## Brokers/Fiduciary Duty

The Defendant, a licensed real estate broker, submitted an offer to purchase on behalf of the Plaintiff. The Defendant also, without advising the Plaintiff, made a "backup offer" for herself, at the same price but with a greater down-payment. The property was sold to the Defendant, who advised the Plaintiff that the seller had accepted a different offer. The Plaintiff, alleging breach of fiduciary duty, sought the imposition of a constructive trust, a judgment requiring the transfer of the property to him for the price he bid, for damages in prima facie tort, and for punitive damages. The Supreme Court, Queens County, denied the branches of the Plaintiff's motion for summary judgment on the causes of action which alleged fraud and breach of fiduciary duty by the broker and breach of fiduciary duty by her firm, which was also a Defendant. The Appellate Division, Second Department, modified the Order to grant those branches of the motion. According to the Appellate Division, "…the Plaintiff had established his prima facie entitlement to judgment as a matter of law… The evidence was sufficient to demonstrate, prima facie, that [the Defendants] breached their fiduciary duty to the plaintiff".

The Appellate Division, however, held that the Plaintiff had not established that he was entitled to judgment as a matter of law on the causes of action for a constructive trust, specific performance and for tort liability. The Supreme Court had properly denied the Plaintiff's motion for summary judgment on those causes of action.

As to a constructive trust, "…the plaintiff failed to establish, prima facie, that any transfer was made in reliance on a promise, or that, only as a potential buyer, he possessed any legally cognizable interest in the property with which he could have parted [citations omitted]". As to specific performance, "…the plaintiff failed to establish the existence of any valid written contract between the parties pertaining to the sale of the property [citations omitted]". As to prima facie tort, the Plaintiff had "failed to establish that [the broker's] conduct in purchasing the house was motivated solely by disinterested malevolence [citation omitted]"; the Defendant only purchased the property because she liked the house.

The Appellate Division also held that the Defendants' affirmative defense asserting that the amended complaint failed to state a cause of action "was without merit as a matter of law [citations omitted]". Edwards v. Walsh, 2019 NY Slip Op 01197, decided February 20, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_01197.htm.

## Condominiums

The Real Estate Finance Bureau issued an update to its "guidance document" entitled "Procedure for Submitting a Price Change Only Amendment for Consideration Prior to Acceptance of a Pending Substantive Amendment" effective as of March 4, 2019. The Bureau's Memorandum is posted at https://on.ny.gov/2Hh4wre.

## Contracts of Sale/Latent Defects

The Defendants sold the Plaintiffs a building undergoing gut renovation. Under the contract of sale, the Defendants were to perform certain work prior to closing but the Plaintiff was to purchase the building "as is"; the sellers' representations, including that mechanical systems would be in working order at closing, would not survive closing. After the closing, the Plaintiff discovered that the roof leaked and other alleged defects in the building and sued for breach of contract, for breach of the implied covenant of good faith and fair dealing, for violations of General Business Law ("GBL") Section 349 ("Deceptive acts and practices unlawful") and Section 777-a of GBL Article 36-B ("Warranties on sales of new homes"), and for fraudulent representation, concealment and inducement. The Supreme Court, New York County, granted the Defendants' motion for summary judgment and dismissed the complaint.

The Court held that "[t]he Contract's 'as is' and 'no representations' clauses preclude, as a matter of law, the breach of contract claim"; the claims for breach of the covenant of good faith and fair dealing did not state an independent cause of action; GBL Article's 36-B's Housing Merchant Implied Warranty only applies to the building and sale of "new homes" and "a gut renovation of a historic home is not a 'new home' for purposes of GBL Section 777-a"; GBL Section 349 does not apply to a private, non-recurring transaction which did not affect the public at large; and, as to the causes of action grounded in fraud, the Plaintiff had "failed to identify any evidence demonstrating that defendants actively misrepresented or actively concealed such defects from plaintiff such that plaintiff was fraudulently induced to proceed with closing".

In sum, according to the Court, "[t]he building may be a 'white elephant' but that is what plaintiff purchased". 116 Waverly Place LLC v. Spruce 116 Waverly LLC, 2019 NY Slip Op 30300, decided February 7, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30300.pdf.

## Contracts of Sale/Time of the Essence

A contract for the sale of real property provided that after the proposed closing date had passed either party, on completion of pre-closing obligations, could declare time of the essence to close and set a date for closing which was seven days after delivery of the time of the essence notice. The contract also required the Plaintiff-seller to deliver certain closing documents to the Defendants-purchasers at least fifteen calendar days prior to the closing date.

The Plaintiff delivered the closing documents to the Defendants on July 15, 2015, completing his pre-closing obligations, and notified the Defendants on July 23, 2015 that a time of the essence closing would take place on August 3, 2015. The Plaintiff appeared on that date ready, willing and able to close; neither the Defendants nor their attorney attended the closing. After the Plaintiff sold the property to a different buyer, he sued for actual and consequential damages. The Supreme Court, Monroe County, granted the Plaintiff's motion for summary judgment on the issue of damages and directed an inquest as to the amount of damages. The Appellate Division, Fourth Department, affirmed.

The Defendants asserted that the contract required that a time of the essence closing date could be scheduled only after the fifteen-day review period had expired. The Appellate Division concluded, however, that the Defendants' position "contradicts the plain language of the contract". The closing was scheduled for a date which was after the fifteen-day review period elapsed and at least seven days after delivery of the time of the essence notice. That the closing date was only one business day after expiration of the fifteen-day review period was not unreasonable, as claimed by the Defendants.

The Defendants' argument that the Plaintiff could not recover consequential damages was raised for the first time on appeal and therefore was not considered. Spellane v. Natarajan, 2019 NY Slip Op 00759, dated February 1, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_00759.htm.

## Easements

Parcels within an industrial park were conveyed subject to an easement establishing "…a perpetual and unobstructed right of way…as a driveway and passageway for vehicles and pedestrians for ingress and egress…" over a private street to be known as Rewe Street. The grantor of the easement was responsible for the maintenance of the private street, until it became a public roadway; those costs would be assessed against the owners of the parcels appurtenant to Rewe Street, pro rata. One of the owners of a parcel adjoining the street, a Defendant, asserted that it had the right to store materials in the street for the use of its business under an agreement with Rewe Park, purportedly the owner of the street.

The Supreme Court, Kings County, held that the easement "provides for only unobstructed ingress and egress and no other use of Rewe Street is permissible by the parcel owners according to the specific intent of the grant". The Court ordered that any and all storage containers were to be removed within thirty days of service of the Order with Notice of Entry. According to the Court,

> *"An easement owned in common with others entitles each owner to full and complete use of the whole easement and one owner cannot make such use of the easement as will unduly interfere with the enjoyment of the easement by other owners. 49 N.Y. Jur. 2d Easements Section 112…[E]ven if Rewe Park was declared the owner of Rewe Street [which the Court did not determine], [the Defendant] would not be entitled to place storage units on Rewe Street in any way that obstructed the other parcel owners rights of egress and ingress".*

The Court also held that the owners of lands appurtenant to the easement were responsible to pay the costs incurred for the maintenance and repair of the street, pro rata. Green Hills (USA), LLC v. Marjam of Rewe Street, Inc., 2019 NY Slip Op 30108, decided January 9, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30108.pdf.

## Equitable Subrogation

Plaintiff, the owner of a home in Brooklyn, conveyed her property in 2004 to Defendant Farhaad Yacoob, subject to an existing mortgage held by Ocwen Federal Bank, FSB ("Ocwen"). At the closing, Yacoob executed a purchase money mortgage to Berkshire Financial Group ("Berkshire"), the proceeds of which were used to satisfy the Ocwen mortgage. In 2005 Yacoob executed a mortgage to Finance America, LLC, later assigned to HSBC Bank USA N.A. ("HSBC"), the proceeds of which were applied to satisfy the mortgage held by Berkshire.

Plaintiff commenced an Action to quiet title in 2005, alleging that Yacoob acted with others to fraudulently obtain title to the Plaintiff's property. The Supreme Court, Kings County, entered a default judgment holding that the deed transferring title to Yacoob and the mortgages held by Berkshire and HSBC were null and void. HSBC asserted a counterclaim seeking to have an equitable lien imposed for $207,566.25, the amount of the proceeds of the Berkshire mortgage which were applied to satisfy the Ocwen mortgage. The Supreme Court, Kings County, denied HSBC's motion for summary judgment on its counterclaim. The Appellate Division, Second Department, reversed and granted summary judgment to HSBC. According to the Appellate Division,

> *"HSBC, as assignee of the FA mortgage, which secured the loan proceeds used to satisfy the Berkshire mortgage, which secured the loan proceeds used to satisfy the plaintiff's mortgage obligation to Ocwen, was entitled to be put in the place of Ocwen as holder of the mortgage lien in the sum of $207,566.25 [citations omitted]"…{E]ven though the deed and the Berkshire and FA mortgages are void, HSBC is still entitled to be equitably subrogated to Ocwen's right against the Plaintiff to the extent that $207,566.25 of the funds of its predecessors in interest were allocated to satisfy the plaintiff's mortgage obligation to Ocwen".*

Lombard v. Yacoob, 2019 NY Slip Op 00427, decided January 23, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_00427.htm.

-In another case involving the application of the doctrine of equitable subrogation, $453,900.03 of the proceeds of the foreclosing Plaintiff's mortgage paid off the Defendants' prior mortgage and unpaid real estate taxes. A Defendant, Angel Dalfin, claiming that his signature on the mortgage was forged, cross-moved for the mortgage to be discharged or, in the alternative, for the complaint to be dismissed as to him. The Supreme Court, Kings County, applying the doctrine of equitable subrogation, granted the Plaintiff's motion for summary judgment to the extent that the Plaintiff sought to recover against Angel Dalfin the amount of the liens paid off by proceeds of the Plaintiff's mortgage. The Appellate Division, Second Department, affirmed the Order of the lower court. According to the Appellate Division,

> *"[e]ven if, .as Angel [Dalfin] contends, his signature on the subject mortgage was forged, the plaintiff could still recover against him on the theory of equitable subrogation based upon its payoff of the prior mortgage and liens against his property at the closing of the subject mortgage [citations omitted]…In opposition, Angel failed to raise a triable issue of fact as to whether the plaintiff actively engaged in any fraud, had actual knowledge of any fraud, or had unclean hands [citations omitted]".*

Wells Fargo Bank, N.A. v. Dalfin, 2019 NY Slip Op 01255, decided February 20, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_01255.htm.

## Mechanic's Lien/Time to File

Lien Law Section 10 ("Filing of a notice of lien") requires that the notice of a mechanic's lien be filed within eight months of the date on which the last item of work was performed by a mechanic or the materials were furnished by a materialman, except when the property is or is to be improved by a single family dwelling, in which case the period in which to file a lien is four months.

The Plaintiff ("MMC") performed work as subcontractor under a contract for the improvement of commercial property. Although the general contractor ended its work on the project on April 13, 2017, MMC alleged that its work as a subcontractor continued until July 18, 2017 when it completed work on a steam pipe. MMC filed its lien on January 31, 2018, which would be within the eight-month period if MMC's work under its contract with the general contractor ended on July 18, 2017; it would not have been timely filed if the work for the general contractor ended on April 13, 2017.

The Supreme Court, New York County, held that the Plaintiff's mechanic's lien was not timely filed, and the Court granted the motion of the Defendants (the fee owner, its lessee and an insurance company) motion to dismiss the complaint and discharge the mechanic's lien. According to the Court,

> *"…warranty or repair work, or new work performed outside the original contract, does not extend the time to file a lien with respect to the original contract…MMC cannot bootstrap that follow-on work to extend the time period for filing a lien in connection with the original contract that was terminated by the general contractor. Because MMC's work under its subcontract necessarily was completed when the general contractor terminated the project, that is April 13, [2017], MMC's lien obtained on January 31, 2018 was not timely and is subject to being discharged".*

Although follow-up work by a subcontractor could be "so substantively connected to the original project as to warrant tacking it on for purposes of extending the time for obtaining a lien", the Court found that was not the case here. The Complaint was only "conclusory as to the nature of the work". Manhattan Mechanical Contractors, Inc. v. Nissan North America, Inc., 2019 NY Slip Op 30223, decided January 28, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30223.pdf.

## Mortgage Foreclosures/Fire Insurance

In a case decided February 6, 2019, the Supreme Court, Kings County, amended its judgment of foreclosure and sale to direct that fire insurance proceeds payable because of damage to the mortgaged property "be applied to the balance of the loan 'at or around the time of default' and the outstanding principal and interest be reduced accordingly". The Appellate Division, Second Department, affirmed the amended judgment. According to the Appellate Division, "it was not economically feasible to make the repairs or restoration" and the mortgage states that "[i]f the repair or restoration is not economically feasible…, then the [hazard insurance] proceeds will be used to reduce the amount that I owe to Lender under the Note and under this Security Instrument". Federal National Mortgage Association v. Azoulay, 2019 NY Slip Op 00857, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_00857.htm.

## Mortgage Foreclosures/Standing

In opposition to the foreclosing Plaintiff's motion for a judgment of foreclosure, the Defendants cross-moved to dismiss the complaint insofar as asserted against them, claiming that the Plaintiff lacked standing to sue. The Supreme Court, Kings County, denied the Defendants' motion and granted the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, affirmed the ruling of the lower court.

Although the defense of lack of standing had not been pleaded in the Defendants' answers, the Defendants asserted that "the denials in their answers of knowledge or information sufficient to form a belief as to the truth of the plaintiff's allegation in the complaint that it was the owner and holder of the note and mortgage were sufficient, standing alone, to place in issue the plaintiff's standing to commence the foreclosure action". The Appellate Division, Second Department, disagreed, holding that "…under CPLR 3018(b) ["Responsive pleadings"] a defendant must affirmatively plead lack of standing as an affirmative defense in the answer in order to properly raise the issue in its responsive pleading". Under Section 3018(b) ("Affirmative defenses")

> *"[a] party must shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading...".*

The dissent noted that "[t]he majority's view has not been adopted by the Appellate Divisions of the other Judicial Departments [citations omitted]". US Bank National Association v. Nelson, 2019 NY Slip Op 00494, decided January 23, 2019, is posted at http://nycourts.gov/reporter/3dseries/2019/2019_00494.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 April 1, 2019 – June 30, 2019 on late payments and assessments of Mortgage Recording Tax and the State's Real Estate Transfer Tax will be 10% per annum, compounded daily. The interest rate to be paid on refunds will be 5% per annum, compounded daily. The notice issued by the Department is posted at https://www.tax.ny.gov/pay/all/int_curr.htm.

## Mortgages/Statute of Limitations

A number of decisions were reported on the application of the six-year statute of limitations provided by Civil Practice Law and Rules ("CPLR") Section 213 ("Actions to be commenced within six years: …on bond or note, and mortgage on real property…"). If a mortgage debt is accelerated, the statute of limitations runs on the entire indebtedness. Absent acceleration of the indebtedness, the statute of limitations runs separately as to each installment of the debt from their respective due dates.

-Affirming the Order of the Supreme Court, Bronx County, holding that the Defendant mortgagee was time-barred from commencing a foreclosure of its mortgage and that the Plaintiff's property was free and clear of the Defendant's mortgage, the Appellate Division, First Department, held that a letter in 2008 from the Defendant's predecessor-in-interest, informing the Plaintiff that the mortgage debt would be accelerated and "'foreclosure proceedings will be initiated'" if the Plaintiff's default in payment was not cured within thirty-two days of the date of the letter, was an acceleration of the indebtedness. According to the Appellate Division, "…this language constitutes a clear and equivocal [sic] intent to accelerate the mortgage balance and commence the statute of limitations on the entire mortgage debt [citation omitted]". The discontinuance of a prior foreclosure of the mortgage was not "an affirmative act by defendant to revoke the acceleration [citation omitted]". Vargas v. Deutsche Bank National Trust Company, 2019 NY Slip Op 00681, decided January 31, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_00681.htm.

-The Appellate Division, Second Department, affirmed the Supreme Court, Kings County's denial of the Defendant's motion to dismiss the complaint in a mortgage foreclosure on the grounds that the statute of limitations barred enforcement of the indebtedness. The Defendant asserted that the commencement of a prior mortgage foreclosure in 2006 had accelerated the mortgage debt and the statute of limitations barred the Plaintiff from proceeding. However, the Supreme Court, Kings County, had dismissed the prior foreclosure because the Plaintiff at that time was not then the holder of the note and mortgage and therefore it "lacked the authority to accelerate the debt through the complaint in that action". US Bank Trust, N.A. v. Williams, 2019 NY Slip Op 00634, decided January 30, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_00634.htm.

-The Plaintiff mortgagor sought an Order under RPAPL Section 1501(4) directing the cancellation and discharge of a mortgage on his property on the ground that the collection of the mortgage debt was barred by the six-year statute of limitations under CPLR Section 213. The Plaintiff alleged that the mortgage debt was accelerated by an Action brought by the Defendant in 2009. The Supreme Court, Suffolk County, denied the Plaintiff's motion for entry of a default judgment. The Appellate Division, Second Department, affirmed the lower court's Order. According to the Appellate Division,

> *"[w]hile the filing of a summons and complaint seeking the entire unpaid balance of principal in a prior foreclosure action may constitute a valid election by the mortgagee to accelerate the maturity of the debt [citations omitted], here, the plaintiff submitted only a summons from an action commenced by [the Defendant] on April 22. 2009, which neither identified the action as one to foreclose the subject mortgage nor expressly alleged that, as a result of the mortgagor's default, [the Defendant] was electing to accelerate the mortgage. The plaintiff's assertion in the supporting affidavit that [the Defendant] validly accelerated the mortgage debt was conclusory and insufficient [citation omitted]".*

Caliguri v. Pentagon Federal Credit Union, 2019 NY Slip Op 00254, decided January 16, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_00254.htm.

-A mortgage foreclosure commenced in 2008 against a condominium unit was dismissed by the Supreme Court, Westchester County later that year for failure to serve the Estate of the deceased mortgagor. The Defendant in the Action was the mortgagor and not his Estate. In 2011, a new Action was commenced to foreclose the mortgage; the foreclosure was discontinued by stipulation in 2016 and the lender rescinded the acceleration of the loan. In 2017, the current owner of the condominium unit sought a declaratory judgment discharging the mortgage, contending that the six-year statute of limitations ran from the date on which the complaint in the 2008 foreclosure was filed and, taking into account the eighteen-month tolling of the statute of limitations under CPLR Section 210 ("Death of claimant or person liable"), the statute of limitations to sue expired on November 2, 2015. The Supreme Court, Westchester County, held that the filing of the complaint in the 2008 foreclosure accelerated the debt, the acceleration was not timely revoked, and the limitations period had expired. The Court granted the Plaintiff's motion for summary judgment and discharged the mortgage. According to the Court,

> *"…the lender's filing of the 2008 summons and complaint in itself accelerated the debt, although the borrower was not alive at the time so that the action could not be sustained…[The rescission of the acceleration of the debt in 2016] was too late to revoke the 2008 acceleration of the debt".*

Your New Home, LLC v. JP Morgan Chase Bank, N.A., 2019 NY Slip Op 29014, decided January 18, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_29014.htm.

-906 Realty LLC, the owner of property being foreclosed, brought a quiet title Action and cross-moved in a mortgage foreclosure for an Order dismissing the foreclosure complaint, asserting that enforcement of the indebtedness secured by the mortgage was barred by the statute of limitations. On April 18, 2008. Fannie Mae, then the holder of the mortgage, commenced an Action to foreclose the mortgage. The foreclosure complaint stated that the plaintiff "does hereby elect to declare the balance of the principal indebtedness immediately due and payable". The foreclosure was voluntarily discontinued in 2014. However, on March 18, 2014 and April 26, 2014, a servicer of the loan mailed "Delinquency Notices" to the borrower and, since September 8, 2015, statements requesting that the borrower make monthly and past due mortgage payments were mailed to the borrower by a successor servicer of the loan.

The Supreme Court, Kings County, granted the mortgagee's motion for summary judgment dismissing the complaint in the suit to quiet title and granted summary judgment in the mortgage foreclosure. According to the Court,

> *"…the loan was accelerated by the commencement of the 2008 Foreclosure Action on April 18, 2018 and, without any further action by the lender, any subsequent foreclosure action would be barred by the 6-year statute of limitations. However, a lender may revoke its election to accelerate by an affirmative act occurring within the statute of limitations period [citation omitted]…The discontinuance of the 2008 Foreclosure Action combined with the notices that were subsequently mailed to [the borrower] unequivocally demonstrate that [the lender] intended to revoke the 2008 acceleration [citation omitted]".*

960 Realty LLC v. Wilmington Savings Fund Society, FSB, 2018 NY Slip Op 33491, decided December 13, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_33491.pdf.

## Notice of Pendency

Under CPLR Section 6513 ("Duration of notice of pendency"), "[a] notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period or an extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period…".

A notice of pendency filed on October 22, 2003 was duly extended a number of times; the last extension expired on October 21, 2015. On January 29, 2016, a new notice of pendency was filed on the same case. The Supreme Court, Kings County, held that the 2016 lis pendens was void ab initio. According to the Court,

> *"…a party whose notice of pendency has been cancelled or expired cannot file another notice of pendency in the same action in Supreme Court [citations omitted.] The addition or substitution of new parties to the same action [as was done in this case] is 'more a change of form than of substance'… [citations omitted]. [In any event], the so-called 'new' notice of pendency filed by defendants in January 2016 was not new since the change in caption had already been memorialized in the October 12, 2012 Order extending the notice of pendency".*

25-35 Bridge Street LLC v. Excel Automotive Tech Center Inc., 2019 NY Slip Op 50102, dated January 23, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_50102.htm.

-The Plaintiff in Diji v. Deutsche Bank National Trust Company commenced an Action in 2015 pursuant to RPAPL Article 15 ("Action to compel the determination of a claim to real property") seeking to extinguish a mortgage held by the Defendant Deutsche Bank. The Supreme Court, Kings County, held that the mortgage was unenforceable because of the expiration of the statute of limitations and canceled the mortgage. The Order is on appeal to the Appellate Division, Second Department.

In its answer, the Defendant counterclaimed for a monetary judgment in the amount of real estate taxes and insurance premiums it had paid since September 2007 and an equitable lien therefor against the mortgaged property. No stay pending appeal having been obtained, the Defendant requested that the Court sever its counterclaims, in order that they could be heard before a ruling was issued on its appeal, and moved for permission to file a notice of pendency.

The Court denied the requests that the counterclaims be severed and that the Defendant be able to file a notice of pendency. As to the lis pendens, "the defendant is seeking a money judgment for payments it made based on a mortgage contract with the plaintiff that this court has previously dismissed. There is nothing in the counterclaims that claim a right, title or interest in the subject property. Therefore, a Notice of Pendency is not proper in the present case".

Under CPLR Section 6501 ("Notice of pendency; constructive notice"), "[a] notice of pendency may be filed in any action…in which the judgment demanded would affect the title to, or the possession, use or enjoyment of real property…". Diji v. Deutsche Bank National Trust Company, as Trustee, 2019 NY Slip Op 30197, decided January 8, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30197.pdf.

## Powers-of-Attorney/Ratification

As was reported in Current Developments dated August 27, 2018, mortgages executed on October 8, 2007 and October 15, 2007 and a consolidation agreement, were signed on behalf of Defendant OKI-DO Ltd. ("OKI") by Edward Stein ("Stein") pursuant to a power of attorney, purportedly signed on October 4, 2007 by Dr. Kazuko Hillyer ("Dr. Hillyer"), the sole shareholder, officer and director of OKI. The Supreme Court, Suffolk County, noted that this power of attorney "revoked all previous authorizations from OKI to any purported agents".

In the foreclosure of those mortgages, OKI argued that the October power of attorney was a forgery. Dr. Hillyer had, however, given Stein a durable power of attorney in July of 2007 which authorized Stein to "take such other actions relating to said real property and the sale thereof as my attorney-in-fact may deem advisable and: Execute all Corporate transactions of OKI-DO LTD, a New York Corporation, with, on my behalf, as President".

The Court held that although the Plaintiffs had failed to prove that Stein had apparent authority under the October 2007 power of attorney, Stein had actual authority to act on behalf of OKI under the July 2007 power of attorney. The Court further found that Dr. Hillyer was aware of the mortgages by no later than February of 2008 and, failing to take any action, "OKI ratified Mr. Stein's actions and became bound by it". The Court directed the Plaintiffs to submit an order of reference and a judgment of foreclosure. Sklavos v. OKI-DO Ltd., 2018 NY Slip Op 50920, decided June 18, 2018, can be found at 2019 N.Y. Misc. LEXIS 427 and at http://nycourts.gov/reporter/3dseries/2018/2018_50920.htm.

The Defendant thereafter moved under Civil Practice Law and Rules ("CPLR") Section 4404 ("Post-trial motion for judgment and new trial") to have the Court set aside its decision and to enter judgment on its behalf. The Defendant's motion was denied. According to the Court,

> *"[h]aving failed to demonstrate that the October 4, 2007 Power of Attorney revoked the July 3, 2007 Power of Attorney, the Defendant presented no evidence that the July 3, 2007 Power of Attorney had been revoked by Dr. Hillyer…In the absence of proof of revocation, Plaintiffs were clearly authorized to rely on the [July 3, 2007] Power of Attorney [citations omitted]".*

This decision, 2019 NY Slip Op 30254, dated January 28, 2019, is posted at http://nycourts.gov/reporter/pdfs/2019/2019_30254.pdf.

## Recording Act/Intervention in Foreclosures

Regional Real Estate Defect Specialists, Ltd. acquired title to property being foreclosed on October 7, 2014 and re-conveyed the property to Eastern Region Real Property Corp. ("Eastern") on February 12, 2018. A notice of pendency for the foreclosure was filed on January 7, 2013.

Eastern requested leave to intervene in the foreclosure, seeking to have the Order of Reference vacated or, in the alternative, to have the hearing on the Plaintiff's motion for a judgment of foreclosure and sale adjourned to afford it the opportunity to respond and seek dismissal of the complaint. The Supreme Court, Suffolk County, denied Eastern's motion, and the Court granted a judgment of foreclosure and sale and directed the distribution of sale proceeds. According to the Court,

> *"[i]n the case at bar, Eastern acquired title by Bargain & Sale Deed with notice of the lis pendens as well as the instant foreclosure matter…Eastern is certainly not a good faith purchaser for value. Eastern cannot claim the protection afforded by RPL Section 290, the New York Recording Act...[I]ts failure to be a good faith purchaser for value precludes its intervention to deny Plaintiff being granted an order of judgment of foreclosure [citation omitted]…Eastern had no interest in the subject property at or prior to the commencement of the instant foreclosure action".*

U.S. Bank National Association v. Barra, 2018 NY Slip Op 33450, decided December 31, 2018, is posted at http://www.nycourts.gov/reporter/pdfs/2018/2018_33450.pdf.

## Tax Liens/Foreclosure

Under Real Property Tax Law Section 1131 ("Default judgment"), a motion to reopen a default in a proceeding to foreclose a tax lien "may not be brought later than one month after entry of the judgment" in the foreclosure. CPLR Section 2004 ("Extensions of time generally") states that "[e]xcept where otherwise expressly provided by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed".

The Plaintiff, the County of Wayne, obtained a default judgment of foreclosure in an Action to foreclose delinquent tax liens on property owned by one of the Respondents, the others Respondents being the holders of a mortgage on the property. The Supreme Court. Wayne County, granted the Respondents' motion to vacate the judgment and cancel the tax deed conveying the property to the Petitioner upon proof that all taxes and penalties due were paid. The Appellate Division, Fourth Department, reversed the lower court's Order. According to the Appellate Division,

> *"[i]nasmuch as respondents brought their motion more than one month after entry of the default judgment of foreclosure, the motion was untimely (see RPTL 1131), thereby requiring denial of the motion on that ground…We conclude that RPTL article 11 comprehensively addresses the situation where a default judgment of foreclosure is properly obtained and the defaulting property owner seeks to reopen the default…To countenance resort to CPLR 2004 under these circumstances [when all notices of the foreclosure proceeding were properly given] would undermine the statutory scheme established by the legislature and erode the finality of foreclosure proceedings even after the defaulting property owner has been afforded due process (citations omitted)".*

Matter of Foreclosure of Tax Liens by Proceeding In Rem Pursuant to Article 11 of the Real Property Tax Law by the County of Wayne Relating to the 2015 Town and County Tax (Schenk), 2019 NY Slip Op 01029, decided February 8, 2019, is posted at http://nycourts.gov/reporter/3dseries/2019/2019_01029.htm.

-The Supreme Court, Oneida County, entered a default judgment in an in rem tax foreclosure awarding the Petitioner City of Utica possession of the real property and "all items of personal property thereon deemed abandoned". The Petitioner engaged a salvage company to dispose of auto parts at the property, which were used in the Respondent property owner's business of dismantling automobiles. The Respondent applied to have vacated the portion of the judgment of foreclosure which had deemed the Respondent's personal property abandoned to the Petitioner. The Supreme Court denied the application, but the Appellate Division, Fourth Department, reversed and vacated the judgment of foreclosure insofar as it deemed the Respondent's personal property abandoned to the Petitioner. According to the Appellate Division, the court acted in excess of its jurisdiction.

> *"Nothing in RPTL article 11 ["Procedures for enforcement of collection of delinquent taxes"] confers upon the Supreme Court in rem jurisdiction over personal property…RPTL article 11 does not grant jurisdiction over personal property located on a parcel of real property that is the subject of an in rem tax foreclosure proceeding, nor does it permit the tax district to obtain a judgment awarding the tax district such personal property".*

In the Matter of the Foreclosure of Tax Liens by Proceeding In Rem Pursuant to Article 11 of the Real Property Tax Law by the City of Utica (Suprunchik), 2019 NY Slip Op 01020, decided February 8, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_01020.htm.

Michael J. Berey
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