Contracts of Sale/Meeting of the Minds

The Defendant property owner sent the Plaintiff an unexecuted proposed contract which included a purchase price. The Plaintiff signed the contract and submitted it to the Defendant with a contract deposit. However, the Plaintiff included handwritten additions, including one that would have had the Defendant represent that the "[p]remises are a legal (2) family dwelling as per the certificate of occupancy". The Defendant's attorney changed the handwritten description of the property to a "(1) family dwelling" and sent a fully executed contract back to the Plaintiff's attorney. The Plaintiff informed the Defendant that it would not close without a certificate of occupancy designating the property as a two-family dwelling or a letter of no objection to that effect. The Defendant declared that the Plaintiff had defaulted; the Plaintiff denied that there was a binding contract and demanded that the deposit be returned.

The Plaintiff commenced an action for specific performance. The Supreme Court, Kings County, granted that branch of the Defendant's motion which was for summary judgment dismissing the complaint and cancelled the notice of pendency. The Appellate Division, Second Department, affirmed the Order of the lower court. According to the Appellate Division,

> *"…the documentary evidence established that the parties were never truly in agreement with respect to all material terms, because the plaintiff did not intend to pay the proposed contract price for a one-family dwelling, and the defendant could not or would not represent that the subject property was a legal two-family dwelling. The plaintiff's signing of the proposed contract did not create a binding agreement… as the plaintiff's acceptance was conditioned on material changes to the contract and, thus, constituted a counteroffer, which the defendant did not accept. Because the parties never came to a meeting of the minds regarding essential terms of the agreement, there was no binding and enforceable contract between the parties [citations omitted]."*

Utica Builders, LLC v. Collins, 2019 NY Slip Op 07312, decided October 9, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_07312.htm.

Contracts of Sale/Time of the Essence

The Plaintiffs entered into contracts to purchase two properties from the Defendants. The Defendants sent notices to the Plaintiffs purporting to set a time of the essence closing date for each contract. Each notice stated that "a closing has been scheduled for December 19, 2016, at 2:00 p.m." and that if the transactions did not close "by the end of business day on December 15, 2016, Purchaser will be held in default of the Contract". The Plaintiffs rejected the time of the essence notices; the Defendants declared that the Plaintiffs defaulted when they did not appear to close on December 19, 2016. The Plaintiffs sought to recover damages for breach of contract and to recover their down payments which, according to the contract, were liens on the property. A notice of pendency was filed against each property. The Defendants counterclaimed for the release of the contract down payments to them, and for damages for the improper filing of the notices of pendency.

The Supreme Court, Nassau County, granted the Defendants' motion for summary judgment, ordering that the down payments be forfeited to the Defendants, and canceled the notices of pendency. The Appellate Division, Second Department, reversed, granting the Plaintiffs' motion for summary judgment, which sought the return of its down payments, and denied the Defendants' cross-motion for cancellation of the notice of pendency. According to the Appellate Division,

> *"[t]he defendants failed to make time of the essence, because the defendants' notices of a purported time of the essence closing failed to clearly and unambiguously set a specific date for the closing [citations omitted]. Therefore, the plaintiffs could not be held in default for failing to appear at the closing [citations omitted]. Moreover, the plaintiffs demonstrated, prima facie, that the defendants repudiated the contracts by sending the notices of default [citation omitted] …Thus, the plaintiffs are entitled to the return of the down payments."*

The Appellate Division also held that the filing of the notices of pendency were proper. "Since the complaint seeks, inter alia, to foreclose vendees' liens on the properties that were the subject of the contracts of sale, the action is one in which the judgment demanded would affect the title to the property…" Krishna v. Jasper Old Westbury 66 LLC, 2019 NY Slip Op 06197, decided August 21, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06197.htm.

Financial Crimes Enforcement Network ("FinCEN")

As reported in Current Developments, FinCEN has issued Geographic Targeting Orders ("GTOs") requiring certain U.S. title insurance companies to identify the natural persons behind companies used to pay all cash for high-end residential real estate in New York City, Broward, Palm Beach and Miami-Dade Counties in Florida, Bexar County, Texas, Los Angeles, San Diego, San Francisco, San Mateo and Santa Clara Counties in California, in the City and County of Honolulu in Hawaii, and, effective November 17, 2018, Tarrant and Dallas Counties in Texas, Clark County in Nevada, King County in Washington, Suffolk and Middlesex Counties in Massachusetts, and Cook County in Illinois. The GTO issued on November 15, 2018 reduced the monetary threshold for the purchase of residential real property for all of the affected jurisdictions to $300,000 or more and included purchases made with virtual currencies.

These GTOs were renewed by FinCEN on November 8, 2019. The GTO just issued is effective November 12, 2019 and ends on May 9, 2020. It amends the definition of a "Legal Entity"; reporting will not be required for purchases made by "a business whose common stock or analogous equity interests are listed on a securities exchange regulated by the Securities Exchange Commission ('SEC") or a self-regulated organization registered with the SEC, or an entity owned by such a business."

FinCEN's News Release, the new GTO and "Frequently Answered Questions" can be obtained at the following links:

News Release:
https://www.fincen.gov/news/news-releases/fincen-reissues-real-estate-geographic-targeting-orders-12-metropolitan-areas-0

GTO:
https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20Order%20FINAL%20GENERIC%2011.8.2019.pdf

FAQs:
https://www.fincen.gov/sites/default/files/shared/FAQs%20on%20Real%20Estate%20GTO%20FINAL%2011.8.2019.pdf

Landmarks Preservation Commission

Affirming a judgment of the Supreme Court, New York County, the Appellate Division, First Department, held that "the [Landmarks Preservation Commission] was precluded from considering the propriety of improvements for which the [New York City Department of Buildings] had issued a permit [in 2009] prior to the historic district designation" in 2015 of the area encompassing the Petitioner's properties. Under Section 25-321 ("Applicability") of Chapter 3 ("Landmarks preservation and historic districts") of Title 25 of New York City's Administrative Code, "[t]he provisions of this chapter shall be inapplicable to the construction, reconstruction, alteration or demolition of any improvement on a landmark site or in a historic district…where plans for such work have been approved, prior to the effective date of the designation, or amended or modified designation…" Matter of Robbins v. The New York City Landmarks Preservation Commission, 2019 NY Slip Op 07152, decided October 3, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_07152.htm.

Lien Law/Mechanics' Liens

Under Lien Law Section 59 ("Vacating of a mechanic's lien"), a notice may be served on a mechanic's lienor requiring "the lienor to commence an action to enforce the lien, within the time specified in the notice, not less than thirty days from the time of service" of the notice.

A mechanic's lien filed on January 17, 2018 was extended by a filing on January 7, 2019. On January 23, 2019, the Petitioner served a demand on the mechanic's lienor, the Respondent, requiring that it commence to enforce its lien within thirty days pursuant to Lien Law Section 59. The Respondent failed to comply with the notice because the employee who accepted service of the notice failed to advise management of the notice. The Petitioner sought an Order vacating the mechanic's lien. The Respondent sought an Order amending its lien and affording it additional time to foreclose. The Supreme Court, New York County, ordered that the mechanic's lien be discharged and directed the County Clerk to vacate and cancel the notice of lien. According to the Court,

> *"[u]pon Respondent's extension of the Lien…Petitioner demanded Respondent to proceed with an action to foreclose within 30 days pursuant to Section 59 of the Lien Law. While the demand stimulated negotiations, it did not relieve Respondent of its obligation to move forward."*

The Court noted that the Respondent could bring a claim for breach of contract, which is governed by a six-year statute of limitations. Atria Builders, LLC v. Red Hook Construction Group-II, LLC, 2019 NY Slip Op 32739, decided September 13, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_32739.pdf.

Mortgages/Abandoned Residential Property

Current Developments issued July 25, 2016 reported the enactment of Chapter 73 of the Laws of 2016, what has been referred to as the "Zombie Property Remediation Act of 2016". Among other changes, the Chapter adopted new Real Property Actions and Proceedings Law ("RPAPL") Section 1308 ("Inspecting, Securing and Maintaining Vacant and Abandoned Residential Real Property"), requiring a servicer authorized to accept payments on a first lien mortgage loan on a one-to-four family residential property to secure and maintain the property when the loan is delinquent and the servicer has a reasonable basis to believe that the property is "vacant and abandoned". Section 1308 was amended by Chapter 168 of the Laws of 2019, signed into law on August 14, 2019, to, according to the Bill summary (Senate Bill No. 04182/Assembly Bill No. 01800), require "a servicer in a mortgage foreclosure action of residential real property to pay homeowners' association or cooperative fees as needed to maintain the property." Chapter 168 can be found at https://www.nyassembly.gov/leg/?bn=S04182&term=2019.

Mortgage Foreclosures/Notices

RPAPL Section 1304 ("Required prior notices") requires that "a lender, an assignee or a mortgage loan servicer [commencing] legal action against the borrower, including [a] mortgage foreclosure" send a notice, in the form specified in Section 1304, to the borrower at least ninety days before litigation on a "home loan" is commenced. The notice is required to be sent by registered or certified mail and by first class mail to the last known address of the borrower.

Solomon Forman, now deceased, executed a note secured by a mortgage on residential property owned by him and Defendant Ann Forman, his wife, both of whom executed the mortgage. In a foreclosure of the mortgage, the Defendant moved to dismiss the complaint as to her on the ground that the Plaintiff had not served her with the 90-day notice required by RPAPL Section 1304. The Plaintiff argued that RPAPL applies only to borrowers and, since the Defendant did not sign the note, she was not a borrower. The Supreme Court, Suffolk County, granted the Plaintiff's motion for summary judgment as to the Defendant and denied the Defendant's cross-motion to dismiss the complaint. The Appellate Division, Second Department, reversed and granted the Defendant's motion to dismiss the complaint as to her.

The Appellate Division noted that the mortgage referred to the Defendant as a "borrower". Although the Plaintiff's attorney argued that the mortgage form "mischaracterizes the defendant as a borrower", the Appellate Division, held that "any ambiguities in the language of the document must be construed against the plaintiff, as the plaintiff is the party who supplied the document [citation omitted]." Further, the Defendant is a homeowner, now the sole owner of the property, and "the 'manifest purpose [of the RPAPL 1304 notice] is to aid the homeowner in an attempt to avoid litigation [citation omitted].'"

"Under these circumstances, where the defendant is referred to as a borrower in the mortgage instrument, and in light of the intent of the RPAPL notice", the Appellate Division found the record "sufficient to establish that the defendant is a borrower for purposes of RPAPL 1304 [citation omitted]." Bank of New York Mellon v. Forman, 2019 NY Slip Op 07045, decided October 2, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_07045.htm.

Mortgage Foreclosures/One Action Rule

Under RPAPL 1301(3) ("Separate action for mortgage debt"), "while [an] action 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."

The foreclosure of a mortgage commenced in 2011; the Plaintiff moved in October 2013 to discontinue the action and, in April 2014, the Plaintiff commenced another foreclosure of the same mortgage. The Defendant asserted, as an affirmative defense, that RPAPL's one action rule was violated by commencing to foreclose while the prior action was pending. The Supreme Court, Queens County, denied the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, reversed, granting the Plaintiff's motion and striking the Defendant's answer. According to the Appellate Division,

> *"[h]ere, the plaintiff moved to discontinue the prior action months before commencing the instant action. Thus, the defendant did not have to defend against more than one lawsuit, and failure by the plaintiff to strictly comply with RPAPL 1301(3) should have been disregarded as a mere irregularity which did not prejudice a substantial right of any party [citation omitted]."*

PNC Bank, NA v. Islam, 2019 NY Slip Op 07303, decided October 9, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_07303.htm.

Mortgage Foreclosures/Statute of Limitations

The Appellate Division, Third Department, reversing the Supreme Court, Bronx County's, dismissal of the complaint in a mortgage foreclosure held that "the mere discontinuance of a prior foreclosure action, without more, is insufficient to constitute an affirmative act to revoke a lender's election to accelerate" the debt secured by the mortgage. Wells Fargo Bank, N.A. v. Liburd, 2019 NY Slip Op 07323, decided October 10, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_07323.htm.

The Appellate Division, Second Department, also held that discontinuing a prior mortgage foreclosure upon its motion "was insufficient to establish, prima facie, that it revoked its election to accelerate the mortgage debt [citations omitted]." U.S. Bank National Association v. Leone, 2019 NY Slip Op 06642, decided September 18, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06642.htm.

The Appellate Division, Second Department, in separate decisions, held that the purported acceleration of the debt in a prior foreclosure of the mortgage was a nullity, and the statute of limitations did not bar the present foreclosure of the mortgage, when the Plaintiff in the prior foreclosure lacked standing. Q & O Estates Corp. v. US Bank Trust National Association, 2019 NY Slip Op 06524, decided September 11, 2019, and Herzl Development Group, LLC v. Federal National Mortgage Association, 2019 NY Slip Op 06385, decided August 28, 2019, are posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06524.htm and http://www.nycourts.gov/reporter/3dseries/2019/2019_06385.htm.

Mortgage Recording Tax/New York State Transfer Tax

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 2018-2019 (April 1, 2018 - March 31, 2019). According to the Report, the Real Estate Transfer Tax collected was $1,119,610,824. Mortgage recording tax collected statewide was $1,424,110,350; the mortgage recording tax collected in New York City was $1,092,263,652. In fiscal year 2017-2018 (April 1, 2017 - March 31, 2018) the Real Estate Transfer Tax collected was $1,125,072,656; mortgage recording tax collected statewide was $2,081,953,107, including mortgage recording tax of $1,433,589,208 collected in New York City. The report for Fiscal Year 2018-2019 is posted at https://tax.ny.gov/research/collections/fy_collections_stat_report/2018_2019_annual_statistical_report_of_ny_state_tax_collections.htm.

Nuisance and Trespass by Diversion of Water

The Plaintiff sought to recover damages from the Town of Southampton, claiming that work by the Town redirected the flow of storm water runoff from roads onto the Plaintiff's property. The Supreme Court, Suffolk County, denied the Town's motion for summary judgment dismissing the complaint for the causes of action alleging nuisance and trespass. The Appellate Division, Second Department, reversed and granted the Defendant's motion. According to the Appellate Division,

> *"[a] landowner will not be liable for damages to abutting property caused by the flow of surface water due to improvements to his or her land, provided that the improvements were made in good faith to make the property fit for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes and ditches' [citations omitted]. Here, the Town established, prima facie, that it did not divert water by artificial means onto the plaintiff's property or make any improvements that were not in good faith [citations omitted]."*

Raia v. Town of Southampton, 2019 NY Slip Op 06637, decided September 18, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06637.htm.

Receivers

In an Action brought for the partition and sale of real property, the Supreme Court, Suffolk County, granted the Plaintiff's motion to appoint a temporary receiver. Under subsection (a) of Civil Practice Law and Rules Section 6401 ("Appointment and powers of temporary receiver"), "[u]pon motion of a person having an apparent interest in property which is the subject of an action…a temporary receiver may be appointed…where there is danger that the property will be…materially injured or destroyed." The lower court's Order was reversed by the Appellate Division, Second Department. According to the Appellate Division, there was not a clear evidentiary showing that the Defendants were using rental income from the property for their own personal benefit, and

> *"with the exception of expenditures made for renovations, the remaining challenged expenditures were not so significant as to present an 'imminent danger of irreparable loss or waste' with respect to the subject property [citation omitted]. Indeed, in that regard, the value of the real estate provided sufficient security to the plaintiffs to enable them to protect their interests [citation omitted]. As to expenditures for renovations, the plaintiffs did not demonstrate that any of the work done on the property was unnecessary or wasteful."*

Manning-Kranes v. Manning-Franzman, 2019 NY Slip Op 06599, decided September 18, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06599.htm.

Recording/Acknowledgements

On re-argument, the Supreme Court, New York County, held that a recorded but improperly acknowledged mortgage was void and unenforceable, and the Court ordered that the mortgage be cancelled and expunged from the public record, notwithstanding the submission of affidavits attesting that the mortgage included a proper acknowledgment when it was submitted to the recording office. Under Real Property Law Section 317 ("Order of recording"), "[e]very instrument, entitled to be recorded, must be recorded by the recording officer…"; "since the mortgage was not properly acknowledged, it clearly was not entitled to be recorded". 80P2L LLC v. U.S. Bank Trust, N.A., 2019 NY Slip Op 32604, decided September 3, 2019, is reported at http://www.nycourts.gov/reporter/pdfs/2019/2019_32604.pdf.

Recording Act/Bona Fide Purchaser

The Plaintiff sought an Order setting aside a deed which purported to convey property owned by Patrick Pollard, Sr., a legally incapacitated person, to 35 Ave. Corona Realty ("Realty"). The deed was executed pursuant to a power of attorney which in a guardianship proceeding was held void ab initio. The Defendants, Realty and its officer, claimed that Realty was a bona fide purchaser. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment and restored ownership of the property to Patrick Pollard, Sr. The Appellate Division, Second Department, affirmed the lower court's Order. According to the Appellate Division,

> *"…the plaintiff established, prima facie, that Corona Realty was not a bona fide purchaser for value, that no consideration was paid by Corona Realty to purchase the subject property, and that deed was delivered to Corona Realty. In opposition, [the Defendants] failed to raise a triable issue of fact. They failed to produce a deed evincing a transfer of title of the property to Corona Realty, or to submit evidence that, as claimed, Corona Realty paid $10,000 to purchase the property."*

Irwin v. Regal 22 Corp., 2019 NY Slip Op 06387, decided August 28, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06387.htm.

Recording Act

Current Developments dated May 10, 2018 reported the decision of the Supreme Court, New York County, in Akasa Holdings, LLC v. 214 Lafayette House, LLC (71 N.Y.S. 3d 57). In that case, properties were benefitted and burdened by an easement contained in a Declaration of Easements recorded by the common owner in 1981 when the parcels were all part of tax lot 30. One of the easements burdened land owned by the Plaintiff, which land, since 1984 when tax lot 30 was subdivided, has been identified on the tax records as tax lot 9. The Declaration, indexed against tax lot 30 when recorded, was not separately indexed against tax lot 9 until the Defendant, the owner of the parcel benefitted by the easement, recorded the Declaration against tax lot 9 in 2014. The Plaintiff purchased tax lot 9 in 2011.

The Plaintiff alleged that it did not have actual or constructive notice of the Declaration when it purchased tax lot 9; it claimed that the recording of the Declaration against tax lot 9 in 2014 was "'egregious and unlawful misconduct' that has substantially damaged the value of its property". It sought damages for trespass and for the diminution of the value of its property, and a ruling holding that the easement was not effective as to tax lot 9. The Supreme Court, New York County, granted the Defendant's motion to dismiss the complaint, holding that a search of the Plaintiff's chain of title would have revealed the Declaration. According to the Court, "[t]he nonfeasance of the Register, in failing to properly include the Declaration on its records in connection with the new Lot 9 at the time of the subdivision, constitutes a ministerial error that did not void the 1981 recording…"

The Appellate Division, First Department, affirmed, as modified on the law, the Order of the Supreme Court, holding that the Plaintiff acquired tax lot 9 with constructive notice of the easement. According to the Appellate Division,

> *"[i]t would appear that, under [the title search industry's 40-year search standard], a prospective purchaser faced with the above-described results of a title search limited to Lot 9 in March 2011 would be compelled to expand the search beyond Lot 9 to complete a chain of title for 57 Crosby [tax lot 9] that went back 40 years…Accordingly, plaintiff 'is chargeable, as a matter of law, with notice of [the 1981 easement as one] of the facts which a proper inquiry would have disclosed [citation omitted]'…[P]laintiff does not identify any statute, regulation or rule that would require a previously recorded instrument be re-indexed either upon the subdivision of a lot into two or more smaller lots (as was effected with respect to Lot 30 in 1984) or upon the merger of two or more lots into one lot (as was effected with respect to Lot 9 and Lot 30 at some point in the 1970s)."*

Akasa Holdings, LLC v. 214 Lafayette House, LLC, 2019 NY Slip Op 06447, decided September 3, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06447.htm.

Tax Sales

The Petitioner commenced a CPLR Article 78 proceeding, claiming that the foreclosure sale of his property for unpaid taxes should be annulled because of alleged irregularities, including a one-hour weather delay and the brief posting of a notice of the cancellation of the sale which, the Petitioner asserted, resulted in fewer potential bidders and a reduced sales price. The Appellate Division, Fourth Department affirmed the dismissal of the petition by the Supreme Court, Monroe County. According to the Appellate Division,

> *"...although the auction was delayed for one hour due to heavy snowfall during the overnight hours, 27 bidders attended the auction and 35 properties were sold, including petitioner's former property. The property sold for $70,000, a price that was significantly in excess of the tax arrears owed and not so low as to shock the conscience [citation omitted]. Petitioner's contention that a higher bid could have been obtained for the property, which was classified as having a risk of environmental problems, is speculative [citation omitted], and the 'mere inadequacy of price' obtained at an auction 'does not furnish sufficient grounds for vacating a sale [citation omitted]'".*

Matter of Liebel v. City of Rochester, 2019 NY Slip Op 063334, decided August 22, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_06334.htm.

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