In these unusual times it is hoped that issuing this Bulletin is acceptable to its readers, and that it continues to be useful.

First American News

The first completely updated edition of James Pedowitz's legendary treatise "Real Estate Titles" is to be released by the New York State Bar Association. The editors of "Real Estate Titles: The Practice of Real Estate Law in New York" are Michael J. Berey of First American and Adam Leitman Bailey of Adam Leitman Bailey, P.C.

Equitable Subrogation/Statute of Limitations

A mortgage executed by Defendant Sermons to MERS as nominee for American Mortgage Express Corp. ("American") was recorded in 2003. In July 2004, Sermons conveyed the mortgaged property to Parker Properties, Inc. ("Parker"), subject to the mortgage; the deed was recorded in October 2004. In July 2004, Sermons purportedly conveyed the same property to Defendant Sanderson; this deed was recorded in December 2004. Sanderson obtained a mortgage loan from Fairmont Funding, Ltd ("Fairmont"). Proceeds from the Fairmont mortgage satisfied the American mortgage. In 2007, the Supreme Court, Kings County, held that Parker was the lawful owner of the property and vacated the deed to Sanderson; the Court's Order was recorded in 2007. In 2007, after the Order was recorded, the Fairmont mortgage was assigned by MERS to HSBC Bank USA, N.A. ("HSBC"). In 2012, Parker conveyed the property to 43 Monroe Street, LLC ("Monroe").

In 2013, HSBC sought a ruling that it held a superior, valid first mortgage lien under the doctrines of equitable subrogation and equitable mortgage. The Supreme Court, Kings County, entered a default judgment against all Defendants except Monroe, which had submitted an answer asserting, as an affirmative defense, the Plaintiff's lack of standing and the statute of limitations. The Court denied the Plaintiff's motion for summary judgment as to Monroe and granted Monroe's cross-motion to dismiss the action as barred by the application of the six-year statute of limitations under Civil Practice Law and Rules ("CPLR") Section 213 ("Actions to be commenced within six years…"). The Appellate Division, Second Department, affirmed the lower court's ruling and remanded the case for entry of a judgment that the action was barred by the statute of limitations. According to the Appellate Division,

> *"…although the plaintiff's predecessor in interest was not made a party to the quiet title action, the May 2007 order, declaring that Parker was the lawful fee owner of the subject property and vacating the deed from Sermons to Sanderson, had the effect of also voiding the Fairmont mortgage that was subsequently assigned to the plaintiff. Furthermore…the plaintiff's claim is through Sanderson, a party to the quiet title action, who obtained the Fairmont mortgage from the plaintiff's predecessor in interest. As a result, the plaintiff is limited to seeking an equitable lien on the subject property pursuant to the doctrines of equitable mortgage or equitable subrogation."*
>
> *"However, in that regard, we agree with the Supreme Court's determination that those causes of action were time-barred by the six-year statute of limitations [citations omitted]…Here, the plaintiff was assigned the Fairmont mortgage on August 10, 2007 and was chargeable with notice, based on the recording of the May 2007 order, that Sanderson's deed had been vacated and that its interest in the subject property was adversely affected. Since the plaintiff did not commence this action until September 2013, the causes of action seeking an equitable first mortgage lien are time-barred."*

HSBC Bank USA, N.A. v. Parker, 2020 NY Slip Op 01335, decided February 26, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_01335.htm.

Estates/Letters of Administration/Recording Act

Estelle Gray, the owner of a 50% tenant in common interest in real property in Kings County, died intestate in 1998, survived by eight children. By a deed recorded in 2017, Clifford, who was one of her daughters who was the holder of the other tenant in common interest, and Barbara, another daughter, purporting to be Estelle's sole heirs and distributees, conveyed Estelle's interest in the property to Defendant 207 Van Buren LLC. By a deed dated January 23, 2019 but not recorded until September 4, 2019, the heirs of Estelle (not including her son Sevonne), individually or by the Administrators of their Estates, conveyed Estelle's tenant in common interest to the Defendant. On March 1, 2019, full and unrestricted Letters of Administration for the Estate of Estelle were issued to Sevonne, who purported to convey Estelle's tenant in common interest to the Defendant by a deed which was not recorded until September 4, 2019. The Surrogate's Court, Kings County, issued an Order approving Sevonne's conveyance to the Defendant and authorized Sevonne to execute a confirmatory quitclaim deed. While Sevonne's petition to the Surrogate's Court for the Order approving the sale was pending, Bobby Rice, the husband of Estelle's daughter Rosalind, a daughter of Estelle, despite Rosalind's daughter having executed the 2019 deed as Administratrix of Rosalind's Estate, deeded his purported interest as an heir of Rosalind to the Plaintiffs (the "Rainford Deed").

The Plaintiffs commenced an action under Real Property Actions and Proceedings Law ("RPAPL") Article 15 ("Action to compel the determination of a claim to real property"), seeking a ruling that they held a fee simple interest in the property. They asserted that neither the Rainford Deed nor the other deeds conveyed any interest in the property which automatically and immediately vested in Bobby Rice on the death of his wife Rosalind. The Plaintiffs further claimed that they were bona fide purchasers protected by New York's Recording Act (Real Property Law Section 291, "Recording of conveyances"), because the March 2019 deed from Sevonne was not recorded until September 2019, almost five months after the January 2019 Administrator's deed to the Defendant was recorded.

The Supreme Court, Kings County, granted the Defendant's motion for summary judgment, dismissed the complaint and vacated the notice of pendency. According to the Court,

> *"[a]lthough Plaintiffs correctly state that title to real property automatically vests in the heirs of a decedent who dies intestate [citations omitted], such vesting of title is subject to the rights granted to the administrator [under SCPA Section 1902 ("For what purposes real property is subject to disposition")] to manage and dispose of it for purposes of distribution to beneficiaries of the estate [citations omitted]… The quitclaim deeds and the Article 19 Order from the Surrogate's Court, which approved the prior disposition of the Property and quitclaim deed executed by Sevonne Gray, encompassed any interest that Bobby Rice had in the Property that the Rainford Deed purported to convey."*
>
> *"The fact that the Rainford Deed was recorded prior to the recording of the quitclaim deeds relied upon by Defendant does not change the court's analysis as Bobby Rice had no interest to convey at the time he executed the Rainford Deed. Alternatively stated, Plaintiffs are not bona fide purchasers entitled to the protections of Real Property Law Section 291, the recording statute, because the Rainford Deed is not a valid deed under Real Property Law Section 245 ["Estate which passes by grant or devise"] as it purports to convey an interest that Bobby Rice did not possess at the time of the conveyance [citations omitted]."*

Rainford Management Corporation v. 207 Van Buren LLC, 2020 NY Slip Op 31129, decided April 27, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31129.pdf.

Judgments

The Plaintiff, a judgment creditor, brought an action to set aside the conveyance of real property by the judgment debtors, which the Plaintiff alleged was a fraudulent transfer. The Appellate Division, Second Department, affirmed an Order of the Supreme Court, Kings County, dismissing the complaint, cancelling the notice of pendency, and declaring that the property was not subject to any interest claimed by the Plaintiff. Because the judgment was not docketed under the correct surnames of the judgment debtors, there was not a valid lien against the property. Further, it was demonstrated that the purchase of the property was supported by fair consideration and made in good faith. Kunin v. Guttman, 2020 NY Slip Op 02044, decided March 25, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02044.htm.

Limited Liability Companies/Publication

Limited Liability Company Law Section 206 ("Affidavits of publication") requires that a newly formed limited liability company, within 120 days of the date on which its initial articles of incorporation are effective, publish a copy of its articles of incorporation "or a notice containing the substance thereof" once in each week for six successive weeks. Proof of publication is to be filed with New York's Department of State. For the failure to comply with these requirements, "the authority of a limited liability company to carry on, conduct or transact and business in this state shall be suspended". However, Section 206 also states that non-compliance does not "limit or impair the validity of any contract or act of such limited liability company."

In One Stone Lending LLC v. Alta Operations, LLC, the foreclosing Plaintiff, a limited liability company organized in New York, failed to timely comply with Section 206, only publishing its articles of organization after the failure to publish was noted by the Defendants. The Plaintiff contended that the failure to comply was not a jurisdictional defect warranting dismissal of the action. The Supreme Court, New York County, disagreed and granted the Defendants' motion to dismiss. According to the Court,

> *"This Court finds that it cannot ignore the purpose of Limited Liability Law §206 and will not permit a plaintiff to maintain a case where it failed to comply with the publication requirements when the case began…This court cannot condone the LLC's practice of ignoring the statute, unless and until it is caught, and then pretending it shouldn't make a difference."*

This case, decided March 6, 2020, is posted as 2020 NY Slip Op 30722 at http://www.nycourts.gov/reporter/pdfs/2020/2020_30722.pdf.

Mortgage Foreclosures/Abandonment

Under subsection (c) of CPLR Section 3215 ('Default judgment"), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned.

The Supreme Court, Nassau County, granted the foreclosing Plaintiff's motions for leave to enter a default judgment and then for a judgment of foreclosure and sale. The Appellate Division, Second Department, reversed and granted the Defendant property owner's motion to dismiss as abandoned the complaint as asserted against her. According to the Appellate Division,

> *"…the plaintiff provided no explanation for the almost four-year delay after the defendant defaulted in 2011 before it filed a request for judicial intervention in February 2015 requesting a residential mortgage foreclosure settlement conference. Under such circumstances, the Supreme Court should have found that the plaintiff had not demonstrated a reasonable excuse for its delay in seeking a default judgment [citation omitted]."*

Flushing Bank v. Sabi, 2020 NY Slip Op 02461, decided April 29, 2020, is posted at http://nycourts.gov/reporter/3dseries/2020/2020_02461.htm.

Mortgage Foreclosures/Default /Acknowledgments

The Defendant moved under CPLR Section 5015 ("Relief from judgment or order") for an Order vacating a judgment of foreclosure and sale which had been entered without opposition, on the grounds that the Plaintiff obtained the judgment by submitting fraudulent documents. Under Section 5015(a), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just…upon the ground of: … 3. fraud, misrepresentation, or other misconduct of an adverse party…" The Supreme Court, Suffolk County, denied the motion and the Appellate Division, Second Department, affirmed. According to the Appellate Division,

> *"…where a defendant seeks to vacate a default pursuant to CPLR Section 5015(a)(3) based on intrinsic fraud, he or she must establish a reasonable excuse for the default and a potentially meritorious defense to the action [citation omitted]. Here, since the defendant presented no excuse for her default, the court properly denied her motion…regardless of whether she presented a potentially meritorious defense to the action [citations omitted]."*

The Appellate Division noted that the assignments of the mortgages to the Plaintiff were valid notwithstanding that the acknowledgments, taken out-of-state, did not include certificates of conformity. Real Property Law Section 299-a ("Acknowledgment to confirm to law of New York or of place where taken; certificate of conformity") provides, in part, that

> *"1. An acknowledgment or proof…may be taken in the manner of the law of the state of New York or by the laws of the state, District of Columbia, territory, possession, dependency, or other place where the acknowledgment or proof is taken. The acknowledgment or proof, if taken by the manner prescribed [by a jurisdiction other than New York] must be accompanied by a certificate that it conforms with such laws."*

The Appellate Division held that the out-of-state acknowledgments substantially conformed with the New York form of acknowledgment and, in any event, "the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be disregarded in the absence of a showing of actual prejudice [citations omitted]. No such showing has been made here." Capital One, N.A. v. McCormack, 2020 NY Slip Op 02664, decided May 6, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02664.htm.

Mortgage Foreclosures/Discontinuance with Prejudice

In 2016, the foreclosing Plaintiff and the Defendant executed a Stipulation discontinuing the action "without prejudice". However, the Court dismissed the action "with prejudice". The Defendant did not make any further payments on the loan, and the Plaintiff again proceeded to foreclose the mortgage in 2017. The Defendant moved for an Order discontinuing the action on the grounds that the dismissal of the 2012 foreclosure "with prejudice" barred the present action and because of the application of the principals of res judicata. The Supreme Court, Schenectady County, denied the Defendant's motion.

According to the Court, in executing the Stipulation "without prejudice" the Defendant arguably waived the "with prejudice" language and "in light of defendant's continued failure to make any payments on her mortgage for a period of more than six years, the Court deems it an appropriate exercise of discretion to disregard the 'with prejudice' language in the interests of justice."

The Court further held that because the dismissal of the prior foreclosure due to the Plaintiff's lack of standing was not a dismissal on the merits, the principals of res judicata did therefore not apply. State of New York Mortgage Agency v. Massarelli, 2017 NY Slip Op 33150, decided June 15, 2017, was posted to the New York Official Reports Slip Opinion Service on March 18, 2020 at http://www.nycourts.gov/reporter/pdfs/2017/2017_33150.pdf.

Mortgage Foreclosures/Necessary Parties

The owner of the mortgaged property died intestate in 2010. The Plaintiff commenced an action to foreclose the mortgage in 2013. The complaint named as a Defendant Sylvanie Gedeon, a daughter of the decedent, "Individually and as Voluntary Administratrix" of her father's estate. Her motion to dismiss the complaint as against her for the failure to join a necessary party and to vacate the order of reference and judgment of foreclosure and sale was granted by the Supreme Court, Kings County. The Appellate Division, Second Department, affirmed the Order, as modified to deny the branch of the motion dismissing the complaint as against Sylvanie. According to the Appellate Division,

> *"…where a mortgagor/property owner dies intestate and the mortgagee does not seek a deficiency judgment, generally a foreclosure action may be commenced directly against the distributees [citations omitted]. Here, however, only one distributee…is named as a defendant. The record contains insufficient information as to whether Sylvanie is the only distributee of [the decedent]. In addition, the plaintiff alleges a default in payment of the mortgage loan subsequent to the death of [the] mortgagor…Under these circumstances, the estate…is a necessary party to this mortgage foreclosure action [citations omitted]."*
>
> *"Further…service of the summons and complaint upon Sylvanie as 'voluntary administratrix' of the estate did not constitute service upon the estate…"*

The case was remitted to the Supreme Court for joinder of the administrator of the estate and for further proceedings consistent with the ruling of the Appellate Division. U.S. Bank Trust, N.A. v. Gedeon, 2020 NY Slip Op 01660, decided March 11, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_01660.htm.

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 JPMorgan Chase Bank, N.A. v. Nellis, the Appellate Division, Second Department, reversed the grant of the foreclosing Plaintiff's motion for entry of a judgment of foreclosure and sale, finding that the Plaintiff failed to establish, prima facie, that it complied with the notice requirements of RPAPL Section 1304. According to the Court, the affidavit of an employee of the loan servicer purporting to establish compliance with Section 1304 did not, inter alia,

> *"aver that he had personal knowledge of the purported mailings, that he was familiar with the mailing practices and procedures of the plaintiff, which allegedly sent the notice, or that the plaintiff's records had been incorporated into the records of the loan servicer and were routinely relied upon by the loan servicer in its business [citations omitted]."*

The Appellate Division also found that the Plaintiff did not establish, prima facie, that it also sent a notice of default by first-class mail to the Defendant before accelerating the indebtedness secured by the mortgage, as required by the terms of the mortgage. This case, 2020 NY Slip Op 02621, decided May 6, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02621.htm.

Mortgage Foreclosures/Standing/Collateral Assignments

The Plaintiff collaterally assigned a note secured by a mortgage prior to commencement of the plaintiff's foreclosure. Applying Massachusetts law, holding that a collateral assignment of a mortgage divests a mortgagee of its rights, the Supreme Court, New York County, held that under the language in the agreement effectuating the collateral assignment, in which the assignor "sells, assigns, transfers, pledges and conveys" the note and other assets, "plaintiff did not have the note when this case began." Accordingly, and although the collateral assignment may have been terminated "well after this litigation began", the Court granted the Defendant's cross-motion to dismiss the action for lack of standing. Avant Capital 52 East 64th Street LLC v. 52 East 64th Street LLC, 2020 NY Slip Op 30778, decided March 11, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_30778.pdf.

Mortgage Foreclosures/Standing/MERS

MERS, as the nominee for Fairmont Funding, LTD and as the mortgagee of record, commenced a foreclosure in 2008. The action was dismissed in 2013 and there was no further foreclosure filed. Plaintiffs, the owners of the mortgaged property, sought an Order discharging the mortgage because of the application of the statute of limitations. The current holder of the mortgage note, Wilmington Trust, N.A., moved to have the action dismissed, asserting that as MERS did not have standing to commence the 2008 foreclosure the indebtedness was never accelerated. Therefore, Wilmington could foreclose on payment defaults occurring in the immediately prior six years. The Supreme Court, Kings County, denied the motion, finding that Wilmington had not demonstrated, as a matter of law, that MERS lacked standing. According to the Court,

> *"[w]hile the mortgage agreement…contains language to the effect that Fairmont appointed MERS as its nominee for the purpose of recording the mortgage and refers to MERS as the mortgagee of record, in [the] seminal case of Bank of New York v. Silverberg [citation omitted], that Court of Appeals held that such language is insufficient to demonstrate that MERS had standing to commence a foreclosure action on behalf of the lender. Notwithstanding the above, if MERS was in possession of the Note when the action was commenced, MERS would have had the requisite standing to commence the action [citation omitted]…Wilmington had the burden of demonstrating that MERS was not in possession of the note when the foreclosure action was commenced. Wilmington did not meet this burden."*

Samet v. Countrywide Home Loans, Inc., 2020 NY Slip Op 30659, decided February 26, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_30659.pdf.

Mortgage Foreclosures/Standing/Original Note

The Appellate Division, Second Department, held that the Plaintiff had not established prima facie that it had standing to foreclose. The affirmation of the Plaintiff's attorney did not set forth facts on personal knowledge to support her statement that the note in the Plaintiff's file was the original note, and she did not attach business records on which she relied in her affirmation. Further, a copy of the note was not attached to the complaint when the foreclosure was commenced. The Appellate Division reversed an Order of the Supreme Court, Queens County, which had granted the Plaintiff's motion for summary judgment. Wells Fargo Bank, N.A. v. Bakth, 2020 NY Slip Op 01382, decided February 26, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_01382.htm.

Mortgage Foreclosures/Standing/RPAPL Section 1302-a

Section 1302-a ("Defense of lack of standing; not waived"), added to the RPAPL effective December 23, 2019, reads, in part, as follows:

> *"…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 mortgage foreclosure was commenced in 2017; the borrowers-Defendants did not file an answer and a judgment of foreclosure and sale was entered. The Defendants moved for an Order vacating the judgment, arguing that under RPAPL Section 1302-a they could seek to interpose a standing defense after defaulting without establishing grounds to vacate their default. The Supreme Court, Westchester County, denied the Defendants' motion, holding that notwithstanding Section 1302-a, "…to vacate a default judgment of foreclosure and sale, a defendant must establish both a reasonable excuse for the default and a meritorious defense [citations omitted]". The argument challenging Plaintiff's standing was "not meritorious. Plaintiff was in possession of the note, endorsed in blank by the original lender, when it commenced this action."

JPMorgan Chase Bank, National Association v. Carducci, 2020 NY Slip Op 20072, decided March 10, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_20072.htm.

Mortgage Foreclosures/Statute of Limitations

In 2009, GreenPoint Mortgage Funding, Inc. commenced an action to foreclose a consolidated mortgage. In 2015, after the Defendant executed a Home Affordable Modification Trial Period Plan, the foreclosure was dismissed without prejudice. Under the Plan, if the Defendant made three trial payments the Defendant would be offered a permanent modification agreement. The Defendant made the trial payments but was not offered a modification agreement. In 2015, Plaintiff, the assignee of the consolidated mortgage, commenced a foreclosure of the mortgage. The Defendant asserted that the action was time-barred by the six-year statute of limitations in CPLR Section 213.

The Plaintiff asserted that execution of the Plan, and the payments made pursuant to the Plan, renewed the running of the statute of limitations and, therefore, the action was timely. The Supreme Court, Queens County, granted the Plaintiff's motion for summary judgment and for an Order of Reference and denied the Defendant's motion for summary judgment. The Appellate Division, Second Department, reversed, denying the Plaintiff's motion and, granting the Defendant's cross-motion, dismissed the complaint, canceled and discharged the mortgage pursuant to RPAPL Section 1501, and awarded Defendant her attorney's fees and expenses pursuant to Real Property Law Section 282 ("Mortgagor's right to recover attorneys' fees in actions or proceedings arising out of foreclosures of residential property"). According to the Appellate Division,

> *"…the Plan did not constitute an 'unconditional and unqualified acknowledgment of [the] debt sufficient to reset the statute of limitations [citations omitted]. While the writing arguably acknowledged the existence of indebtedness, the defendant merely agreed to make three trial payments so as to receive a permanent modification offer. Any intention to repay the debt was conditioned on the parties reaching a permanent modification agreement, which condition did not occur…Just as an express conditional promise or acknowledgment does not serve to reset the statute of limitations, an implied conditional promise also does not have that effect. Although the Appellate Division, Third Department, held to the contrary in Wells Fargo Bank, N.A. v. Grover (165 AD3d 1541), we disagree and decline to follow that holding."*

Nationstar Mortgage, LLC v. Dorsin, 2020 NY Slip Op 01354, decided February 26, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_01354.htm.

Mortgage Recording Tax/Washington County

Washington County has, effective for mortgages recorded on and after April 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 is $1.25 for each $100 secured by a mortgage. MT-20-2, "Changes to the Mortgage Recording Tax Rates Affecting Washington County" is posted to New York State Department of Taxation and Finance's website at https://www.tax.ny.gov/pdf/notices/mt-20-2.pdf.

Notice of Pendency

It was alleged that in August 2018 the interests in 1965 JK Realty LLC ("JK Realty") were assigned by Joel Klein to plaintiff David Fleischmann as nominee. It was further alleged that on October 11, 2018 Klein purported to assign his interest in JK Realty to a company owned by Martin Mittelman. On October 12, 2018, JK Realty conveyed property in Brooklyn to Mittleman LLC. JK Realty was purportedly dissolved in November 2018 and reorganized in 2019. Plaintiff, an attorney, commencing this action as "nominee" for Mendel Fischer, sought, among other relief, an Order declaring that the deed to Mittelman LLC was void. Defendants' motion to cancel the original and amended notices of pendency for this action was denied by the Supreme Court, Kings County. According to the Court,

> *"…[t]he original complaint does not make clear whether the true nature of this action is plaintiff's effort to establish his interest in JK Realty, which owns the subject property, or whether plaintiff seeks to recover title to the subject property directly…[If the action was to establish the ownership of JK Realty] the judgment demanded would only indirectly affect title to the property, and the notice of pendency would be improper [citations omitted]…"*
>
> *"If JK Realty was dissolved, then its assets should have been distributed in accordance with NY Limited Liability Company Law § 704…[I]n the absence of [information about JK Realty's creditors or liabilities], the property would return to plaintiff's sole possession. In such an event, plaintiff would have a direct relationship with the subject property…Under the circumstances, the better course here is to allow the notice of pendency to remain in effect."*

Fleischmann v. Mittelman, 2020 NY Slip Op 30834, decided February 3, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_30834.pdf.

Statute of Limitations/Acceleration of Indebtedness

A mortgage foreclosure commenced in 2008 was discontinued by a Court Order granted ex parte in 2012 on motion of the Plaintiff, the prior holder of the mortgage, and on consent of the Defendants. The Complaint in that action stated that the "[p]laintiff elects to call due the entire amount due secured by the mortgage." The current holder of the mortgage commenced a foreclosure in 2017. The Defendants raised the statute of limitations as an affirmative defense and moved for the Court to dismiss the action.

The Supreme Court, Suffolk County, denied the Defendants' motion to dismiss. The mortgage did not allow for acceleration of the indebtedness before entry of a judgment of foreclosure and sale and, until that time, the Defendants could make all past due monthly payments without paying the balance of the loan. According to the Court,

> *"[b]ased upon the terms of the contract the plaintiff did not accelerate the mortgage on September 16, 2008 and even if they had attempted to accelerate the mortgage the affirmative action of discontinuing the first foreclosure action upon the defendants' consent would have decelerated the mortgage."*

U.S. Bank Trust, N.A. v. Dromerhauser, 2018 NY Slip Op 33663, decided April 11, 2018, was posted to the New York Official Reports Slip Opinion Service on March 17, 2020 at http://www.nycourts.gov/reporter/pdfs/2018/2018_33663.pdf.

Statute of Limitations/Transfer Tax

When title to real property was transferred to the Plaintiffs on February 2, 2015 the Defendant-Seller executed a Hold Harmless Agreement ("Agreement") to indemnify the Plaintiffs against the imposition of any additional New York City Real Property Transfer Tax, together with any interest and penalties assessed for an underpayment of tax and reasonable attorneys' fees. The Agreement required the Defendant to pay any additional transfer tax and stated that this indemnity "shall survive Closing until the sooner of the statutory limit by New York City or the transfer of title by Purchaser." On June 16, 2017, New York City, due to an alleged discrepancy in the tax classification of the property, issued an assessment for $46,980.04. The Defendant refused to make payment; the Plaintiffs paid the assessment, which, together with interest and penalties, was $57,193.20, and sued to recover that amount. The action was commenced on July 30, 2019.

The Defendant claimed that the action was barred under New York City's Administrative Code Section 11-2116 ("Notices and limitations of time"), which provides, in part, that "except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return…" The Plaintiffs argued that the six-year statute of limitations for "an action upon a contractual obligation or liability" under CPLR Section 213 ("Actions to be commenced within six years…") applied.

The Supreme Court, New York County, denied the Defendant's motion to dismiss the complaint. According to the Court,

> *"[the Defendant] has failed to establish his prima facie burden of demonstrating that this action is time-barred…Although [the Defendant] maintains that this action is barred by the parties' agreed-upon three-year statute of limitations, as set forth in New York City's Administrative Code Section 11-2116 (b), this code is never mentioned in the agreement, and it is unclear whether the reference to 'the statutory limit by New York City' in the agreement implicates the statute. Given this ambiguity, [the Defendant] cannot prevail [on his motion to dismiss] [citations omitted]."*
>
> *"Importantly, New York City's Administrative Code Section 11-2116(b) precludes the City from making an assessment of additional tax after three years from the filing of a return. It does not, as [the Defendant] suggests, impose a three-year statute of limitations for actions based on an additional tax assessment."*

Murphy v. Williams, 2020 NY Slip Op 31009, decided April 23, 2020, is posted at http://www.nycourts.gov/reporter/pdfs/2020/2020_31009.pdf.

Powers of Attorney

Defendant, as attorney-in-fact for her mother under a durable power of attorney, transferred title to her mother's home to herself, and then to herself and her husband. Plaintiff, the Defendant's sister, commenced an action to rescind the deeds so that the property would pass equally to the Defendant and her sister. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment and rescinded the deeds. The Appellate Division, Second Department, reversed and denied the Plaintiff's motion. Although the power of attorney did not contain the required statutory gifts rider, there were triable questions of fact as to whether the mother intended the property to be transferred to the Defendant. There was also a triable issue of fact as whether the complaint should be barred by the doctrine of laches, since the action was commenced three years after the mother's death and, during that period, the Defendant and her husband maintained the property at their expense. Goldberg v. Meyers, 2020 NY Slip Op 01602, decided March 11, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_01602.htm.

Tax Liens/Public Use

Real Property Tax Law Section 406 ("Municipal corporations") states, in part, that "[r]eal property owned by a municipal corporation within its corporate limits held for a public use shall be exempt from taxation and exempt from special ad valorem taxes and special assessments to the extent provided in section four hundred ninety of this chapter."

The Town of Hempstead sought a judgment declaring that a tax lien, for school taxes for the year 2005-2006 and state, county and special district taxes for the year 2006, was void. Defendant, the assignee of the tax lien, counterclaimed to enforce the lien, asserting that the property was acquired by the Town pursuant to a vesting Order entered after the taxable status date for the taxes encompassed by the lien. The Supreme Court, Nassau County, granted the Town's motion for summary judgment, holding that the tax lien was void and unenforceable. The Appellate Division, Second Department, affirmed. According to the Appellate Division, the Town established, prima facie, that the property was put to a public use and the Town was exempt even though it acquired the property after the taxable status date. Further, according to the Appellate Division,

> *"…to the extent that the tax lien on the property existed prior to the date that title vested in the Town, such lien was extinguished by condemnation prior to the assignment of the lien to the defendant…Upon condemnation, the subject lien is substituted [for] by an equitable lien against the condemnation award [citations omitted]."*

Town of Hempstead v. AJM Capital II, LLC, 2020 NY Slip Op 02600, decided May 6, 2020, is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_02600.htm.

Uniform Commercial Code/Loan Servicers/Mortgage Foreclosures

The Appellate Division, Second Department, because of the foreclosing Plaintiff's failure to establish, prima facie, that it had standing to foreclose, reversed the Supreme Court, Queens County's grant of summary judgment and entry of a judgment of foreclosure and sale. The Plaintiff was the loan servicer, and while UCC Section 3-301 ("Rights of holder") authorizes "[t]he holder of an instrument whether or not he is the owner [to] enforce payment in his own name" when the instrument, here the note, is lost, under UCC Section 3-804 ("Lost, destroyed or stolen instruments'), for a lost note, "[t]he owner of an instrument which is lost…may maintain an action in his own name." According to the Appellate Division,

> *"[s]ince the plaintiff is indisputably not the owner of the note, pursuant to the plain language of UCC 3-804, the plaintiff was not entitled to maintain this action 'in [its] own name' to enforce the lost note against the defendant."*

Even if the Plaintiff were to be permitted to foreclose, the affidavit submitted on its behalf "'failed to identify who conducted the search for the lost note and failed to explain when or how the note was lost [citations omitted].'" Also, when the action was commenced, the Plaintiff did not demonstrate it was physically in possession of the note. Bank of America, N.A. v. Sebrow, 2020 NY Slip Op 01317, dated February 26, 2020, was posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_01317.htm.

Visual Artists Rights Act of 1990 ("VARA")

Current Developments dated May 10, 2018, reported that 21 aerosol artists sought a preliminary injunction preventing a real estate developer and four of his companies from demolishing warehouse buildings at the 5Pointz site in Long Island City, Queens County, on the walls of which the Plaintiffs had painted works of art. The United States District Court for the Eastern District of New York denied a preliminary injunction but, before a written opinion was issued, the paintings were whitewashed over. The Court then held that the Plaintiffs' works of aerosol art were works of "visual art" protected under VARA [17 U.S.C. Section 106A], which "gives the 'author of a work of visual art' the right to sue to prevent the destruction of [the] work if it is one of recognized stature". Cohen v. G&M Realty L.P. 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).

According to the District Court, in a decision rendered February 12, 2018, reported at 320 F. Supp. 3d 421, "[s]ince the Plaintiffs' works were effectively destroyed, plaintiffs were relegated to seeking monetary relief under VARA". VARA "permits the artist to seek monetary damages under [17 U.S.C.] Section 106A (a) (3) (A) if the work was distorted, mutilated, or otherwise modified to the prejudice of the artist's honor or reputation".

Under 17 U.S.C. Section 504 ('Remedies for infringement; Damages and profits"), statutory damages can be awarded "in a sum of not less than $750 or more than $30,000 as the court considers just" but "[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that the infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of no more than $150,000". The Court, finding that the developer acted willfully in destroying the works of art, awarded statutory damages of $150,000 for each of 45 works of art for a total of $6,750,000. Damages for emotional distress were not recoverable.

The United States Court of Appeals for the Second Circuit, in a decision dated February 20, 2020, affirmed the ruling of the District Court. The Court of Appeals held that "the district court correctly concluded that the artwork created by Appellees was protected by VARA and that [the developer's] violation of the statute was willful. Furthermore, the damages awarded involved no abuse of discretion." Castillo v. G&M Realty, L.P. is reported at 950 F. 3d 155.

Michael J. Berey
Current Developments since 1997
No. 206
May 27, 2020