor", in Social Services Law Section 104, according to the Appellate Division, has "been construed to give a social services department priority over a 'general creditor, that is, a creditor that, upon giving credit, takes no rights against specific property of a debtor [citation omitted]'". Matter of Shambo, 2016 NY Slip Op 02699, decided April 7, 2016, is posted at http://www.courts.state.ny.us/reporter/3dseries/2016/2016_02699.htm.

Michael J. Berey
Senior Underwriting Counsel

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mberey@firstam.com