Adverse Possession/Bona Fide Encumbrancer

In moving for an Order that the Plaintiffs had acquired title by adverse possession to a strip of land located between the Plaintiffs' and the Defendants' homes, and other relief, the Plaintiffs sought to have the mortgage executed by the Defendants, which was a lien on the parcel being litigated, extinguished insofar as it encumbered the strip of land. The Defendants having raised issues of material facts, the Supreme Court, Bronx County, denied the Plaintiffs' motion for summary judgment. Applying Real Property Law Section 260 ("Land adversely held may be conveyed or mortgaged"), the Court also granted the mortgagee's motion for summary judgment, dismissing all causes of action as to it. Section 260 states the following:

> *"No grant, conveyance or mortgage of real property or interest therein shall be void for the reason that at the time of the delivery thereof such real property is in the actual possession of a person claiming under a title adverse to that of the grantor."*

Burton v. Allston, 2019 NY Slip Op 33229, decided October 5, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_33229.pdf.

Adverse Possession/De Minimis Encroachments

Defendants removed a fence located at the rear of the Plaintiffs' land; the Defendants alleged that the fence encroached on their property. The Plaintiffs commenced an action pursuant to Real Property Actions and Proceedings Law ("RPAPL") Article 15 ("Action to compel the determination of a claim to real property") to determine title to the area in question.

The Plaintiffs asserted that the Defendants' claims were barred because the disputed area was included in the deed to the Plaintiffs or alternatively, because the Plaintiffs had acquired title to the area by adverse possession. As to the latter claim, the "plaintiffs assert[ed] that since purchasing Lot 1 in 2000 the disputed area has been enclosed by a fence, that they have installed landscaping and performed lawn maintenance, used the area for social gatherings and recreational activities and that stone was placed in the area to assist in maintaining septic system laterals." They also alleged that they had a pool installed in the area in question for two to three years, which the court characterized as being for "a relatively short time."

The Supreme Court, Saratoga County, granted the Defendants' motion to dismiss as to the claim of adverse possession. Under RPAPL Section 543 ("Adverse possession; how affected by acts across a boundary line") effective July 7, 2008, "the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, shed and non-structural walls, shall be deemed to be permissive and non-adverse." Section 543 further states that "the acts of lawn mowing or similar maintenance across the boundary line of an adjoining landowner's property shall be deemed permissive and non-adverse." According to the Court, the plaintiffs' use and possession of the disputed area" are de minimis and therefore, permissive and non-adverse [citations omitted]." The motion to dismiss the claim based on the Plaintiffs' deed was denied. Bond v. Brookview Court, Inc., 2017 NY Slip Op 33115, decided November 1, 2017, was posted to the New York Official Reports Slip Opinion Service on November 7, 2019 at http://www.nycourts.gov/reporter/pdfs/2017/2017_33115.pdf.

Bankruptcy/Statute of Limitations

Under subsection (a) of Bankruptcy Code Section 362 ("Automatic stay"), "…a petition filed [under the Code] …operates as a stay, applicable to all entities, of – (1) the commencement or continuation…of a judicial, administrative or other proceeding against the debtor that was or could have been commenced. Subsection (a) of Civil Practice Law and Rules ("CPLR") Section 204 ("Stay of commencement for action…") provides that "[w]here the commencement of an action has been stayed by a court or by statutory provision, the duration of the stay is not a part of the time within which the action must be commenced. "

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

In 2007, after a mortgage foreclosure was commenced, the owner of the subject property, the Plaintiff in this case, filed for bankruptcy. The bankruptcy stay was lifted in 2009 when the bankruptcy petition was dismissed. The first foreclosure was dismissed as abandoned in 2010. In 2011, the assignee of the mortgage commenced a second foreclosure, which was stayed when the Plaintiff filed a second bankruptcy petition. The property was released from the bankruptcy estate. The Supreme Court, Suffolk County, dismissed this foreclosure for improper service of process. In 2014, after the foreclosure was dismissed, the Plaintiff commenced an action under RPAPL Section 1501("Action to compel a determination of a claim to real property") to obtain a discharge of the mortgage. The Plaintiff asserted that the six-year statute of limitations had expired. The Defendant moved to dismiss, asserting that its foreclosure claim was tolled by the bankruptcy stays. The Supreme Court's grant of the Defendant's motion to dismiss was affirmed by the Appellate Division, Second Department, and by New York State's Court of Appeals.

The Court of Appeals held that the bankruptcy stay is a "statutory provision" under CPLR Section 204(a). The Court further held that "the toll provided in CPLR 204(a) is available to a claimant who, when the bankruptcy stay was imposed, had already commenced an action against the debtor – later dismissed – on the claim now reasserted." The statute of limitations began to run on June 11, 2007. As the property was subject to bankruptcy stays for at least 1651 days, the statute of limitations would have expired on or about December 18, 2017. Lubonty v. U.S. Bank National Association, 2019 NY Slip Op 08520, decided November 25, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08520.htm.

Contracts of Sale/Religious Corporations

The Plaintiff and the Defendant, The Corporation of the Rector, Churchwardens, and Vestrymen of Saint James Episcopal Church, entered into an agreement for the Defendant to sell St. James Episcopal Church, in Bronx County. The Defendant holds title to the property in trust for the Episcopal Diocese. The Agreement provided, in part, that

> *"Seller will as expeditiously as possible take all steps required under the Canons of the Episcopal Diocese of New York, The Episcopal Church in the United States, the New York Religious Corporations Law, Section 511 of the New York Not-For-Profit Corporation Law (the 'Consent') for the approval of this Agreement, and the transactions contemplated hereby, a justice of the Supreme Court of the State of New York (jointly, the 'Consenting Parties'), including without limitation, application to the Standing Committee and to the Bishop of the Episcopal Diocese of New York and commencement of a proceeding in the Supreme Court of the State of New York for approval thereof…"*

After the Standing Committee and the Bishop refused to approve the proposed sale, the Plaintiff sued for specific performance and to recover damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. The Supreme Court, Bronx County, in granting the Defendant's motion for summary judgment, stated that

> *"[t]his court cannot substitute its judgment for that of the Diocese Canons. St. James complied with the terms of the Agreement, which required that it undertake to obtain the approval for the proposed sale by submitting a Notice of Intention to the Bishop and the Standing Committee…[I]t could not guarantee that approvals would be obtained…"*

As to the cause of action for breach of the covenant of good faith and fair dealing, the Court found that "[p]laintiff has failed to show that St. James prevented performance of the Agreement or that it withheld any benefits of the Agreement from plaintiff, thus, it has not proved that St. James breached the covenant of good faith and fair dealing…" As to unjust enrichment, that cause of action "contemplates an obligation imposed by equity to prevent injustice in the absence of an actual agreement between the parties." 2520 Jerome LLC v. The Corporation of the Rector, Churchwardens, and Vestrymen of Saint James Episcopal Church, Index No. 27270/2018, was decided by Judge Franco on October 11, 2019.

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Leasehold Condominiums/Real Estate Tax Exemptions for Not-for-Profits

Real Property Tax Law Section 420-a ("Nonprofit Organizations; mandatory class") states, in relevant part, that "[r]eal property owned by a corporation or association organized or conducted exclusively for…educational purposes…shall be exempt from taxation as provided in this section." According to the New York City Department of Finance's website, at https://www1.nyc.gov/site/nfp/index.page, while "a wide range of nonprofits may be eligible for a fully or partial exemption…[t]o receive a tax exemption, the property's legal title must be in the name of a nonprofit organization and the applicant must be the owner of the property. Federal 501(c)(3) status alone does not automatically qualify you for the exemption." The Department has issued a ruling on the application of the exemption to a condominium unit owned by a nonprofit in a two-unit condominium.

According to the Department's ruling:

A real property exemption pursuant to Section 420-a is properly granted to the leasehold condominium unit owned by a tax-exempt entity organized under Internal Revenue Code Section 501(c)(3) conducted for educational purposes when the condominium declaration requires that unit owner to pay all of the real estate taxes attributable to its unit.

The condominium unit will be exempt if the unit is owned by a wholly owned IRC 501(c)(3) tax-exempt subsidiary of the Petitioner and leased back to the Petitioner, provided that the rent paid to the subsidiary does not exceed the subsidiary's maintenance and carrying costs and/or depreciation charges.

The Petitioner's condominium unit will be exempt even though the other unit is owned by a for-profit subsidiary of the sponsor.

Department of Finance Ruling FLR-19-4999, dated October 15, 2019, is consistent with FLR-08-4886, a Ruling issued by the Department on February 13, 2009. The 2019 Ruling is at https://www1.nyc.gov/assets/finance/downloads/pdf/redacted-letter-rulings/real_property/real_property_tax_law_flr-19-4999.pdf.

Lien Law/Judgments

An action was commenced against a general contractor and its principals to recover damages for the alleged breach of a contract to renovate the Plaintiff's residence. The Defendants counterclaimed to foreclose a mechanic's lien or, in the alternative, for a money judgment. A Referee found that the Defendants were owed $102,627 and that it had not been established that the Defendants were in breach. The Supreme Court, Queens County, granted the Defendants' motion for leave to enter a money judgment for that amount; the mechanic's lien had expired. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division, "…the defendants were entitled, in lieu of or in addition to pursuing a mechanic's lien foreclosure, to obtain a money judgment against [the Plaintiff] for the amount due under the parties' contract". Lien Law Section 64 ("Award of personal judgment by court or referee") states, in part, that "[a] court or referee in any action heretofore or hereafter brought may at any time award a money judgment in favor of any party…" Kandov v. Kats, 2019 NY Slip Op 08558, decided November 27, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08558.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. The Supreme Court, New York County, granted a general contractor's petition to vacate a mechanic's lien filed by a subcontractor for the failure, after the Petitioner served the notice required by Section 59, to commence to foreclose its lien. The mechanic's lienor contended that the Petitioner did not have standing to seek removal of the lien. According to the Court, "it has long been held that a general contractor may serve a notice pursuant to Lien Law Section 59 and has standing to bring a petition to

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

vacate the lien [citations omitted]". G Builders V, LLC v. Quality Waste Services Corp., 2019 NY Slip Op 33500, decided November 26, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_33500.pdf.

Other decisions have been reported on the application of the Lien Law.

A mechanic's lien was filed for pre-construction management services for the development of real property. The property owner responded that the lien was invalid on its face because the services alleged to be provided did not support the filing of a mechanic's lien. Under Lien Law Section 19 ("Discharge of lien for private improvement"), "[w]here it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed", the lien may be discharged of record. The Supreme Court, Westchester County, denied the property owner's petition to discharge the lien; the Appellate Division, Second Department, affirmed.

While a mechanic's lien was not properly filed for certain of the services alleged to have been rendered, such as the preparation of construction budgets and consulting with the owner's agents on construction phasing, the preparation of "site logistics and access plans" and the performance of a "constructability review for the project… could qualify as an 'improvement' [under Lien Law Section 3] if the site logistics, access plans, or constructability review included drawings by an architect or engineer, even if such were prepared preconstruction [citations omitted]." Under Lien Law Section 23 ("Construction of article"), the Lien Law "is to be constructed liberally…" for the benefit of mechanics' lienors. Matter of Old Post Road Associates, LLC v. LRC Construction, LLC, 2019 NY Slip Op 07930, decided November 6, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_07930.htm.

A mechanic's lien was filed within eight months of the mechanic's completion of its work, as required by Lien Law Section 10 ("Filing of notice of lien"). After the expiration of the eight-month period, the lienor filed a second mechanic's lien to correct the tax lot number. The Supreme Court, New York County, granted the Petitioner's motion to vacate the second filed lien. The Appellate Division, First Department, affirmed the lower court's ruling. According to the Appellate Division, "while [Lien Law] section 10(2) allows for the filing of a mechanic's lien to cure the irregularity of an earlier lien, such corrected lien must be filed within the eight-month time period."

Matter of 361 Broadway Associates Holdings, LLC v. Blonder Builders Inc., 2019 NY Slip Op 08920, decided December 12, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08920.htm.

Columbia University ("Columbia") retained APG International, Inc. ("APG") to install the exterior curtain wall for a new building. APG subcontracted a portion of the work to the Plaintiff, Genetech Building Systems, Inc. The Plaintiff alleged that after the Plaintiff did work APG terminated the contract. The Plaintiff filed a mechanic's lien and commenced an action against APG and Columbia to foreclose the lien and for other relief. A money judgment was entered against APG.

By September 20, 2016, Columbia had paid APG $4,783,763.25 for its work. APG executed a waiver of liens and release form acknowledging that it was paid for all work done. In November 2016, APG notified Columbia's construction manager that it was abandoning the project; Columbia engaged a different general contractor to complete the work.

The Supreme Court, New York County, granted Columbia's motion for summary judgment dismissing the complaint; there were no funds to which the Plaintiff's lien could attach. According to the Court,

> *"[a] subcontractor's right to recover is generally derivative of the general contractor's right to recover from an owner [citation omitted]…Thus, where there are no funds due from the owner to the general contractor at the time the mechanic's lien was filed, a subcontractor must look to the general contractor for payment of its services [citation omitted]…Here, APG acknowledged that it had been paid all sums due under the Contract as of September 20, 2016, as evidenced by its waiver of liens and release form. Therefore, at the time plaintiff filed its lien, there were no funds due to APG…Columbia has also shown that the amount paid to complete APG's work exceeded the unpaid balance on the Contract, and that the lien fund was depleted as a result."*

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Genetech Building Systems, Inc. v. APG International, Inc., 2019 NY Slip Op 33225, decided October 29, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_33225.pdf.

Mortgage Foreclosures/Appointment of a Receiver

The Supreme Court, New York County, in the foreclosure of a mortgage on a residential condominium unit, granted the motion by the Board of Managers of the Condominium for the appointment of a temporary receiver to collect rent from the Defendant unit owner during the pendency of the foreclosure. The ruling was affirmed by the Appellate Division, Second Department. Under Real Property Law Section 339-aa ("Lien for common charges; duration; foreclosure"), "prior to sale pursuant to judgment of foreclosure and sale, if so provided in the by-laws… the plaintiff in such foreclosure shall be entitled to the appointment of a receiver" to collect a reasonable rental. The condominium's by-laws provided for the appointment of a receiver. Further, the condominium Board was entitled to "this drastic remedy". The Defendant had not paid common charges since 2008, causing "a shortfall in the condominium's monthly income, creating a burden shouldered by the other unit owners." Capital One, N.A. v. Banfill, 2019 NY Slip Op 08004, decided November 7, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08004.htm.

Mortgage Recording Tax/ Livingston County

Livingston County has, effective for mortgages recorded on and after January 1, 2020, imposed a county mortgage recording tax of $.25 for each $100 secured. The total combined rate of mortgage recording tax in the County will therefore be $1.25 for each $100 secured by a mortgage. MT-19-1, "Changes to the Mortgage Recording Tax Rates Affecting Livingston County" is posted to New York State Department of Taxation and Finance's website at https://www.tax.ny.gov/pdf/notices/mt19-1.pdf.

Mortgages/Assignment of Notes

Champion Mortgage assigned consolidated mortgages to Beneficial Homeowner Service Corporation, the Plaintiff, which re-assigned the mortgages to KeyBank National Association. Both mortgage assignments recited that they were made "together with the certain note(s) described therein". KeyBank executed and recorded a mortgage satisfaction even though the mortgages were not actually satisfied. The borrower continued to make payments for two years after the satisfaction was recorded.

Beneficial sought an Order cancelling the erroneous satisfaction, claiming that because the Plaintiff retained the notes KeyBank lacked the authority to execute the satisfaction. The Supreme Court, Jefferson County, denied the Plaintiff's motion for summary judgment. The Appellate Division, Fourth Department, modified the Order to allow for the substitution of the legal description of the property to correct scrivener's errors but otherwise affirmed the lower court's Order. According to the Appellate Division,

> *"[a]lthough plaintiff retained physical possession of the notes, the assignment to KeyBank specifically provided that the mortgages 'together with the certain note(s) described therein' were being assigned. Such language has been held to effectuate an assignment of both the note and the mortgage [citations omitted]. Where, as here, there is an effective assignment of both the mortgage and the note, physical delivery of the note is not required for the assignee to lawfully take action on the mortgage. 'Either a written assignment of the underlying note or the physical delivery of the note is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident' [citations omitted]. Plaintiff thus failed to establish that the assignment of the notes and mortgages to KeyBank was invalid."*

Beneficial Homeowner Service Corporation v. KeyBank National Association, 2019 NY Slip Op 08018, decided November 8, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08018.htm.

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

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 was commenced in 2005 and a judgment of foreclosure and sale was entered in 2007. The Plaintiff's assignor, the former mortgage lender, and the Defendants entered into a loan modification in 2008. The judgment was not vacated; the 2005 action was not formally discontinued. When a new foreclosure was commenced the Plaintiff did not seek leave of Court under Section 1301. The Defendants asserted that the Supreme Court, New York County, lacked jurisdiction due to the Plaintiff's failure to seek leave to commence the Action.

The Supreme Court, New York County, granted a judgment of foreclosure and sale, which Order was affirmed by the Appellate Division, First Department. According to the Appellate Division, because of the loan modification agreement "defendants are not facing 'the expense and annoyance of two independent actions at the same time with reference to the same debt' [citation omitted], and plaintiff's failure to comply with RPAPL 1301(3) 'was properly disregarded as a mere irregularity' [citation omitted]." Bosco Credit Trust Series 2012-1 v. Johnson, 2019 NY Slip Op 08525, decided November 26, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08525.htm.

Mortgage Foreclosures/Environmental Remediation Offset

The foreclosing Plaintiff's husband, now deceased, was remediating contamination at his gas station when he sold the property to the Defendant, taking back a purchase money mortgage. Her husband and the Defendant executed a "completion agreement", providing that his "responsibility to take remedial action…shall terminate at such time as the [New York State Department of Environmental Conservation (DEC)] determines that no further continuation of action as set forth in the Corrective Action Plan is necessary." A "no further…action" letter was issued by the DEC.

When the Defendant sought to re-sell the property, he discovered that contamination remained. The Defendant applied money to be used for mortgage payments for "site investigation and remediation." The Plaintiff, to whom the mortgage was assigned, jointly with her husband, commenced a foreclosure of the mortgage. The Defendant moved for partial summary judgment on his counterclaims that the Plaintiff was liable as an owner and a discharger. Under Navigation Law Article 12 ("Oil Spill Prevention, Control and Compensation") Section 181 ("Liability"),

> *"4(b) Nothing set forth in this subdivision shall be construed to hold a lender liable to the state as a person responsible for the discharge of petroleum at a site in the event: (1) such lender, without participating in the management of the site, holds indicia of ownership primarily to protect the lender's security interest in the site; or (ii) such lender did not participate in the management of such site prior to a foreclosure, and such lender (1) forecloses on such site…[However, under Section 181 (4)(c),] "[t]his exemption shall not apply to any lender that has (i) caused or contributed to the discharge of petroleum from or at such site…"*

The Supreme Court, Monroe County, denied the Defendant's motion for partial summary judgment and the Appellate Division, Fourth Department, affirmed. According to the Appellate Division,

> *"[W]e…reject plaintiff's contention that she is the assignee only with respect to decedent's role as lender. We thus conclude that plaintiff, as the assignee of a discharger, cannot assert the innocent lender exemption to liability established in Navigation Law Section 181(4)(b)(i) (see Section 181 [4][c]), and we agree with defendant that he can assert any defenses or claims against plaintiff that he could have asserted against decedent, but only as an 'offset to the amount of [plaintiff's foreclosure] demand [citations omitted]. We nevertheless conclude that the court properly denied defendant's motion insofar*

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

> *as there are triable issues of fact whether his Navigation Law counterclaims…are precluded by the completion agreement."*

Mason v. Caruana, 2019 NY Slip Op 08039, decided November 8, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08039.htm.

Mortgage Foreclosures/Lost Notes

The amended complaint for the foreclosure of a mortgage stated that the note, which had been assigned to it with the related mortgage, had been "permanently lost, stolen or inadvertently destroyed" but, notwithstanding, the Plaintiff could maintain the action under the authority of Uniform Commercial Code Section 3-804 ("Lost, destroyed or stolen instruments"). Under Section 3-804, "[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from a party liable thereon upon due proof of his ownership, the facts which prevent the production of the instrument and its terms…" A lost note affidavit, an affidavit supporting the possession of the original note, and a copy of the note accompanied the complaint. The Supreme Court, Rockland County, granted a judgment of foreclosure and sale, confirmed the referee's report, and directed that the property be sold. The Appellate Division, Second Department, reversed the lower court's Order. According to the Appellate Division,

> *"the affidavit of possession of the original note, sworn to by a vice president of loan documentation for the plaintiff, does not contain any details of delivery of the note, except for the claim that it was delivered to the plaintiff sometime after its execution, and that the plaintiff 'had possession of the Promissory Note on or before…the date that this action was commenced.' The lost note affidavit of another vice president…stated vaguely, and in a conclusory manner, that the note was 'inadvertently lost, misplaced or destroyed', that the plaintiff had not 'pledged, assigned, transferred, hypothecated or otherwise disposed of the note' and that the plaintiff had made 'a diligent and extensive search of its records…' The lost note affidavit did not provide any facts as to when the search for the note occurred, who conducted the search, or when or how the note was lost [citation omitted]. Thus, it failed to sufficiently establish the plaintiff's ownership of the note' [citations omitted]."*

Wells Fargo Bank, N.A. v. Meisels, 2019 NY 08243, decided November 13, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08243.htm.

Mortgage Foreclosures/Notices - RPAPL Section 1303

In a mortgage foreclosure the Supreme Court, Suffolk County, denied the Defendant's motion to vacate a judgment of foreclosure and sale entered on default; the Defendant contended that the RPAPL Section 1303 ("Foreclosures; required notices") notice served on him did not strictly comply with the requirements of the statute. In a mortgage foreclosure involving residential real property, the foreclosing party is required by Section 1303 ("Foreclosures; required notices") to deliver to the mortgagor with the summons and complaint a notice captioned "Help for Homeowners in Foreclosure" when the foreclosure relates to an owner-occupied one-to-four family dwelling. The Appellate Division, Second Department, affirmed the lower court's Order, stating that

> *"[a] plaintiff's failure to comply with the notice requirements of RPAPL 1303 may be raised 'at any time during an action' [citation omitted]...Here the defendant failed to raise the issue of the plaintiff's compliance with RPAPL 1303 during the action, and instead raised the issue only after the judgment of foreclosure and sale was entered…[A] plaintiff's failure to comply with RPAPL 1303 does not constitute an independent ground for vacating a judgment of foreclosure and sale…"*

Wells Fargo Bank, N.A. v. Coffey, 2019 NY Slip Op 08597, decided November 27, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08597.htm.

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Mortgage Foreclosures/Notices - RPAPL Section 1304

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.

In Federal National Mortgage Association v. Johnson, the Appellate Division, Third Department, held that a Section 1304 notice was not required to be sent to the owner-occupant of the mortgaged property who had not signed the note or the mortgage and was not otherwise an obligor on the note. He "was not a borrower and was not entitled to RPAPL 1304 notices [citation omitted]." Federal National Mortgage Association v. Johnson, 2019 NY Slip Op 08472, decided November 21, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08472.htm.

Other decisions have been reported on the application of RPAPL Section 1304.

The Appellate Division, First Department, held that the notice addressed to the borrower at the building in which the borrower's condominium unit is located did not comply with the requirements of Section 1304 because the mailing did not identify the unit number. Wells Fargo Bank, N.A. v. Biederman, 2019 NY Slip Op 08932, decided December 12, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08932.htm.

The Appellate Division, Second Department, reversed the issuance of a judgment of foreclosure and sale by the Supreme Court, Kings County. The affidavit of an officer of the Plaintiff "was insufficient to establish that the RPAPL 1304 notice was mailed, because [the officer] did not submit proof of a standard office mailing procedure or any independent proof of actual mailing [citations omitted]." JPMorgan Chase Bank, N.A. v. Akanda, 2019 NY Slip Op 08180, decided November 13, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08180.htm.

Mortgage Foreclosures/Standing

Affirming the Order of the Supreme Court, Suffolk County, granting the foreclosing Plaintiff summary judgment, the Appellate Division, Second Department, ruled, in response to the Defendant's affirmative defense that the Plaintiff lacked standing, that "the plaintiff established, prima facie, that it had standing by demonstrating that it had physical possession of the note prior to the commencement of the action, as evidenced by its attachment of the note, endorsed in blank, to the summons and complaint [citations omitted]…" JPMorgan Chase Bank, National Association v. Escobar, 2019 NY Slip Op 08181, decided November 13, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08181.htm.

Mortgage Foreclosures/Standing/Home Loans

New Section 1302-a ("Defense of lack of standing; not waived") has been added to the RPAPL by Chapter 739 of the Laws of 2019 effective December 23, 2019. Section 1302-a reads as follows:

> *"Notwithstanding the provisions of subdivision (e) of rule thirty-two hundred eleven of the civil practice law and rules, any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in paragraph (a) of subdivision six of section thirteen hundred four of this article, shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon defendant's default."*

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Mortgage Foreclosures/Statute of Limitations

The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment in an action to cancel a mortgage on the ground that the six-year statute of limitations to foreclose under CPLR Section 213 ("Actions to be commenced within six years…") had expired. The Appellate Division, Second Department, reversed and granted the Defendant's motion for summary judgment. According to the Appellate Division,

> *"…the defendant demonstrated, prima facie, that the debt was never validly accelerated, as prior actions to foreclose the subject mortgage, commenced in 2007 and 2009, were dismissed upon determinations that the plaintiff in those actions lacked standing [citations omitted]."*

Diji v. Deutsche Bank National Trust Company, 2019 NY Slip Op 07944, decided November 6, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_07944.htm.

Other decisions have been reported on the application of the statute of limitations.

In Wilmington Savings Fund Society, FSB v. Fernandez, the Appellate Division, Fourth Department, held that a debtor's discharge in a Chapter 7 Bankruptcy, which is an in personam action against a debtor, "did not automatically accelerate the debt, [and, therefore, the foreclosing] plaintiff's complaint is not time-barred because separate causes of action accrued for each installment payment that was not made." According to the Court,

> *"a discharge in bankruptcy does not automatically accelerate the debt and that the terms of the mortgage survive bankruptcy. Because the terms of the mortgage survive, causes of action would thus continue to accrue with respect to each installment payment as the payments become due, although a note holder would only be able to commence an action in rem."*

This decision, 2019 NY Slip Op 08290, dated November 15, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08290.htm.

In U.S. Bank Trust, N.A., as Trustee, v. Boktor, the Defendant asserted that the foreclosure of the Plaintiff's mortgage was time barred; the Plaintiff's predecessor-in-interest had commenced a foreclosure in 2009 which was discontinued in 2015. The current foreclosure was brought in 2017. The Plaintiff asserted that the Defendant, in his bankruptcy filed in 2011, reaffirmed the debt, restarting the statute of limitations. The Plaintiff also claimed that the statute of limitations was restarted again when the Defendant entered into a trial modification plan in 2016. The Supreme Court, New York County, granted the Defendant's motion for summary judgment and directed the County Clerk to cancel the notice of pendency filed for the action.

According to the Court, the statement of intention filed by the Defendant in the bankruptcy, in which he checked "a box that states he is reaffirming the debt…is sufficient to restart the statute of limitations." However, the foreclosure was commenced more than six years after the date on which the Defendant was discharged from bankruptcy. Further, the trial payment plan, pursuant to which the Defendant made three payments on the mortgage loan and would receive a loan modification on "successful completion of the Trial Period Plan", was not the acknowledgement of the debt. According to the Court, a trial payment plan

> *"is merely an agreement to pause a foreclosure case in exchange for a few payments. It is not an agreement to pay the loan and, therefore, is not an acknowledgment of the debt. Otherwise, lenders could use this type of agreement to trick people into restarting the statute of limitations and back out before agreeing to an actual modification of the loan."*

This decision, 2019 NY Slip Op 33289, dated October 31, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_33289.pdf.

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Parkland/Public Trust Doctrine

Under the public trust doctrine, land impliedly dedicated as parkland cannot be alienated without approval of the state legislature. The party asserting the public trust doctrine has the burden of proving that the land was dedicated to a public use.

The Supreme Court, New York County, held that New York City's release of Pier 5 on the Harlem River in the Bronx to a private developer for non-park use without state legislative approval did not violate the public trust doctrine. The Appellate Division, First Department, affirmed.

The management of Pier 5 was transferred to the City's Department of Parks and Recreation ("DPR") in 2006. The pier was fenced and closed until 2014 when the state's Department of Transportation began to use it for storage for a highway project. The DPR allowed private companies to hold circuses and carnivals at Pier 5 for a few weeks each year from 2010 to 2016. However, according to the Appellate Division,

> *"[t]he fact that Pier 5 was transferred to DPR's jurisdiction and management does not by itself evince any intention on the City's part to commit the parcel permanently to use as parkland [citation omitted]. Nor do the facts that the parcel's fencing bore DPR signage and that DPR and other entities at times referred to the parcel as a park compel the conclusion that Pier 5 became a park by implication [citations omitted]."*

Matter of Bronx Council for Environmental Quality v. The City of New York, 2019 NY Slip Op 08005, decided November 7, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08005.htm.

Restrictive Covenants

A 1966 deed conveyed a landlocked parcel to the County of Schuyler together with an easement of ingress and egress over land now owned by the Defendant. The deed required that "[t]he premises…be used for the purpose of erecting towers and radios for voice communication, for the County of Schuyler, it's [sic] governmental departments and agencies and other political subdivisions now cooperating in and using it's [sic] various radio systems, only." In 2014, the Defendant objected to the construction and installation of a new communications tower to be used by Chemung County and Schuyler County, the Plaintiffs in this case. The Defendant blocked access to the right-of-way to prevent construction of the new tower, claiming that the Plaintiffs had violated the restrictive covenant. The Defendant argued that in 1966 Chemung County was not "cooperating in and using [the] various radio systems" and it was, therefore, precluded from now doing so. Further, the Defendant alleged that the Plaintiffs were using the radio tower for more than "voice communication".

The Plaintiffs commenced an action seeking, among other relief, an Order declaring that they had a right of ingress and egress over the easement and enjoining the Defendant from interfering with their use and enjoyment of the tower site and the right-of-way. The Supreme Court, Chemung County, granted the Plaintiffs' motion for summary judgment; the Appellate Division, Third Department, affirmed. According to the Appellate Division, the "plaintiffs submitted prima facie evidence establishing that, at the time of the conveyance [in 1966], the tower's radio systems were being used by [the Plaintiffs]". Further, affidavits of experts were submitted to establish that "the new tower is used solely for the transmission of voice communication and that the new tower does not have the capability to transmit informational data…" The Defendant did not submit proof in admissible form to raise a question of fact on whether the new tower is being used for other than voice communication. County of Schuyler v. Hetrick, 2019 NY Slip Op 08745, decided December 5, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_08745.htm.

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.

Reverse Mortgages

Section 280-b ("Federal home equity conversion mortgage regulation") has been added to New York's Real Property Law by Chapter 581 of the Laws of 2019. Section 280-b affects reverse mortgage loans, as defined in Real Property Law Section 280 ("Reverse mortgage loans for persons sixty years of age or older"), issued pursuant to the home equity conversion mortgage for seniors program operated by the federal Department of Housing and Urban Development ("HUD"). Among its provisions, Section 280-b prohibits "unfair or deceptive practices in connection with the marketing or offering of reverse mortgage loans", adds notice requirements for consumer protection, and imposes requirements for lenders to verify the occupancy of the mortgaged premises when a lender seeks to foreclosure on the basis that the mortgaged property is no longer the primary residence of or occupied by the mortgagor. It requires that both the borrower and the lender be represented by counsel at the closing of such a reverse mortgage. Compliance with the requirements of Section 280-b is a condition precedent to foreclosing the mortgage, "and the failure to comply therewith shall be a complete defense to a foreclosure action." A person injured by a violation of Section 280-b, or by a violation of any applicable rules issued by HUD, may bring an action to recover treble damages and reasonable attorneys' fees.

Chapter 581 is effective on the 90 day after its enactment which was on December 6. The Superintendent of the Department of Financial Services is directed to "amend, add and/or repeal any rules and regulations necessary to implement" Section 280-b within 180 days of enactment. The legislation, Senate Bill 4407/Assembly Bill 5626, can be obtained on the New York State Assembly's website at https://nyassembly.gov/leg/?bn=A05626&term=2019.

Tax Liens/Notices

A proceeding was commenced under CPLR Article 78 ("Proceeding against body or officer") to review a determination of the Nassau County Treasurer approving the issuance of a tax deed. The Supreme Court, Nassau County, set aside the tax deed, restoring title to the Petitioner. The Appellate Division, Second Department, dismissed the appeal and affirmed the lower court's judgment.

Under Nassau County Administrative Code Section 5-51.0 ("Notice to owner by holder"), the holder of a tax lien is required to serve notice of a tax sale on the owner of and to other parties having interests in the property subject to the tax lien to afford an opportunity to redeem before a tax deed may be issued. In this case, the holder of the tax lien served the owner of the property at 136 West 57th St. instead of to its correct business address at 136 East 57th St.

IM Long Island, LLC v. Jefferson, 2019 NY Slip Op 07949, decided November 6, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_07949.htm.

Wishing all a healthy and prosperous 2020!

Michael J. Berey
Current Developments since 1997
No. 204, January 13, 2020

©2020 First American Financial Corporation and/or its affiliates. All rights reserved. NYSE: FAF
Not to be reprinted without written permission obtained in advance from First American Title.