Acknowledgments

The Appellate Division, Second Department, affirming entry of a judgment of foreclosure and sale by the Supreme Court, Nassau County, considered whether the statutory form of certificate of conformity under Real Property Law ("RPL") Section 299-a ("Acknowledgment to conform to law of New York or of place where taken; certificate of conformity") for acknowledgments taken outside of New York had to be a part of affidavits submitted to the lower court and certain mortgage assignments. According to the Appellate Division, the acknowledgements "conformed substantially" with the statutory form, and even if "the subject documents…were not accompanied by certificates of conformity, 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]." U.S. Bank Trust v. McGlone, 2022 NY Slip Op 00458, decided January 26, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00458.htm.

Adjoining Owners

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…"

In E83 Properties LLC v. LL 1592 Second Avenue LLC, 2021 NY Slip Op 32672, decided December 14, 2021, the Supreme Court, New York County, granted a license under Section 881 to enable the Petitioner-fee owner to enter onto the Respondent's adjoining property to enable the Petitioner to install protective measures for the repair of a shared party wall. While "RPAPL Section 881 is not the proper vehicle to seek to demolish, repair, or rebuild a party wall [citation omitted]", the Respondent had not opposed the protective measures requested, such as entry onto the Respondent's property to conduct a preconstruction survey and the installation of overhead protection during the project.

The Court also held that one of the Petitioners, the intended transferee of the other Petitioner's property, did not have standing to bring the application. "RPAPL Section 881 does not allow for prospective owners to bring an action. Upon transfer of ownership…[the transferee] may petition this Court to have any licensed transferred…should [the] same be necessary." This decision is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_32672.pdf.

Condominium Common Charge Liens/Statute of Limitations

The Appellate Division, First Department, affirming an Order of the Supreme Court, New York County, which had dismissed a mechanic's lienor action against a condominium, held that the three-year statute of limitations under paragraph 2 of Civil Practice Law and Rules ("CPLR") Section 214 ("Actions to be commenced within three years…") applied to the Plaintiff's claims which were brought under RPL Section 339-l ("Liens against common elements…"). Paragraph 2 of CPLR Section 214 states that "an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215" must be commenced within three years. ELM Suspension Systems, Inc. v. The 45 East 33rd Street Condominium, 2022 NY Slip Op 00247, decided January 13, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00247.htm.

Contracts of Sale

A seller terminated a contract of sale because the purchaser did not make pre-closing monthly progress payments as required by the contract. The purchaser sued for damages, claiming breach of the implied covenant of good faith and fair dealing and promissory estoppel. The Supreme Court, New York County, granted the Defendant-seller's motion to dismiss the complaint, cancelled the notice of pendency filed for the action, and directed the escrow agent to deliver the contract down payment to the seller. The cause of action claiming breach of the implied covenant of good faith was denied because the contract's closing date was not extended and the purchaser did not make the required payments.

In support of its cause of action claiming promissory estoppel, the purchaser asserted that the seller had represented that the seller would extend the closing date and not terminate the contract if the progress payments were made at the closing. According to the Court, "[t]his theory fails because Purchaser's reliance damages would be limited to any actual costs incurred based on these alleged representations (i.e., damages from the date of the reliance)…." Those purchaser's costs related to its efforts to obtain ULURP approval, but the contract was not conditioned on obtaining that approval. Franklin Avenue Acquisition LLC v. HPG Associates, Inc., 2021 NY Slip Op 32636, decided December 9, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_32636.pdf.

In Meisels v. Melamed, 2021 NY Slip Op 32855, decided December 31, 2021, the contract of sale for the purchase of the membership interest in a limited liability company, the only asset of which is a parcel of real property in Brooklyn required that the purchaser "receive title clear of all liens and encumbrances on or prior to Closing." A title search reported a mortgage, sidewalk liens and environmental control board liens (and a lis pendens to enforce the ECBs). Plaintiff, the contract vendee's assignee, did not appear at the time of the essence closing date and then sued to recover its down payment, contending that the seller was not ready, willing and able to close. The Supreme Court, Kings County, denied the Plaintiff's motion for summary judgment. According to the Court,

> *"…the plaintiff did not demonstrate as a matter of law that the defendants were not ready, willing or able to perform on the time is of the essence closing date…[The contract] only required [that there be] clear title…on or before the closing…There was no requirement that the closing be scheduled on a day after all liens and encumbrances on the property had been cleared. The plaintiff did not demonstrate as a matter of law that the liens [and] encumbrances on the property could not have [been] cleared…"*

This decision is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_32855.pdf.

In Rodriguez v. Richards, 2022 NY Slip Op 50026, decided January 19, 2022, the contract of sale stated the Defendant "shall accept the property subject to all…easements of record…so long as the property is not in violation thereof and…does not prevent the intended use of the property for the purpose of [a] personal residence…, provided that nothing in this paragraph renders the title to the property unmarketable." The Defendant-purchaser, when signing the contract, was aware that there was an easement over part of the driveway on the Plaintiff-seller's property before the contract was signed. Notwithstanding, the Defendant-purchaser, claiming that the Plaintiff was unable to transfer marketable title on account of the easement, failed to appear at the closing on the date set by the Plaintiff as the time of the essence closing date.

The Plaintiff commenced an action seeking to recover the contract deposit held in escrow. The Supreme Court, Warren County, granted the Plaintiff's motion for summary judgment and ordered that the contract deposit be paid to the Plaintiff. According to the Court,

> *"…the contract did not specify a conveyance of title free of all encumbrances. Rather, the contract expressly indicated that the property was being conveyed subject to all covenants, conditions, restrictions and easements of record, so long as none prevented use of the property as a personal residence. Again, neither the easement over the driveway nor the prohibition on commercial use prevented the property from being used as a personal residence."*

The Defendant also unsuccessfully argued that the Plaintiff was not entitled to retain the contract deposit because the contract did not include a provision for liquidated damages and was silent as to what happened if there was a default, and the Plaintiff, having sold the property to third parties for a greater price, suffered no damage. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_50026.htm.

Land Under Water/Town of Southampton

The 1686 Dongan Charter, from the then Royal Governor of the Province of New York, granted title to land underwater in the Town to the Trustees of the Freeholders and Commonalty of the Town of Southampton. The Plaintiffs claimed that sections of the Town's Code, as amended by Local Law 21 of the Laws of 2008, regulating crabbing and conching in navigable waters, were preempted by the state's Environmental Conservation Law and were, therefore, unconstitutional. The Appellate Division, Second Department, affirmed the ruling of the Supreme Court, Suffolk County, upholding the provisions of the Code.

The state's Navigation Law, Section 2 ("Definitions") defines "Navigable waters of the state" [to] mean all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated, except all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties." According to the Appellate Division,

> *"{b}ecause the State has expressly excluded navigable waters within the County of Suffolk…from its jurisdiction, and the Town owns the land under its tidal waters, articles 11 and 13 of the Environmental Conservation Law do not preempt Local Law 21 insofar as those articles regulate crabbing and conching in navigable waters."*

Brookhaven Baymen's Association, Inc. v. Town of Southampton, 2022 NY Slip Op 00394, decided January 26, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00394.htm.

Lien Law/Itemized Statements

Under Lien Law Section 38 ("Itemized statement may be required of lienor"), "[a] lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished..."

In Matter of FPG Maiden Lane, LLC v. Pizzarotti, LLC, 2022 NY Slip Op 30098, decided January 16, 2022, the Petitioner moved for a mechanic's lien to be cancelled because the lienor had not provided an itemization distinguishing between the charges already paid and those not paid. The Supreme Court, New York County, afforded the Respondent ten days to submit a revised itemization. If documentation was not submitted by then which identified the charges comprising the lien, "this lien will be discharged and cancelled." This decision is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_30098.pdf.

In Matter of PDS Second Carroll LLC v. Triple C Glass Corp, 2021 NY Slip Op 32743, decided December 21, 2021, the Respondent's mechanic's lien, originally filed for $204,159.61, was extended in the amount of $142,999.02. The Supreme Court, Kings County, ordered that the Respondent provide Petitioner with a revised itemization within thirty days of the date of the Court's Order. In the extension of the lien, the Respondent had not explained the basis for the reduction in the amount of the lien and there was no supporting documentation in the verified statement provided for $128,000 for "mobilization and Re-Mobilization (COVID)." This decision is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_32743.pdf.

In Matter of PDS Second Carroll, LLC v. Regulator Construction Corp., 2021 NY Slip Op 32878, decided December 20, 2021, the Supreme Court, Kings County, granted the Petitioner's motion to require the mechanic's lienor to provide a revised, verified itemized statement within five business days of the date of its receipt of the Court's Decision and Order. According to the Court,

> *"…any detailed itemization of the lien requires the lienor to provide what portions of the scope of work…was not paid for. Respondent's [statement to the Petitioner]…merely shows what is tantamount to an outstanding invoice and a copy of the contract between the Respondent and Petitioner's general contractor…This by no means details those items that the Respondent is seeking payment for and fails to address labor and material costs, if any…"*

This decision is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_32878.pdf.

However, in York Restoration Corp. v. Pedrol Contracting Inc., 2022 NY Slip Op 30003, decided January 3, 2022, the Supreme Court, New York County, noting that "[s]ection 38 [titled "Itemized statement may be required of lienor"], does not establish 'an absolute right to an itemized statement' [citations omitted]", denied the Petitioner's application for an Order requiring the Respondent to produce an itemized statement under Section 38.

In this case, in opposing the application, the Petitioner submitted an affidavit with exhibits setting forth the labor and materials for which its mechanic's lien was filed and their value. According to the Court,

> *"The Contract called for a fixed price per month that Petitioner does not challenge. Petitioner also does not dispute the length of the Contract term or the fact that Respondent sent a final invoice detailing outstanding payments due. Itemization of labor and materials is not required…where a Petitioner does not dispute that the contract was substantially completed [citation omitted]. Furthermore...Respondent has already supplied Petitioner with information setting forth the basis for the lien and the terms of the contract and has also supplied requisite verification."*

This decision is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_30003.pdf.

Lien Law/Necessary Parties After Bonding

The Supreme Court, New York County, dismissed the compliant in an action to foreclose a bonded mechanic's lien as against the Defendants other than the principal and surety on the bond and the other mechanics with filed liens. Under paragraph (1) of Lien Law Section 37 ("Bond to discharge all liens"), when a mechanic's lien is bonded the parties defendant are "the principal and surety on the bond, the contractor, and all claimants who have filed notices of claims prior to the date of the filing of such summons and complaint." 334-340 Hotel Management LLC v. PCCM Supply, Inc., 2021 NY Slip Op 32801, decided December 22, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_32801.pdf.

Mortgage Foreclosures/Abandonment

Under subsection (c) ("Default not entered within one year") 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 [of the Defendant], the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or motion, unless sufficient cause is shown why the complaint should not be dismissed…"

In Federal National Mortgage Association v. Kresner, 2021 NY Slip Op 07286, decided December 22, 2021, the Plaintiff's predecessor in interest commenced a mortgage foreclosure in 2012. The defendant failed to interpose an answer or appear in the action. In 2019, the Supreme Court, Nassau County, granted the Plaintiff's motion to enter a default judgment, confirmed the Referee's report, entered a judgment of foreclosure and sale, and directed the sale of the property. The Court denied the Defendant's cross-motion to dismiss the complaint as abandoned. The Appellate Division, Second Department, reversed the lower court's rulings and granted the Defendant's cross-motion to dismiss the complaint as abandoned as to him. According to the Appellate Division,

> *"The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory…The failure to timely take proceedings for the entry of judgment may only be excused upon the plaintiff's showing that it had a reasonable excuse for the delay and a potentially meritorious action [citations omitted]…Here, the defendant's time to answer the complaint expired on February 13, 2012. Neither the plaintiff nor its predecessor in interest took any proceedings for the entry of a judgment (or any proceedings at all) within one year of that default. Moreover, the plaintiff did not proffer any excuse for its delay during that time."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_07286.htm.

Mortgage Foreclosures/Acceleration of Indebtedness

An action commenced in 2010 to foreclose a mortgage was dismissed by the Supreme Court, Queens County. In a second foreclosure brought more than six years later, the Plaintiff asserted that because the original mortgagor died before the 2010 action was commenced the acceleration of the debt by the 2010 action was a nullity. The Appellate Division, Second Department, affirmed the Supreme Court, Queens County's granting of the motion for summary judgment by the Administrator of the mortgagor's estate which dismissed the complaint for being time barred. According to the Appellate Division,

> *"…contrary to the plaintiff's contention, the fact that the original mortgagor died prior to commencement of the 2010 foreclosure action, while rendering the 2010 foreclosure action 'a legal nullity from its inception' [citations omitted] did not revoke or invalidate, or otherwise destroy, the plaintiff's express invocation of the contractual election to accelerate the debt [citations omitted]."*

The Plaintiff failed to establish that a letter it sent in 2015 purporting to de-accelerate the debt was transmitted in the manner required by the mortgage. Deutsche Bank National Trust Company v. Rivera, 2021 NY Slip Op 07306, decided December 22, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_07306.htm.

In HSBC Bank USA, N.A. v. Spitz, 2022 NY Slip Op 00170, decided January 12, 2022, Mortgage Electronic Registration Systems (MERS"), as nominee for HSBC, commenced an action to foreclose a mortgage in 2008, thereby accelerating the indebtedness. In 2018, HSBC brought a second foreclosure of the mortgage. The Appellate Division, Second Department, reversing the ruling of the Supreme Court, Kings County, granted HSBC's motion for summary judgment and for an order of reference, and dismissed the Defendant's counterclaims which included the defense that the action was time-barred.

Noting that "…an acceleration of a mortgaged debt is only valid if the party making the acceleration had standing at that time to do so [citation omitted]", the Appellate Division concluded that HSBC had established, prima facie, that MERS lacked standing to commence the 2008 foreclosure. An affidavit of an officer of HSBC supporting a finding that HSBC "'held the original Note after its execution and at no time was it physically delivered to MERS.'" This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00170.htm.

In Bank of New York Mellon v. Mor, 2022 NY Slip Op 00162, decided January 12, 2022, the Appellate Division, Second Department, held that the initial mortgagee's letter to the borrower, stating that "[i]f the default is not cured on or before April 22, 2008, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time", "did not express a clear and unequivocal acceleration of the mortgage debt [citation omitted]…Thus, the defendant failed to establish, prima facie, that so much of the complaint as sought to recover unpaid mortgage installments under the subject mortgage that accrued on or after June 23, 2008 [six years before the date on which the foreclosure action was commenced], was time-barred [citations omitted." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00162.htm.

In Wilmington Savings Fund Society, FSB v. Damaro, 2022 NY Slip Op 50042, decided January 25, 2022, a judgment of foreclosure and sale in a prior foreclosure of the mortgage was reversed by the Appellate Division, Second Department, because the Plaintiff had not established compliance with RPAPL Section 1304. That action, in 2011, accelerated the entire debt; it was not claimed that the action was discontinued voluntarily which, under the Court of Appeals decision in Freedom Mortgage Corp. v. Engel (37 NY3d 1 (2021)), would have revoked the Plaintiff's acceleration of the debt.

The Supreme Court, Suffolk County, dismissed the complaint in the foreclosure commenced in 2018 for the same mortgage. Among its other findings, the Court determined that the statute of limitations had run. According to the Court, "[t]he mere dismissal of an action has been held not [to] be an act revoking acceleration [citations omitted]…The court could find no authority holding that dismissal on RPAPL Section 1304 grounds is an affirmative act of revocation of acceleration…" This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_50042.htm.

Mortgage Foreclosures/Defendants

The Appellate Division, Second Department, affirmed entry of a judgment of foreclosure and sale by the Supreme Court, Queens County, notwithstanding that a Defendant had died eleven years before the action was commenced. "An action commenced against a deceased defendant is a nullity only insofar as asserted against that defendant…" Further, the lower court had discontinued the action as against this Defendant who, not being an obligor on the note, was not subject to a deficiency judgment. Wells Fargo Bank, N.A. v. Dhanani, 2022 NY Slip Op 00461, decided January 28, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00461.htm.

Mortgage Foreclosures/Notices - PAPL 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.

In an action commenced in 2016 to foreclose a mortgage, the Appellate Division, Second Department, modified the Order of the Supreme Court, Suffolk County, reversing the grant of the Plaintiff's motion for summary judgment, holding that the Plaintiff had failed to establish strict compliance with the requirement of RPAPL Section 1304 (2) (effective until January 14, 2020) that the notice be sent "in a separate envelope from any other mailing or notice." Here, the mailing of the notice also contained separate notices regarding the Home Affordable Modification Program and bankruptcy issues. Wells Fargo Bank, N.A. v. DeFeo, 2021 NY Slip Op 07577, decided December 29, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_07577.htm.

Similarly, in Wells Fargo Bank, N.A. v. Gerrato, 2022 NY Slip Op 22012, decided January 19, 2022, the Supreme Court, Suffolk County, dismissed the complaint because the RPAPL Section 1304 notice contained "additional language not directed under the section." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_22012.htm.

In Citimortgage, Inc. v. Leitman, 2022 NY Slip Op 00397, decided January 26, 2022, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Kings County, because the Plaintiff failed to establish strict compliance with Section 1304. "'[T]he plaintiff failed to provide evidence of the actual mailing or proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure'…[citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00397.htm.

A similar recent decision of the Appellate Division, Second Department, is JPMorgan Chase Bank, N.A. v. Deblinger, 2022 NY Slip Op 00410, decided January 26, 2022 and posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00410.htm.

Mortgage Foreclosures/Ratification of Obligation

In granting the foreclosing Plaintiff's motion for summary judgment, the Supreme Court, Kings County, struck the Defendant's affirmative defense asserting that her purported signatures on the note and mortgage were forged. The Appellate Division, Second Department, held that the Defendant had failed to raise a triable issue of fact and, in any event, "the defendant ratified the allegedly forged note by continuing to make mortgage payments after receiving copies of the allegedly forged documents a 'couple of months' after the closing and by retaining the benefits of the loan transaction and executing the loan modification agreement while aware of the alleged fraud [citations omitted]." Deutsche Bank National Trust Company v. Crosby, 2022 NY Slip Op 00402, decided January 26, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00402.htm.

Mortgage Foreclosures/Referee's Report

The Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Queens County, because the computations in the Referee's Report were based on business records that were not produced. Wells Fargo Bank, N.A. v. Dhanani, 2022 NY Slip Op 00460, decided January 26, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00460.htm.

Mortgage Foreclosures/Standing

The Appellate Division, Second Department, affirmed entry of summary judgment by the Supreme Court, Richmond County, in an action to foreclose a mortgage, notwithstanding the Defendant's claim that the Plaintiff lacked standing. According to the Appellate Division, "[h]ere, contrary to the defendant's contention, the plaintiff was not required to demonstrate that it was the owner of the note in order to establish its standing, nor was it required to prove a chain of title for the note. Instead, the plaintiff, who was the servicer of the subject loan, attached a copy of the note, endorsed in blank, to the complaint. 'This alone was sufficient to establish standing since it demonstrated that the plaintiff was in possession of the note at the time the action was commenced'[citation omitted].'" Wells Fargo Bank, N.A. v. Moussa, 2022 NY Slip Op 00463, decided January 26, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00463.htm.

In Nationstar Bank, LLC v. Calomarde, 2022 NY Slip Op 00428, decided January 26, 2022, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Nassau County "Although the plaintiff attached to the complaint copies of the note and an undated purported allonge to the note endorsed in blank, the plaintiff did not demonstrate [in the affidavit submitted] that the purported allonge, which was on a piece of paper completely separate from the note, was 'so firmly affixed thereto as to become a part thereof' as required by UCC 3-202(2) [citations omitted]." Therefore, the Plaintiff had not established, prima facie, that it had standing. https://www.nycourts.gov/reporter/3dseries/2022/2022_00428.htm.

In JPMorgan Chase Bank, N.A. v. Rodriguez, 2022 NY Slip Op 00411, decided January 26, 2022, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Nassau County. "[T]he defendant raised a triable issue of fact as to whether the plaintiff had produced the unpaid note and had standing to commence the action, by submitting…a copy of another version of the note, purportedly produced by the plaintiff…bearing a different version of the defendant's purported signature and initials than the note relied upon by the plaintiff…[T]he defendant averred that she only signed one copy of the note at closing, and denied that any of the copies of the note produced by the plaintiff were the note she signed [citations omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00411.htm.

Mortgage Foreclosures/Statute of Limitations/Mortgagee-in-Possession

For a foreclosure commenced in 2010 the Plaintiff elected to call due the entire amount secured by the mortgage. That action was dismissed in 2012. In 2016, the Plaintiff brought an action under RPAPL Article 15 ("Action to compel the determination of a claim to real property") to have the mortgage canceled and discharged of record on the ground that the statute of limitations had expired. The Defendant-mortgagee asserted that the Plaintiff had abandoned the property and that the Defendant's being in possession of the property since 2013 pursuant to paragraph nine of the mortgage ("Lender's Right to Protect Its Rights in the Property") had tolled the statute of limitations. Under paragraph 9, if the borrower abandoned the property, the mortgagee may "do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and Lender's rights."

The Supreme Court, Westchester County, grant of the Defendant's motion for summary judgment dismissing the complaint was reversed by the Appellate Division, Second Department, which also granted the Plaintiff's motion to dismiss the counterclaim to foreclose the mortgage as being time-barred. According to the Appellate Division, while

> *"[t]he statute of limitations will not run against a 'mortgagee in possession' since the mortgagor's consent to that possession is a continuing acknowledgment of the debt [citations omitted]…[T]he mere fact that [the Defendant] took measures to protect its rights in the property under paragraph nine of the mortgage does not establish that the parties reached an agreement for [the Defendant] to take possession of the premises with all the rights and obligations that possession entails. Paragraph nine of the mortgage merely allows the mortgagee to take measures to protect its rights in the property [citations omitted], but the exercise of those rights cannot be construed as the mortgagor's continuing acknowledgement of the debt so as to toll the statute of limitations."*

Mardenborough v. U.S. Bank N.A., 2022 NY Slip Op 00034, decided January 5, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00034.htm.

Partition

The Supreme Court, Kings County, granted the Plaintiff's motion for the partition and sale of real property in which she held a 25% interest as a tenant in common. The Defendants, the other tenants in common, argued that the motion should be denied because some of them still reside at the property and they were willing to buy the Plaintiff's interest. According to the Court, "[h]ere t]he mere fact that some of the defendants still reside at the Property 'does not tip the equities in [their]favor' and is insufficient to raise a material triable issue of fact." Manieri v. Manieri, 2021 NY Slip Op 32702, decided December 17, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_32702.pdf.

Restrictive Covenants/Subdivisions

Lots 5 and 6 on a Subdivision Map recorded in 1928 are owned, respectively, by the Plaintiff and the Defendants. The Plaintiff sought a ruling that the Defendants' proposed subdivision of Lot 6 violated restrictive covenants in the original deeds in 1928 and 1929 for these filed map lots and for injunctive relief. The original conveyances from the map maker prohibited the parcels from being subdivided and required that only one home could be built on each parcel. The Supreme Court, Suffolk County, granted the Defendants' motion to dismiss the complaint. The Court found that the Plaintiff had not established that there was a common plan for the uniform development of the subdivision and, therefore, the Plaintiff lacked standing to enforce restrictive covenants in the defendants' chain of title. The Appellate Division, Second Department, modifying the lower court's Order, denied the Defendant's motion. According to the Appellate Division,

> *"[t]he defendants are charged with notice of the restrictive covenants contained in the original deed from the grantor conveying Lot 6 as is in their direct chain of title [citation omitted]….[Further], …the plaintiff has the requisite vertical privity to enforce the restrictive covenants [citations omitted]…and did not need to demonstrate a common plan or scheme for the entire subdivision [citation omitted]…"*

The Appellate Division noted that there remained a triable issue of fact as to whether the restrictive covenant prohibiting subdivision was enforceable under RPAPL Section 1951("Extinguishment of non-substantial restrictions on the use of land") due to changes in the area. Under Section 1951, a court may adjudge a restriction to be unenforceable if it has no "actual and substantial benefit to the persons seeking its enforcement…by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for other reason…" Shehan v. Commisso, 2022 NY Slip Op 00328, decided January 19, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00328.htm.

Uniform Commercial Code/Mezzanine Loans

The Supreme Court, New York County, denied a motion to preliminary enjoin the UCC sale on December 21, 2021 of a second position mezzanine loan secured by the pledge of the Plaintiff's one hundred percent interest in a corporation indirectly owning property in Boston. The Plaintiff argued that the "disposition of the collateral" was not being done "in a commercially reasonable manner", as required by UCC Section 9-627 ("Determination of whether conduct was commercially reasonable").

The Plaintiff argued that holding the sale during the end of year holidays would minimize attendance, chill bidding and provide insufficient time for potential bidders to obtain financing, and that the scheduling of the sale within one day of the scheduled sale of another mezzanine loan would create confusion and thereby chill bidding, According to the Court,

> *"…the notices [of the sale] were publicized on November 11, 2021, well before any holiday season. The mere fact that the actual sale is a few days before a holiday and might interfere with an overarching and extended holiday season does not mean that the sale is commercially unreasonable as a matter of law… Furthermore, the mere fact that the defendant has scheduled the sale a day before the third mezzanine lender…does not mean the schedule is commercially unreasonable."*

The Plaintiff also asserted that the UCC sale would result in a loss of its property, which could not be replaced by money damages. However, according to the Court, "the plaintiff does not own the real property. The plaintiff owns one hundred percent of the shares of a corporation that indirectly owns the property…[Further], the plaintiff was fully aware of the limits, parameters and benefits of a mezzanine loan. No… irreparable harm can result if the foreclosure action takes place." Lincoln Street Mezz II, LLC v. One Lincoln Mezz 2 LLC, 2021 NY Slip Op 32635, decided December 8, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_32635.pdf.

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