Adjoining Owners/Condominium Units

Under Real Property Actions and Proceedings Law ("RPAPL") Section 881 ("Access to adjoining property to make improvements or repairs"), "[w]hen an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make improvements or repairs may commence a special proceeding for a license to so enter…"

The Supreme Court, New York County, granted the Petitioner a license to enter the adjoining property to install overhead roof and terrace protections in connection with façade work being done to Petitioner's property. The Appellate Division, First Department, vacated the lower court's Order. According to the Appellate Division,

> *"[i]n granting access, [the] Supreme Court permitted petitioner to designate a controlled access zone and to place roof protection on respondent's terraces. The roof protection petitioner seeks to install is placed directly on top of the floors of respondent's terraces and according to respondent [the adjoining property owner] would completely prohibit the tenants of the terraced apartments from using any portion of their terraces. Prior to granting petitioner's application, [the] Supreme Court must consider and resolve the issue as to whether there are less intrusive and equally effective methods of roof protection."*

The Supreme Court was also directed to reconsider the license fees and rent abatement awarded to the Respondent, as well as an award of future prevailing party fees. Matter of 400 E57 Fee Owner LLC v. 405 East 56th Street LLC, 2021 NY Slip Op 02587, decided April 29, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_02587.htm.

In 323 E 53rd Street Owner LLC v. Chiang (2021 NY Slip Op 31431), the Supreme Court, New York County, granted a license to enable the Petitioner to enter the Respondent's adjoining property for a period of up to one year to enable Petitioner to make repairs and improvements to its property, provided that the Petitioner pay the Respondent a license fee of $7,500 per month until the work was completed. The Respondent had objected to the installation of an exterior installation and finishing system ("EIFS") to the exterior party wall between the properties because it permanently encroached onto the Respondent's property for its entire length for up to three inches. The Court found that

> *"the inconvenience to Petitioner if the license is denied is far greater than the inconvenience to Respondent upon the granting of a license…[Further] the encroachment upon Respondent's property caused by installation of an EIFS is de minimis unless Respondent or a subsequent owner of the adjoining property seeks to increase the height of [Respondent's] property at a subsequent time."*

The Court required that the EIFS not encroach more than 3 inches and "must be removed at Petitioner's or any subsequent property owner's sole expense upon thirty (30) days written notice by Respondent or any subsequent property owner if removal is necessary for an upward expansion of [Respondent's] property…"

The Court denied the Petitioner's demand that it be reimbursed for fees it expended in attempting to negotiate the license agreement, including payments made to the Respondent for legal and architectural fees. This case, decided April 27, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31431.pdf.

Adjoining Owners/Easements

New York City's Fire Department issued to the Plaintiff a violation for its failure to maintain a secondary means of egress in the rear yard of its property. The City's Buildings Department issued Plaintiff a violation for failing to provide an unobstructed passage from the rear of the property. The Plaintiff was therefore required to engage a fire watch guard to direct occupants from the building if there was a fire. The Plaintiff sought a ruling that its property had an easement to access the rear yard of the Defendant's adjoining property in case of an emergency. It sought an Order requiring the Defendant to remove its fence and damages for the expenses it incurred to hire a watch guard and for its attorneys' fees. The Supreme Court, New York County, granted the Defendant's motion to dismiss the complaint. There was no written easement agreement and, since there was never a unity of ownership, there was not an easement by necessity or implication. Nor was there a prescriptive easement; "there was no use of the alleged secondary means of egress, openly and notoriously or otherwise, for the 10-year period before plaintiff commenced this action…" Asian American HDFC, Inc. v. 110 Ridge St Venture LLC, 2021 NY Slip Op 31458, decided April 30, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31458.pdf.

Adjoining Owners/Strict Liability

The Plaintiffs and the Defendant, who owned the property adjoining the Plaintiffs' land, entered into a license allowing access to parts of the Plaintiffs' property to enable excavation on the Defendant's land. The Plaintiffs sought to recover for damage to their property. The Supreme Court, Kings County, on re-argument, applying New York City Administrative Code Section 3309 ("Protection of adjoining property"), which the Court ruled is a "strict liability statute", granted the Plaintiffs' motion for summary judgment on the issue of liability. Under Section 3309.4, "[w]henever soil or foundation work occurs…the person who causes such to be made shall… preserve and protect from damage any adjoining structures…provided such person is afforded a license…to enter and inspect the adjoining buildings and property, and to perform such work thereon as may be necessary for such purpose…"

The Court found that the Plaintiffs had established, prima facie, that the excavation performed on the Plaintiffs' property after the license was granted had resulted in damage to the property. Tapper v. 116 India Street Villa LLC, 2021 NY Slip Op 31291, decided March 31, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31291.pdf.

Adjoining Owners/Water Runoff

The Plaintiffs alleged, in an action commenced in 2017, that the expansion in 2009 of the Defendant's driveway, which bordered the Plaintiff's property, increased the runoff of water, causing damage to the Plaintiff's property. The Supreme Court, New York County, dismissed the complaint as being time-barred under the three-year statute of limitations. The claims for nuisance and trespass were also dismissed. The Appellate Division, First Department, affirmed the lower court's ruling, stating that there was no allegation that work was done on the driveway after 2009. Further, according to the Appellate Division,

> *"where, as here, damages are claimed due to surface water flowing from one property to another, a plaintiff must show that improvements on defendant's land caused surface water to be diverted, that damages resulted, and that either the defendant diverted the surface water by artificial means, or the claimed improvements by a defendant to its land were not made in good faith so as to enhance the usefulness of such land [citations omitted]. Here, there were no allegations to support a claim that defendants had diverted water by artificial means [citation omitted], or that the improvements they made to their driveway in 2009 were other than in good faith."*

Ubiles v. Ngardingabe, 2021 NY Slip Op 02772, decided May 4, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02772.htm.

Adverse Possession/Easements

A recorded easement burdening the Defendant's property benefits the Plaintiff's adjoining property. The Plaintiff brought an action to quiet title to the easement, alleging that the Defendant was obstructing his use. The Defendant counterclaimed that the easement was extinguished by adverse possession. The Supreme Court, Erie County, granted the Plaintiff's motion for summary judgment. The Appellate Division, Fourth Department, modified the lower court's Order, denying the Plaintiff's motion and reinstating the Defendant's counterclaim.

According to the Appellate Division, the "plaintiff was required to demonstrate that the easement had not been extinguished by adverse possession…plaintiff did not meet his initial burden on his motion of establishing, as a matter of law, that the use was not under a claim of right as that term is defined by statute (see RPAPL 501[3] [citation omitted]" A claim of right, under RPAPL 501(3) as amended in 2008, is defined as "a reasonable basis for the belief that the property belongs to the adverse possessor or property owner, as the case may be."

As to the Defendant's motion for summary judgment, which the lower court had denied, "…defendant failed to establish by clear and convincing evidence that its use and possession of the easement was under a claim of right as defendant failed to show, as a matter of law, a reasonable basis for the belief that the property belonged to it alone, free from the burden of an easement (see RPAPL 501[3]…" The Defendant, which purchased its property in 2000, is required to establish its "claim of right"; no evidence was submitted as to the use of the easement by its predecessor in title. Kopp v. Rhino Room, Inc., 2021 NY Slip Op 01923, decided March 26, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_01923.htm.

Condominiums/Blanket Liens

After a condominium's Declaration was recorded, establishing 43 residential units, each with its own tax lot, a mechanic's lien was filed against the tax lot which existed prior to the conversion. The Supreme Court, Kings County, granted the Defendant bonding company's motion to vacate the mechanic's lien, ordered that the bond be released, and dismissed the action against the bonding company because the lien was an invalid blanket lien. Under Lien Law Section 339-l ("Liens against common elements…"),"[s]ubsequent to recording the declaration…no lien of any nature shall thereafter arise or be created against the common elements, except with the unanimous consent of the unit owners." According to the Court,

> *"[p[ermitting the Plaintiff to amend the lien would be improper because this relief was requested in opposition papers and not by motion, 2) permitting same would serve to prejudice the non-party present owner [which purchased all of the units] and possible interim purchases of individual units, and 3) it assumes the validity of the lien."*

Herc Rentals, Inc. v. Elevation Holdings, LLC, 2021 NY Slip Op 31376, decided April 16, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31376.pdf.

Condominiums/Common Charges

Defendant East River Mortgage Corp. ("East River") sold its condominium unit to Defendant East Texas Entertainers LLC ("East Texas") in August 2017. Common charges were not paid for the Unit since October 2018. The Board sued East River, the guarantor of East River's obligations to the condominium, and East Texas for a money judgment for the unpaid common charges, including interest, and to recover expenses such as its attorneys' fees.

The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment as to liability only, the amount of common charges due and owing and other costs and expenses claimed by the Board to be later determined. East River did not give notice of the sale to the Board of Managers of the Condominium as required by the condominium's By-Laws. The By-Laws state that "[n]o Unit Owner shall be liable for payment of any part of the Common Charges…subsequent to a sale, transfer or other conveyance by him (made in accordance with the provisions of…these By-Laws)…" According to the Court,

> *"as the sale and transfer to East Texas was not made in compliance with the Condominium's Bylaws and Rules and Regulations, the obligations of East River, as unit owner, and of McGown, as guarantor of those obligations, were not extinguished by the sale and transfer of the Unit to East Texas. As such, these defendants are liable to the Condominium for the sums due and owing (see RPL Section 339-j)."*

Board of Managers of the Club at Turtle Bay v. McGown, 2021 NY Slip Op 31100, decided April 5, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31100.pdf.

In a companion case, the Board of Managers sought to enforce its common charge lien. The Court granted the Board's motion for summary judgment and referred the case to a referee to compute. The Court held that the "defendants' belated offer to grant the Board a right of first refusal is insufficient to remedy East River's failure to comply with the Condominium's requirements for the transfer and sale of the Unit." This decision, Board of Managers of the Club at Turtle Bay v. East Texas Entertainers LLC, 2021 NY Slip Op 31592, decided May 11, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31592.pdf.

Constructive Trusts

The Plaintiff and the Defendant, who had been in a romantic relationship, resided at the premises in question from 2011 to 2018, when the Defendant ended the relationship and demanded that the Plaintiff vacate the property. The Plaintiff claimed that while in residence he expended substantial time and money on improvements and for maintenance relying on the Defendant's promise that they would be married and jointly own the property. The Plaintiff sought imposition of a constructive trust and claimed unjust enrichment. The Defendant argued that a constructive trust cannot be based on cohabitation by unmarried persons with a promise that they be married and then each have an interest in the property.

The Supreme Court, Westchester County, denied the Defendant's motion to dismiss. To impose a constructive trust there must be a "confidential or fiduciary" relationship, and. according to the Court, "no marital or familial relationship is essential to the existence of a confidential relationship [citation omitted]." There must also be a "promise"; here, "the alleged promise at issue is an explicit one-that the couple would be married and plaintiff would then jointly own [the property]." Whalen v. McElroy, 2021 NY Slip Op 50379, decided April 30, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_50379.htm.

Cooperatives/"Business Judgment" Rule

Every five years, the Board of Directors of a cooperative corporation hired a contractor to caulk a crack in the cooperative building's façade. An engineer had recommended that the Board undertake extensive brick work to remedy the problem. A unit owner sued the Board for failing to properly maintain the building's façade and for failing to hold the managing agent and contractors responsible for not fixing the facade. He also sued AKAM, the managing agent, for not retaining competent professionals to inspect, monitor and maintain the façade's condition. The Plaintiff sought to recover, for the cooperative and its shareholders, the cost to repair the façade and attorneys' fees. The Supreme Court, New York County, granted the Defendnats' motion to dismiss the complaint.

First, Court found that the Plaintiff' was seeking redress for injuries suffered by the corporation, not merely those suffered by himself. Second, the Court agreed with the Defendants' argument that the plaintiff "had not pleaded with particularity that the Board's actions were undertaken in bad faith, or otherwise fell outside the scope of the business-judgment rule." According to the Court,

> *"allegations merely of mismanagement alone are not enough. To the contrary, 'absent a showing of discrimination, self-dealing, or misconduct' by the Board or its members, 'judicial inquiry into the actions of corporate directors is prohibited' even if 'the results show that what [Board members] did was unwise or inexpedient.' [citation omitted]."*

As to the claims against the managing agent,

> *"the Board was legally entitled to decide on behalf of the Co-Op – without judicial second-guessing – to decline to bring…claims against AKAM relating to AKAM's conduct with respect to building maintenance and repair…[E]ven if AKAM is not covered by the business-judgment rule, permitting plaintiff's derivative claims against AKRM to go forward would impermissibly circumvent the rule as it protects the decisions of the Board."*

The Court also held that the Plaintiff's wife, who also owned the unit as a joint tenant, was a necessary party to the action. If the Court had held at this time for the Plaintiff, she would have needed to be added as a Plaintiff. Weinstein v. Board of Directors of 12282 Owners' Corp., 2021 NY Slip Op 50338, decided April 19, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_50338.htm.

Deeds

Wilbur and Colette, as the result of their divorce, owned certain real property as tenants in common. Colette executed a deed to Wilbur which quitclaimed to him her "50% undivided interest in and to the undivided 50% interest of Wilbur." Wilbur then conveyed the property to the Defendant partnership, of which he was the general partner. The partnership entered into a contract to sell the property to the Plaintiff; after Wilbur died the partnership repudiated the contract. The Plaintiff sued for specific performance. The Defendants, who included the children of Colette and Wilbur, argued that the Partnership did not have an ownership interest. The Supreme Court, Westchester County, granted the Defendant's motion for summary judgment dismissing the complaint, which ruling was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"…Colette's conveyance was limited to any interest she may have had in Wilbur's 50% undivided interest in the subject property…As Colette retained her undivided 50% interest in the subject property, Wilbur could not convey more than his undivided 50% interest in the subject property to the Partnership…"*

Deckoff v. W. Manning Family Limited Partnership, 2021 NY Slip Op 02272, decided April 14, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02272.htm.

Deeds/Caveat Emptor

The Defendant, an heir of his father who died in 1981, entered into a contract in 2019 to sell his father's home to the Plaintiff. The contract recited that the Defendant held a fifty percent interest in the property; his father's Last Will and Testament left him a one-quarter interest in the home. However, the deed to the Plaintiff did not mention any percentage interest, merely stating that the Defendant was making the conveyance as his father's "sole heir". The Plaintiff obtained a title search but the conveyance was not title insured. (The Plaintiff's attorney believed that obtaining only a title search was "sufficient due diligence").

After the Defendant conveyed the property to the Plaintiff, the Plaintiff purchased the other interests in the property and brought this action, claiming, among other causes of action, breach of contract and fraud. The Supreme Court, Kings County, dismissed the complaint for the failure to state a cause of action. According to the Court,

> *"…to prevail on a fraudulent non-disclosure claim in the real estate context, the plaintiff must demonstrate that the defendant breached an affirmative duty to disclose which arose as the result of the seller's having taken steps to actively conceal a condition [citations omitted]…Here the information plaintiff alleges was concealed was a matter of public record…Plaintiff's failure to conduct any due diligence to determine if defendant actually was an intestate distributee of a valuable piece of property almost 30 years after his father had died is the problem…'Purchasers are too apt to disregard the caution of the law, caveat emptor…'"*

98 Gates Avenue Corp. v. Bryan, 2021 NY Slip Op 30752, decided March 12, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_30752.pdf.

Easements/Prescriptive or By Necessity

The Plaintiff purportedly permitted members of a yacht club, including the Defendants who owned adjoining property, to access a dock on the Plaintiff's property during the boating season. In 2016, the Plaintiffs erected a fence to prevent access and commenced an action to recover damages for trespass and injunctive relief. The Defendants asserted that they each had an easement over the Plaintiff's property. The Appellate Division, Second Department, affirmed the Supreme Court, Richmond County's, grant of the Plaintiff's motion for a preliminary injunction and denial of the Defendants' motion for summary judgment.

According to the Appellate Division, "the plaintiff raised a triable issue of fact as to whether the…defendants' use of the plaintiff's property had been permitted due to 'neighborly cooperation or accommodation…'" Further, the Defendants who owned the property adjoining the Plaintiff's property had not established that they held an easement by necessity. They had "failed to establish, prima facie, that at the time of severance of a unified property, an easement over the plaintiff's property was 'absolutely necessary" and not in the nature of a 'mere convenience' [citation omitted]." Kuzmicki v. Bentley Yacht Club, 2021 NY Slip Op 02144, decided April 7, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02144.htm.

Election of Remedies/One Action Rule

RPAPL Section 1301 ("Separate action for mortgage debt") states, in part, that "while an action to foreclose a mortgage "is pending…no other action shall be commenced…to recover any part of the mortgage debt, without leave of court…" In Bayview Loan Servicing, LLC v. Starr-Klein (2021 NY Slip Op 02269), JPMorgan Chase Bank, N.A. commenced an action to foreclose a consolidated mortgage and then assigned the mortgage being foreclosed to Bayview Loan Servicing, LLC, which commenced a second foreclosure. The Supreme Court, Suffolk County, dismissed the Defendant's motion to dismiss the complaint in the latter foreclosure. The Appellate Division, Second Department, reversed and granted the Defendant's motion. "…[S]ince the plaintiff commenced the instant action without leave of the court in which the prior action was brought, and there is no basis in the record to determine that JPMorgan discontinued or effectively abandoned the prior action, dismissal is warranted under RPAPL 1303(3)[citation omitted]." This decision, on April 14, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02269.htm.

Lien Law/Trust Funds

A materialman, alleging that it was not fully paid for materials it had furnished for the making of improvements, filed a mechanic's lien. It commenced an action against, among others, the Defendant who was the owner of the property when the supplies were furnished alleging, first, that having received the benefits of those materials Defendant should pay for them, and, second, that the proceeds of Defendant's sale of the property were trust funds which should be applied to pay for expenses of the improvement. The Supreme Court, New York County, dismissed the claims against the prior owner.

For a subcontractor or a supplier to have any claims against the owner of real property they must be parties to a contract or a mechanic's lien must be filed. Here, there being no contract between the Defendant and the Plaintiff "any liability the owner maintains toward the plaintiff is not contractual in nature but rather is solely based on the lien law."

As to the claim that sales proceeds were trust funds under the Lien Law, when the Defendant sold the property it assigned, with the consent of the construction manager, all of its obligations to the new owner, who was also a Defendant in the action. According to the Court,

> *"…the lien law does not prohibit the assignment that took place...[and] the lien law can only apply to the extent the owner still is obligated to make any payments. There is no question that [the Defendant] has been relieved of any further obligations. Consequently, the plaintiff cannot maintain any cause of action against [the Defendant] …The plaintiff may pursue the claims noted against [the new owner of the property] to the extent any funds are still owed to any party. Thus, any request to vacate or dismiss the mechanic's lien is denied to afford the plaintiff that opportunity."*

World-Wide Plumbing Supply Inc. v. Copper Services LLC, 2021 NY Slip Op 31546, decided May 5, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31546.pdf.

In DiMarco Constructors, LLC v. Top Capital of N.Y. Brockport, LLC (2021 NY Slip Op 02680), decided April 30, 2021, the general contractor and subcontractors commenced an action to recover what was claimed to be due under the construction contract between Top Capital, the Defendant property owner, and the general contractor. They claimed that Top Capital, with the participation of the other Defendants, had diverted trust funds. The Supreme Court, Monroe County, reduced the Plaintiff damages on the claim of diversion by crediting against the amount due what Top Capital paid the general contractor after the trust funds were depleted. The Appellate Division, Fourth Department, disagreed. The lower court had credited not only the general contractor but all of the defendants with the amount paid from non-trust assets. Absent proof that there was no loss to the Plaintiffs, who were claiming they were not fully paid, the "defendants failed to establish their entitlement to a restoration defense as a matter of law." The Appellate Division's decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02680.htm.

Mechanic's Lien Foreclosure/Notice of Pendency

In an action to recover damages for breach of contract and to foreclose a mechanic's lien, the Defendant opposed the Plaintiff's motion to extend the filing of the notice of pendency. The Defendant asserted that a named party defendant which had filed a different mechanic's lien before the Plaintiff's lien was filed was a necessary party to the action and the failure to serve that party required dismissal. The Supreme Court, New York County, concluding that the prior mechanic's lienor was not a necessary party because its lien had expired, granted the Plaintiff's motion to extend the notice of pendency. The Court also held that the Plaintiff's quantum meruit claim could proceed because there was a dispute as to whether there was a valid and enforceable contract. "Generally, parties may not recover in quantum meruit if they have a valid, enforceable contract that governs the same subject matter as the quantum meruit claim. [citations omitted]." Olek, Inc. v. Merrick Real Estate Group Inc., 2021 NY Slip Op 31301, decided April 15, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31301.pdf.

Mortgage Foreclosures/Judgment of Sale

RPAPL Section 1351 ("Judgment of sale") was amended effective December 20, 2016 to require that a foreclosure sale take place within 90 days of the date of the judgment of foreclosure and sale. The Appellate Division, Second Department, held that this requirement did not apply when the judgment of foreclosure and sale was entered before the effective date of the amendment. Wells Fargo Bank, N.A. v. Graziano, 2021 NY Slip Op 02016, decided March 31, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_02016.htm.

Mortgage Foreclosures/Necessary Parties

The heirs of the now deceased mortgagor were Defendants in an action to foreclose the mortgage; the Estate of the mortgagor was not a party to the action. The Supreme Court, Kings County, granted a Defendant's cross-motion to dismiss the complaint for the failure to join the Estate as a necessary party. The Appellate Division, Second Department, modified the lower court's Order. Instead of dismissing the complaint, the court should have directed joinder of the Estate as a defendant. "…[W]here, as here, the plaintiff seeks a deficiency judgment, and alleges a default in payment subsequent to the death of the deceased mortgagor, the estate of the mortgagor is a necessary party to the foreclosure action [citation omitted]." BAC Home Loans Servicing, L.P. v. Williams, 2021 NY Slip Op 02780, decided May 5, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_02780.htm.

In U.S. Bank N.A. v. Apelbaum, 2021 NY Slip Op 02008, decided March 31, 2021, the Appellate Division, Second Department, held that the Estate of the deceased mortgagor was not a necessary party to an action to foreclose a mortgage because the mortgagor had conveyed the property before the action was commenced and no deficiency judgment was sought. A similar recent ruling of the Second Department is JPMorgan Chase Bank, N.A. v. Joseph 2021 NY Slip Op 02141, decided April 7, 2021. These cases are posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02008.htm and http://www.nycourts.gov/reporter/3dseries/2021/2021_02141.htm.

Mortgage Foreclosures/Notes

The Appellate Division, Second Department, reversed entry of summary judgment in favor of the Plaintiff by the Supreme Court, Suffolk County, because of the failure to establish that the "purported allonges [to the note secured by the mortgage] were so firmly affixed to the note as to become a part thereof (see UCC 3-202[2]…" Under UCC Section 3-202 ("Negotiation"), "[a]n endorsement must be…on the instrument or on a paper so firmly affixed thereto as to become a part thereof." The Court also found that the Plaintiff had not established that it had strictly complied with the notice requirements of RPAPL Section 1304. LNV Corporation v. Almberg, 2021 NY Slip Op 02791, was decided May 5, 2021. A similar recent ruling was issued by the Second Department in U.S. Bank, N.A. v. Ainsley, 2021 NY Slip Op 02014, decided March 31, 2021, which is reported at 192 AD3d 1188. These cases are posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02791.htm and http://www.nycourts.gov/reporter/3dseries/2021/2021_02014.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 Appellate Division, First and Second Departments, in recently issued decisions, vacated entry of judgments entered by the Supreme Court in New York, Queens and Suffolk Counties because of the failure of the Plaintiff to establish strict compliance with the requirements of Section 1304. The representative of the loan servicer in each instance did not aver personal knowledge of the mailing of a Section 1304 notice or any personal knowledge of the standard office mailing procedure for the sending of a notice. The First Department ruling is U.S. Bank Trust, N.A. v. Stewart, 2021 NY Slip Op 02123, decided April 6, 2021. The cases in the Second Department are Santander Bank, N.A. v. Schaefer, 2021 NY Slip Op 02005, U.S. Bank, N.A. v. Zientek, 2021 NY Slip Op 02015, both decided March 31, 2021, and HSBC Bank USA, N.A. v. Cardona, 2021 NY Slip Op 02138, decided April 7, 2021. These decisions are posted at

http://www.nycourts.gov/reporter/3dseries/2021/2021_02123.htm
http://www.nycourts.gov/reporter/3dseries/2021/2021_02005.htm,
http://www.nycourts.gov/reporter/3dseries/2021/2021_02015.htm, and
http://www.nycourts.gov/reporter/3dseries/2021/2021_02138.htm.

Mortgage Foreclosures/Referee's Report

The Supreme Court, Suffolk County, granted the Plaintiff's motion to confirm the referee's report and for entry of a judgment of foreclosure and sale and denied the Defendants' cross-motion to reject the referee's report. The Appellate Division, Second Department, reversed the judgment of foreclosure and sale and granted the Defendants' motion. According to the Appellate Division,

> *"…the affidavit of an employee of the plaintiff's loan servicer, submitted for the purpose of establishing the amount due and owing under the subject mortgage loan, constituted inadmissible hearsay and lacked probative value because the affiant did not produce any of the business records she purportedly relied upon in making her calculations [citation omitted]. Under the circumstances, the referee's finding with respect to the total amount due upon the mortgage were not substantially supported by the record [citations omitted]."*

The matter was remitted to the Supreme Court for further proceedings after the submission of a new referee's report re-computing the amount due. Bank of New York Mellon v. Davis, 2021 NY Slip Op 02267, decided April 14, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02267.htm.

Mortgage Foreclosures/Standing

The Appellate Division, Second Department, modified the Order of the Supreme Court, Nassau County, deleting the grant of a judgment of foreclosure and sale for lack of standing. According to the Appellate Division,

> *"[a]lthough the plaintiff can establish standing by attaching the blank-endorsed note to the complaint when commencing the action [citation omitted], here, the record demonstrates that the plaintiff only attached the mortgage to the complaint. Moreover, although Wallace stated in her affidavit, based on her review of certain business records, that the plaintiff or its agent had possession of the note prior to commencement, the affidavit was insufficient to establish standing because the records themselves were not submitted by the plaintiff [citations omitted]."*

Deutsche Bank National Trust Company v. Szal, 2021 NY Slip Op 02274, decided April 14, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02274.htm.

Mortgage Foreclosures/Standing/RPAPL Section 1302-a

As reported in Current Developments dated January 13, 2020, Section 1302-a ("Defense of lack of standing; not waived") was 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."*

A mortgage was executed by Carlton Edwards, Sr. on his home in Brooklyn. After his death in 2010, the Administrator of his Estate transferred the property to Defendant 433 East 35th 3 Inc. ("433"). After the conveyance, an action to foreclose the mortgage was commenced and a judgment of foreclosure and sale was entered on default. Before the auction sale, the Defendant, relying on Section 1302-a, moved, by order to show cause, for an Order cancelling the auction sale and vacating the order of reference and foreclosure judgment. The Supreme Court, Kings County, denied the motion. According to the Court,

> *"…RPAPL 1302-a is only applicable to a 'home loan' and the borrower/decedent…died five years before this action was commenced, and thus, was no longer residing at the property…[Further], [i]n order to vacate a judgment of foreclosure and sale, a decedent must establish both a reasonable excuse for the default and a meritorious defense [citation omitted]. Defendant 433 failed to demonstrate a reasonable excuse for its default…, and, therefore, denial of its motion to vacate the order of reference and judgment of foreclosure and sale is warranted."*

U.S. Bank N.A. v. 433 East 35th 3 Inc., 2021 NY Slip Op 31671, decided May 13, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31671.pdf.

Mortgage Foreclosures/Statute of Limitations

Current Developments dated March 1, 2021 reported the February 18, 2021 decision of New York State's Court of Appeals in Freedom Mortgage Corporation v. Engel (2021 NY Slip Op 01090), in which the Court held that "where the maturity of the debt has been validly accelerated by commencement of a foreclosure action, the noteholder's voluntary withdrawal of that action revokes the election to accelerate, absent the noteholder's contemporaneous statement to the contrary…" Based on that holding, the Appellate Division, First, Second, and Third Departments have ruled in a number of cases that the statute of limitations had not expired because, as stated in the case below decided by the Third Department, the voluntary discontinuance of prior foreclosure actions for the same mortgage "constituted affirmative acts of revocation of the prior elections to accelerate as a matter of law [citation omitted]." Representative of these rulings are, in the First Department, Ditech Financial, LLC v. Rector 70 LLC, 2021 NY Slip Op 02062, decided April 1, 2021; in the Second Department, Pyrce v. Nationstar Mortgage, LLC, 2021 NY Slip Op 02430, decided April 21, 2021, and in the Third Department, U.S. Bank National Association v. Creative Encounters LLC, 2021 NY Slip Op 02849, decided May 6, 2021. These decisions are posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_02062.htm, https://www.nycourts.gov/reporter/3dseries/2021/2021_02430.htm, and https://www.nycourts.gov/reporter/3dseries/2021/2021_02849.htm.

Mortgage Recording Tax/Federal Credit Unions

The Plaintiff commenced a purported class action to recover mortgage recording tax it had paid, asserting that its lender, a federal credit union, is exempt from the payment of mortgage tax. The Appellate Division, Second Department, affirmed the Supreme Court, Dutchess County's, grant of Defendant New York State Department of Taxation and Finance's motion to dismiss. The Appellate Division, citing the 2013 decision of New York's Court of Appeals in Hudson Valley Federal Credit Union v. New York State Department of Taxation and Finance (20 NY3d 1), noting that there were "conflicting federal intermediate court decisions which post-date" that ruling, held that "mortgages issued by New York State federal credit unions are not exempt from the imposition of the New York State mortgage recording tax [citation omitted]." O'Donnell & Sons, Inc. v. New York State Department of Taxation and Finance, 2021 NY Slip Op 02535, decided April 28, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_02535.htm.

Nuisance/Elevators

The upper 22 floors of a building sold by Verizon New York Inc. to developers were converted to residential condominium units. Verizon continues to occupy the space below the 22nd floor. The Plaintiffs, the purchasers of a residential unit directly above the commercial elevator machine room, claiming that unreasonable and excessive noise from the machine room and the elevator bank did not allow them to use two of their bedrooms, commenced an action against Verizon for nuisance and trespass and for violating New York's Noise and Building Codes. They sought injunctive relief and money damages. The Supreme Court, New York County, granted Verizon's motion to dismiss only the causes of action for trespass and injunctive relief.

Verizon claimed that the noise was not unreasonable and the Plaintiffs should have known there would be noise when they purchased their unit. On a motion to dismiss the cause of action claiming there was a nuisance, the Court could not find that the noise was reasonable as a matter of law. Verizon further asserted that the 2014 Building Code's requirements concerning vibration installation pads and the placement of machinery rooms near dwelling units did not apply to a building constructed in the 1920s.

Multiple Dwelling Law Section 84 ("Construction standards for the control of noise") states, in part, that "[a]ny construction of a multiple dwelling commenced after January 1, 1970 shall comply with the standards promulgated pursuant to this section in effect at the time of commencement of such construction." In light of this statute, the Court held that the Plaintiffs "have stated a valid cause of action because the building was converted from entirely commercial to a mixed use building." According to the Court,

> *"[o]n this motion to dismiss, Verizon cannot have it both ways; it cannot decide to sell floors to be converted to multi-million dollar residential units and then claim that the newly constructed units should be subject to the Building Code from 1968."*

OceanhouseNYC, LLC v. 140 West Street (NY), LLC, 2021 NY Slip Op 31451, decided April 28, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31451.pdf.

Pandemic/Leaseholds

In an action to recover from a commercial tenant and its guarantor unpaid rent and other charges due, the Defendants moved to dismiss, asserting defenses of frustration and impossibility of performance due to the pandemic. The guarantor claimed that its guarantee could not be enforced under the recently enacted "Guaranty Law" (NYC Administrative Code Section 22-1005 ("Personal liability provisions in commercial leases") which prohibits enforcement of a lease guarantee when the tenant's default was due to the pandemic. The Supreme Court, New York County, denied the motion, holding that "the decline in Tenant's business does not constitute a frustration of purpose or render its performance under the contract as impossible [citations omitted]." Based on the pleadings, the Court did not determine whether the guarantor was permitted to seek relief under the Guaranty Law. Ten West Thirty Third Associates v. A Classic Time Watch Company, Inc., 2021 NY Slip Op 31137, decided April 9, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_31137.pdf.

In Tabor v. 148 Duane LLC (2021 NY Slip Op 30966), the Plaintiffs agreed to vacate their apartment for one year to enable the Defendant property owner to make repairs and renovations to the building. If the work was not completed within a year, the Defendant was to pay the Plaintiffs a per diem penalty of $500 per day. The Defendant's motion for an Order staying, tolling or extending the temporary relocation agreement, on the grounds that the pandemic had rendered its performance impossible, was denied by the Supreme Court, New York County. According to the Court, although work had ceased temporarily due to government-imposed restrictions,

> *"…the defendant's inability to complete construction within a year…was due to defendant's financial difficulties…Even if defendant's financial difficulties had their origins in the pandemic, they do not excuse its obligation to complete construction absent any indication that it was physically impossible for the work to continue once permitted [citations omitted]."*

The Court noted that neither the Defendant's dispute with its contractor nor the pandemic having rendered the work more costly and difficult had made the Defendant's performance objectively impossible. This case, decided March 29, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_30966.pdf.

In HWA 1290 III LLC v. GKNY 1 Inc. (2021 NY Slip Op 31621), the Plaintiffs sought the ejectment of a tenant and damages. The Defendant, the tenant, had not paid rent since April 1, 2020 but had remained in possession. The Defendant asserted, as affirmative defenses, force majeure due to the pandemic and reduction of rent during the government-ordered shutdown when the Defendant had been only partially opened for business. The Plaintiffs' motion for an Order of ejectment if all back rent was not paid and an undertaking was not posted was denied by the Supreme Court, New York County. According to the Court,

> *"…factual questions exist as to whether the Covid-19 pandemic, which resulted in the closure of [the Defendant's] business for more than three months and is alleged to have substantially reduced the number of customers upon reopening, supports a frustration of purpose and/or impossibility defense [citations omitted]."*

However, the Court ordered that the Defendant pay 25% of the monthly rent for its use and occupancy from February 1, 2021 and to pay that amount each month going forward, pending a further Order of the Court. This case, decided May 12, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31621.pdf.

Real Estate Taxes/Exemptions

Real Property Tax Law Section 420-a ("Nonprofit organizations; mandatory class") provides that "[r]eal [property owned by a corporation or association or conducted exclusively for…charitable…purposes shall be exempt from taxation as provided in this section." The City of Utica denied the Respondent's application for tax exempt status under this Section, notwithstanding that its property was used solely to provide housing for low income persons at below market rates, because the Petitioner was organized under the Private Housing Finance Law as a Housing Development Fund Company. According to the City, the Petitioner could not be considered as carrying on a charitable operation "'because it has a special corporate form and receives state benefits in exchange for enhanced regulation.'" The Appellate Division, Fourth Department, affirmed the Order of the Supreme Court, Oneida County, granting the Petition. According to the Appellate Division,

> *"[t]here is nothing in RPTL 420-a or the Private Housing Finance Law that disqualifies an HDFC from receiving a tax exemption under RPTL 420-a. Furthermore, there is nothing in either statute that supports the City's position that the receipt of assistance and favorable mortgage terms by petitioner negates its charitable status."*

Matter of Academy Square Apartments Housing Development Fund Company, Inc. v. Assessor of City of Utica, 2021 NY Slip Op 06268, decided April 30, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02628.htm.

Recording Act/Bona Fide Purchasers

In 2012, William Aversa conveyed his property for no consideration to the Trustees of a Trust. In 2014, the Plaintiff, claiming that William and another person with whom he owned a business had wrongfully diverted trust funds owed the Plaintiff, obtained a money judgment against them. In 2016, the Trustees sold the property to Defendants William Sha and Pamela Htay-Sha (the "Shas"). In 2016, the Plaintiff sought to have the 2012 conveyance set aside as fraudulent and for money damages. The Supreme Court, Queens County, dismissed the complaint as against the Shas. The Appellate Division, Second Department, affirmed the lower court's ruling.

Under Real Property Law Section 266 ("Rights of purchaser or incumbrancer for valuable consideration protected"), "[t]his article [8; "Conveyances and mortgages"] does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration , unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." According to the Appellate Division, the Shas

> *"made a prima facie showing that they were bona fide purchasers by demonstrating that they paid valuable consideration for the property, in good faith and without knowledge of any alleged fraudulent intent…The Shas further established, prima facie, that they had no knowledge of facts that would lead a prudent purchaser to make inquiry of possible fraud [citations omitted]…[T]hat payments were made at the closing of sale…to 'two creditors of the sellers who had filed lis pendens or liens against the property, as appeared on the title search', was insufficient to impose upon the Shas a duty to make a further inquiry [citation omitted]."*

Unity Electric Co., Inc. v. William Aversa 2012 Trust, 2021 NY Slip Op 02188, decided April 7, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_02188.htm.

In Baker v. Beckford (2021 NY Slip Op 31283), the Plaintiff, as Ancillary Executor of his father's estate, in 2018 deeded real property in Brooklyn to Defendant Beckford 435 Limited ("Beckford"). According to the Plaintiff, the proceeds from the sale to Beckford were to be applied to make repairs and pay outstanding real estate taxes, and the Plaintiff would be made a principal of Beckford. The check for the proceeds was returned for insufficient funds. Later in 2018, the property was conveyed to Maka Communications LLC ("Maka"), which executed a consolidated mortgage to Ice Lender Holdings LLC, which in turn assigned the mortgage to Toorak Capital Partners, LLC ("Toorak").

The Plaintiff contended that his presence at the property, in which he resided and collected rents from tenants, gave the Defendants actual notice that he had a possessory interest in the property. The Plaintiff lived at the property and collected rental payments from the other tenants. The Supreme Court, Kings County, dismissed the action as against Maka and Toorak. According to the Court,

> *"[h]ere, Maka made a prima facie showing that it was a bona fide purchaser for value…without actual notice of the plaintiff's alleged interest in the premises, or knowledge of facts that would lead a reasonably prudent purchaser to make inquiry [citation omitted]. Additionally, the Court finds that the [sic]Toorak is a bona fide encumbrancer of the premises as an assignee stands in the shoes of the assignor and the assignee did not know of facts that would require it to make inquiries as to an alleged fraud [citation omitted]."*

The notice of pendency for this litigation was filed after the deed to Maka was recorded. This case, decided April 9, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31283.pdf.

Tax Lien Foreclosures

A judgment of foreclosure and sale was entered in an action to foreclose a tax lien. The successful bidders at the auction failed to close as required by the Terms of Sale. Notwithstanding their default, they assigned their bid to non-party movants who moved to intervene, seeking to oppose the foreclosing Plaintiff's motion to vacate the judgment of foreclosure and sale. The Supreme Court, Bronx County, denied the motion of the non-party movants. According to the Court,

> *"[b]ecause neither the successful bidder or the assignee has any interest in the premises, and are in default under the contract, they have no grounds to oppose the vacating of the sale. Moreover, plaintiff asserts that there may be a defect in the lien. Consequently, as the original purchaser is in default, and the alleged assignee acquired the bid after the original purchaser's default, this Court may exercise its general equitable power to set aside the sale in view of possible defects in the sale."*

NYCTL 1198-2 Trust v. Quarry Crotona Homes Inc., 2021 NY Slip Op 50390, decided May 4, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_50390.htm.

Tenants in Common/Physical Partition of Property

The Plaintiffs sought an Order for the partition and sale of a brownstone they owned as tenants in common and occupied together. The Defendant opposed a partition and counterclaimed for a declaratory judgment granting the Defendant the sole and exclusive use of the floors of the building in which she and her son resided as well as the exclusive use of the basement, backyard, backroom and storage areas. There was no written agreement between the parties as to the occupancy of the premises.

The Supreme Court, Kings County, granted the Plaintiffs' motion for summary judgment for the partition and sale of the property and dismissed the Defendant's counterclaim. The Plaintiffs, as tenants in common, may maintain an action for partition, and, as to the Defendant's counterclaim, there being no agreement between the parties as to the occupancy of the premises and any oral agreement being subject to the statute of frauds "…the plaintiffs and the defendant each have the right to use and enjoy all parts of the premises, and…[the Defendant] is not entitled to exclusive use and occupancy of specific sections of the property." Further, "…the defendant has failed to raise a triable issue of fact that a physical partition of the property can be accomplished without great prejudice to the owners." Xing Ng v. Ng, 2021 NY Slip Op 31289, decided April 15, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31289.pdf.

Zoning Lots/Expansion

The ground lessee of tax Block 248 Lot 76 and its mortgagee, the Plaintiffs, objected to the expansion of a zoning lot which included tax lots 15 and 76. The Plaintiffs had each executed a Waiver of Declaration of Zoning Lot when those tax lots 15 and 76 were combined into a single zoning lot. The Plaintiffs asserted that the Waivers did not allow for the further expansion of the zoning lot to include tax lot 70; they sought a ruling that the Waivers did not allow further expansion of the zoning lot and injunctive relief.

A Recital in the Zoning Lot and Development Agreement ("ZLDA") for the combination of tax lots 15 and 76 into a single zoning lot stated that the zoning lot "may be expanded" and the Waiver referenced the ZLDA. However, the ZLDA was not signed by either of the Plaintiffs and the Waiver itself did not address whether the zoning lot could be further expanded. The Supreme Court, New York County, granted the Plaintiffs' motion for summary judgment, enjoining construction without the consent of the Plaintiffs, as parties-in-interest, to the expansion of the zoning lot to include tax lot 70. According to the Court,

> *"[a]s a matter of law, the Declarations of Waiver…did not waive their right to object to future mergers with other lots. The Declarations of Waiver are unambiguous and only apply to the merger of Lots 15 and 76…Defendants' reliance on Recital B [in the ZLDA that the zoning lot "may be expanded"] to create an expansion of the Waivers is misplaced. The Recitals are descriptive and non-binding [citations omitted]."*

The Court noted the following text from the Appellate Division, First Department's decision in Grand Manor Health Related Facility, Inc. v. Hamilton Equities, Inc., 65 AD3d 445 (2009):

> *"Although a statement in a 'whereas' clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document."*

Little Cherry, LLC v. Cherry Street Owner LLC, 2021 NY Slip Op 31225, decided April 9, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_31225.pdf.

Michael J. Berey
Current Developments since 1997
No. 218
June 28, 2021