Champerty

Among the claims asserted by a Defendant in a foreclosure brought by the assignee of a note and mortgage was that the action should be dismissed on grounds of champerty. Under Judiciary Law Section 489 ("Purchase of claims by corporations or collection agencies"), "[n]o person or co-partnership engaged directly or indirectly in the business of collection and adjustment of claims, and not corporation or association…shall solicit, buy or take an assignment of…a bond, [or] promissory note…with the intent fan for the purpose of bringing an action or proceeding thereon…" Violating of this section may result, under Section 489, in the imposition of a fine or the charging of a misdemeanor.

The Supreme Court, New York County, granted the Plaintiff's motion for dismiss a number of affirmative defenses including champerty. According to the Court, "[t]he claim of champerty fails as the 'mortgage loan had already fallen into default and been accelerated before its assignment to plaintiff' [citation omitted]… [In addition, the] Plaintiff established that the note and mortgage were acquired for the purpose of enforcing same via a foreclosure action [citation omitted]." Band H Florida Notes LLC v. Ashkenazi, 2022 NY Slip Op 30445, decided February 4, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_30445.pdf.

Contracts of Sale/"As Is" Condition/"PCDA"

One month after closing, the purchasers noticed a "musty smell" in the basement of the home and rainwater pooling in the basement. They sued the sellers to recover $13,000, the cost to repair the damage. Under the contract the property was sold "as is" without any warranty, the purchasers' home inspection did not report any sign of water penetration, and the sellers represented in a Property Condition Disclosure Statement ("PCDA")that they had no knowledge of any rot or water damage. Notwithstanding, the purchasers, claimed that the sellers know or should have known of the water problem in the basement of the house and the Albany City Court, finding that the purchasers had established a prima facie case, denied the sellers' motion for summary judgment dismissing the complaint. The Albany County Court reversed the lower court's ruling and granted the sellers' motion for summary judgment.

The Plaintiff asserted causes of action alleging breach of contract, fraudulent inducement, unjust enrichment and quantum meruit. The County Court dismissed the breach of contract cause of action because the contract disclaimed any warranty or representation as to the property's condition and, a PCDA being completed based on actual knowledge, there was "no proof that the sellers knowingly misrepresented a material fact" when completing the PCDA. As to fraudulent concealment, there was no proof that the sellers had actively concealed the condition. As to fraudulent concealment, the sellers had no actual knowledge of the water-related issues and the purchasers had the property inspection. Lastly, as to quantum meruit, "the sellers performed no services for the purchasers…Moreover, where, as here, there exists a binding sales contract which specifically provides that the property is sold 'as is' there can be no recovery in quasi-contract for quantum meruit [citation omitted]." Amiri v. Gurusamy, 2021 NY Slip Op 21368, decided December 21, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_21368.htm.

Contracts of Sale/Impossibility of Performance

The Plaintiff, a resident and citizen of the People's Republic of China, entered into a contract to purchase a condominium unit from the Sponsor. The purchase agreement provided that if the Plaintiff failed to close the Sponsor could cancel the agreement and retain the contract deposit. There was no financing contingency. The Plaintiff sued to recover the deposit, claiming impossibility of performance; that due to restrictions issued by the Chinese Government limiting the flow of capital out of China he was unable to transfer funds out of China to complete the purchase. The Supreme Court, New York County, dismissed the complaint. According to the Court,

> *"[e]ven taking plaintiff's allegations regarding Chinese money transfer regulations as true, plaintiff does not allege that the means of performance have been totally destroyed, i.e., that he could not have found a way to purchase the Unit without a wire transfer from a Chinese bank…Moreover, there is no contingency clause in the agreement that would allow plaintiff to escape performance due to the actions of nonparty State actors, and thus plaintiff cannot claim that his performance was impossible due to those actions [citation omitted]."*

Zeyu Wang v. 44th Drive Owner LLC, 2022 NY Slip Op 30436, decided February 8, 2022, is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_30436.pdf.

Deeds/Administrators/Apparent Authority

In 2008, the administrator of the Estate of a decedent owning real property conveyed the property to her sister and herself who, in 2009, obtained a mortgage loan. In 2017, she was removed as administrator of the Estate. The sister, claiming that the 2008 conveyance was void ab initio, then moved, in an action to foreclose the mortgage, for the mortgage to be canceled and discharged of record, which motion was denied by the Supreme Court, Queens County. Affirming the lower court's ruling, the Appellate Division, Second Department, stated the following:

> *"[T]he record shows that the [administrator] was cloaked with apparent authority, since she executed the deed in her capacity as administrator of the decedent's estate, pursuant to letters of administration issued by the Surrogate's Court. The fact that [her] letters of administration were later revoked…dies not render the deed void ab initio, but, at most, voidable [citation omitted]."*

There was no claim that the foreclosing mortgagee was not a bona fide encumbrancer. Gerlitz v. Biddle, 2022 NY Slip Op 00851, decided February 9, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00851.htm.

Deeds/Partnerships

In 1964, title to land in Queens County was acquired by a partnership consisting of three brothers. In 1992, a deed was executed by the partnership, signed on behalf of the partnership by the three brothers, one of whom died twenty-three years before the date was purportedly signed by him. The Administrator c.t.a. of the Estate commenced an action seeking to have the deed declared void and to recover damages against, among others, the other brothers and the person who notarized the deed for fraudulent concealment and unjust enrichment. The Supreme Court, Queens County's dismissal of the complaint was upheld by the Appellate Division, Second Department. According to the Appellate Division, the property was held in the name of the partnership and on the death of the partner his interest passed to the other partners under the Partnership Law. Thus, the decedent's estate

> *"was not entitled to, and never acquired, any interest [the decedent] may have had in the disputed property prior to his death. Moreover…[the decedent's] alleged signature on the 1992 deed has no significance, as at that point in time, his interest…had already vested in the remaining partners…Further, while a forged deed is void ab initio [citation omitted], here, the plaintiff was not aggrieved by the 1992 forged deed and, therefore, does not have standing to bring an action for a judgment declaring said 1992 deed void ab initio on behalf of the estate."*

Abruzzi v. Bond Realty, Inc., 2022 NY Slip Op 00156, decided January 12, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00156.htm.

Lien Law

The Supreme Court, Kings County, dismissed the complaint in a subcontractor's action to foreclose its mechanic's lien, discharged the lien, and cancelled the lis pendens. The general contractor executed an Unconditional Waiver and Release Upon Final Payment, establishing that the Defendant had paid the general contractor for the subcontracted work before the mechanic's lien was filed. The Plaintiff did not allege it performed work or provided materials for the Defendant's property after the date on which the general contractor, in the Waiver, indicated it had been paid in full. The Court further noted that "[s]ubject to certain exceptions which are not relevant to this case, 'a property owner who contracts with a general contractor…does not become liable to the subcontractor on a quasi-contract theory' [citation omitted]." O.R.B Star Construction, Inc. v. Lindahl, 2022 NY Slip Op 30495, decided January 28, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30495.pdf.

Mezzanine Loans/Mortgage Foreclosures

Notwithstanding the objections of a mezzanine lender, the Supreme Court, New York County, granted the foreclosing Plaintiff's motion for summary judgment. According to the Court, "[t]he Mezzanine Lender was structurally subordinate to the Mortgage Lender's position. In the absence of an intercreditor agreement… providing otherwise, the Mezzanine Lender simply has no basis to contest the Mortgage Lender's right to foreclose on the real property…It does not matter that the borrower under the mezzanine loan documents by consenting to the foreclosure of the Mortgage." U.S. Bank, N.A. v. 342 Property LLC, 2022 NY Slip Op 30488, decided February 14, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30488.pdf.

Money Judgments/Interest

On December 31, 2021, Governor Hochul signed into law Chapter 831 of the Laws of 2021 amending Sections of the CPLR to reduce the interest rate on money judgments against natural persons involving "consumer debt" (as defined in CPLR Section 5004(b)) from 9% to 2% per annum. The legislation (Senate Bill 05724A/ Assembly Bill 06474A), amending the CPLR, is effective 120 days after its enactment, which is April 30, 2022, and can be obtained at Bill Search and Legislative Information | New York State Assembly (nyassembly.gov).

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…"

The Supreme Court, Suffolk County, denied a motion to dismiss the complaint in an action to foreclose a mortgage as having been abandoned under Section 3215, as no proceedings was commenced for entry of a default judgment within one year of the appellant's failure to appear to answer. The Appellate Division, Second Department, reversed the lower court and dismissed the action. "'The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory'…[and] there was no showing of sufficient cause why the complaint should not be dismissed [citation omitted]." HSBC Bank USA v. Rini, 2022 NY Slip Op 01016, decided February 16, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01016.htm.

Mortgage Foreclosures/Judgment of Foreclosure and Sale

After entry of a judgment of foreclosure and sale, the Defendant-mortgagor commenced an action to quiet title seeking to have the mortgage loan rescinded. Among the causes of action asserted in the quiet title action were allegations of fraud, intentional infliction of emotional distress, violation of federal statutes, and unjust enrichment. The Supreme Court, Kings County, dismissed the complaint as being barred by the doctrine of collateral estoppel, and the Appellate Division, Second Department, affirmed the lower court's Order. According to the Appellate Division, "[t]he issues raised by the plaintiff in this action were or could have been litigated in the foreclosure action, and [the plaintiff] is therefore precluded from relitigating them in this action…" Savory v. Wells Fargo Bank, N.A., 2022 NY Slip Op 01060, decided February 16, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_01060.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.

In MTGLQ Investors, L.P. v. Cutaj, 2022 NY Slip Op 00858, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Westchester County, holding that the Plaintiff had failed to establish that it had strictly complied with Section 1304. Notwithstanding that the Plaintiff had submitted a certified mail receipt, the notice did not indicate that it was sent by registered or certified mail or by first class mail. In addition, the affidavit submitted by an officer of the loan servicer "merely described the mailing requirements listed in the statute…[and was therefore] insufficient to constitute proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed [citations omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00858.htm.

In Bank of New York Mellon v. Sae Young Min, 2022 NY Slip Op 00393, decided January 26, 2022, the Appellate Division, Second Department, reversed entry of summary judgment by the Supreme Court, Kings County, holding that the foreclosing Plaintiff had not established, prima facie, its compliance with the requirements of Section 1304. "No evidence that the RPAPL 1304 notice was mailed by certified mail to the defendant at the subject property was provided, and the affidavit of a…officer of the plaintiff's loan servicer… failed to describe the procedures in place designed to ensure that RPAPL 1304 notices are properly addressed and mailed by both certified and first-class mail [citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00393.htm.

In MLB Sub I, LLC v. Mathew, 2022 NY Slip Op 01156, decided February 23, 2022, the Appellate Division, Second Department, affirming the grant of a motion for summary judgment by the Supreme Court, Kings County, held that the notice requirements of Section 1304 did not apply because the obligation secured was not a "home loan" with the meaning of Section 1304. "The plaintiff demonstrated that the property being foreclosed was not the defendant's principal dwelling by submitting the '1-4 Family Rider' which deleted the occupancy-by-borrower requirement in the mortgage [citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01156.htm.

Mortgage Foreclosures/ RPAPL Section 1304/Community Housing Agencies

Until January 14, 2020, RPAPL Section 1304 required that "the notices required by this section shall contain a current list of at least five housing counseling agencies serving the county where the property is located from the most recent listing available from the department of financial services." Effective January 14, 2020, the counseling agencies serving the county must be approved by the United States department of housing and urban development."

In a mortgage foreclosure started in 2019, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Suffolk County, because one of the counseling agencies listed in the Section 1304 notice is located in Watertown, New York, approximately 350 miles from the mortgaged premises. "By failing to submit evidence that the Watertown agency served the region wherein the defendants resided, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law…" Wells Fargo Bank v. McMahon, 2022 NY Slip Op 00903, decided February 9, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00903.htm.

Similarly, in U.S. Bank, N.A. v. Gordon, 2022 NY Slip Op 00898, decided February 9, 2022. Involving an action to foreclose a mortgage on a property in Queens County, the Appellate Division, Second Department, held that the foreclosing mortgagee had not established, prima facie, its compliance with Section 1304. One of the five housing counseling agencies listed in the Section 1304 notice is located in Nassau County and "the plaintiff failed to establish, prima facie, that all five of the agencies [listed] served Queens County." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00898.htm.

Mortgage Foreclosures/ RPAPL Section 1304/"Separate Envelope"

Subdivision "2" of RPAPL Section 1304 also states that "[t]he notices required by this section shall be sent by lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice." The Supreme Court, Westchester County, denied the Plaintiff's motion for summary judgment and granted a Defendant's cross-motion to dismiss the complaint as to him because the Plaintiff had included with the Section 1304 notice other information as to the rights of a debtor in bankruptcy and in military service. The Appellate Division, Second Department, affirming the lower court's ruling, held that "inclusion of any material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL 1304(2)." The Appellate Division noted that "the 'separate envelope' requirement of RPAPL 1304 appears to be exclusive to this section and is not found in other notice provisions applicable to mortgage foreclosure proceedings [citations omitted]."

Mortgage Foreclosures/Referee's Report

The Appellate Division, Second Department, rejecting the report of the referee appointed in an action to foreclose a mortgage, reversed entry by the Supreme Court, Queens County of the foreclosure judgment and remitted the case for a new report to be prepared. The referee's report was based "in significant part" on the affidavit of an officer of the purported "servicer and attorney-in-fact". However, the affidavit did not set forth "when [the servicer] began servicing the loan and did not provide a power of attorney appointing it as attorney-in-fact [citation omitted]. Moreover, [the affiant] did not state that 'she was personally familiar with the record-keeping practices and procedures' [of the servicer] [citation omitted]…[T]he plaintiff [also] did not submit the business records on which [the affiant] purportedly relied in computing the total amount due on the mortgage." Christiana Trust v. Campbell, 2022 NY Slip Op 00845, decided February 9, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00845.htm.

A similar, recent decision from the Appellate Division, Second Department, is HSBC Bank USA, N.A. v. Sharon, 2022 NY Slip Op 00852, also decided February 9, 2022. In this case, in reversing entry of a judgment of foreclosure and sale by the Supreme Court, Nassau County, the Appellate Division noted that "'the affiant did not produce any of the business records he purportedly relied upon in making his calculations' [citations omitted]…Thus, the referee's findings with respect to the total amount due upon the mortgage were not substantially supported by the record [citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00852.htm.

Mortgage Foreclosures/Standing

The Appellate Division, Second Department, in affirming the grant by the Supreme Court, Kings County, of the Plaintiff's motion for summary judgment, considered the Defendant's affirmative defense that the Plaintiff did not have standing. The Appellate Division found that "the plaintiff established its physical possession of the note at the time of commencement of this action by annexing a copy of the note, endorsed in blank, to the summons and complaint [citations omitted]." According to the Appellate Division, "[w]here, as here, an entity is in possession of a negotiable instrument that has been endorsed in blank, it need not establish how it came into possession of the instrument in order to be able to enforce it [citations omitted]." Citimortgage, Inc. v. Malek, 2022 NY Slip Op 01137, decided February 23, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01137.htm.

In Bayview Loan Servicing, LLC v. Caracappa, 2022 NY Slip Op 00997, decided February 16, 2022, the Appellate Division, Second Department, affirmed a judgment of foreclosure and sale, stating that "the plaintiff demonstrated it has standing to commence the instant action by attaching a copy of the note, with an allonge endorsing the note in blank, to the complaint [citations omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_00997.htm.

In Pennymac Holdings, LLC v. Biedermann, 2022 NY Slip Op 30472, decided February 7, 2022, the Supreme Court, New York County, denied the foreclosing Plaintiff's motion for summary judgment for its failure to establish that it had standing. "Since the indorsements at issue were on separate allonges, not [on the] note itself, Plaintiff was required, but neglected, to establish the indorsements or allonges were 'firmly affixed' to the original note [citations omitted]…To the extent Plaintiff relies on naked physical possession of the note to establish [its] standing, 'mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note' [citation omitted]." This decision is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30472.pdf.

In VC RTL Holdings, LLC v. 244 Albany LLC, 2022 NY Slip Op 30390, decided February 2, 2022, a mortgage was assigned and then reassigned to the foreclosing Plaintiff. Defendants asserted that the foreclosing Plaintiff lacked standing since it had not been established that the allonge to the note, indorsed by the original mortgagee and by the initial assignees on its further assignment were "firmly affixed" to the note, as required by UCC Section 3-202 ("Negotiation"). Under Section 3-202, "(2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof."

The Supreme Court, Kings County, dismissed the Defendants' motion to dismiss, holding that the note was assigned and then reassigned. The first assignment of mortgage stated that the "[a]ssignor…assigns and transfers to Assignee [the mortgage] …TOGETHER with the note or notes therein described or referred to…" In the second mortgage assignment, to the Plaintiff, it is stated that "[a]ssignor hereby…assigns, and transfers to Assignee…[the mortgage]…and any and all of its right, title and interest in and to any and all loan documents related to the Security Instrument, including, without limitation, any notes [and] allonges." According to the Court, "[i]t is well established that 'either a written assignment of the underlying note or the physical delivery of the note…is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident' [citation omitted]." This decision is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_30390.pdf.

However, in HSBC Bank USA, N.A. v. Herod, 2022 NY Slip Op 01444, decided March 9, 2022, the Appellate Division reversed entry of summary judgment by the Supreme Court, Kings County, because there was "a triable issue of fact as to whether the note was properly endorsed in blank by an allonge 'so firmly affixed thereto as to become a part thereof' when it came into the possession of the plaintiff [citations omitted]" further stated that "[t]he plaintiff's reliance on the assignments of the mortgage is misplaced 'because the mortgage is not the dispositive document of title as to the mortgage loan' [citations omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_01444.htm.

Mortgage Foreclosures/Statute of Limitations

A lender mailed a notice of the default and commenced to foreclose on its mortgage in 2007; the complaint in that action was dismissed in 2011. In 2018, the Plaintiff, the grantee of the original mortgagor, brought an action under Real Property Actions and Proceedings Law Article 15 ("Action to compel the determination of a claim to real property") to have the mortgage discharged because the statute of limitations to foreclose had expired. The Supreme Court, Suffolk County, denied the Defendant-mortgagee's motion to dismiss the complaint; the Appellate Division, Second Department, reversed the lower court's Order. According to the Appellate Division,

> *"[t]he language in the 2007 notice of default did not serve to accelerate the loan, as it was nothing more than a letter discussing acceleration as a possible future event which does not constitute an exercise of the mortgage's optional acceleration clause [citations omitted]. Moreover, since the 2008 foreclosure action was dismissed on the ground that the defendant lacked standing, the commencement of that action as [a] purported acceleration was a nullity, and the statute of limitations did not begin to run at the time of the purported acceleration."*

IPA Asset Management, LLC v. Bank of New York Mellon, 2022 NY Slip Op 01151, decided February 23, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01151.htm.

In Nassau County. HSBC Bank USA, N.A. v. Ming Young You, 2022 NY Slip Op 01293, decided March 2, 2022, a prior action to foreclose the mortgage was commenced in 2009 and voluntarily discontinued in 2014. In that action, the debt was accelerated when the lender called due the entire amount of the loan. However, since the voluntary discontinuance of the action was an affirmative act of revocation of the acceleration of the debt within the six-year limitations period, the current foreclosure action was timely. The Appellate Division, Second Department, therefore affirmed the grant of the Plaintiff's motion for summary judgment by the Supreme Court. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01293.htm.

In Deutsche Bank Trust Company America v. Morocho, 2022 NY Slip Op 01146, decided February 23, 2022, the Appellate Division, Second Department, affirming denial of the foreclosing Plaintiff's motion for summary judgment, held that the execution of a loan modification agreement was not sufficient to establish, prima facie, that the agreement restarted the running of the statute of limitations. "'General Obligations Law Section 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt' [citation omitted]." There remained "triable issues of fact as to whether the defendant's execution of the loan modification agreement constituted 'an unqualified acknowledgment of the [mortgage] debt sufficient to reset the statute of limitations' [citation omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01146.htm.

Mortgage Foreclosures/Statute of Limitations/Strict Foreclosure

In 2015, the purchaser at a foreclosure sale brought a strict foreclosure under RPAPL Section 1352 ("Judgment foreclosing right of redemption") to foreclose the right of redemption of a junior mortgagee not named in the foreclosure. The Defendant-mortgagee asserted that the strict foreclosure was barred by the six-year statute of limitations which, he argued, ran from 2009, when the original foreclosure action was commenced. The Appellate Division, First Department, held that the "Supreme Court [New York County] correctly found that the six-year statute of limitations that applies to this action did not begin to run until the property was sold at the foreclosure sale in July 2014…Accordingly, this action, commenced in November 2015, was well within the six-year statute of limitations." 517-525 W. 45 LLC v. Avrahami, 2022 NY Slip Op 01230, decided February 24, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01230.htm.

Mortgages/Erroneous Satisfaction

The obligation under a note and the mortgage securing that note, executed in 2002, were part of a consolidated note and mortgage executed in 2006. A satisfaction of the 2002 mortgage was erroneously recorded in 2007. The foreclosing Plaintiff sought an Order cancelling and expunging the satisfaction from the record. The Defendant claimed that he relied on the recorded satisfaction to his detriment. The Supreme Court, Richmond County, denied the Defendant's motion to dismiss the complaint. The Appellate Division, Second Department, affirmed the lower court's Order. According to the Appellate Division,

> *"[t]he satisfaction of the 2002 mortgage…makes no reference to the 2006 consolidated note underlying the 2006 mortgage [being foreclosed]; instead, it expressly refers to a 2002 mortgage which the plaintiff alleged was consolidated into the 2006 mortgage. Moreover, the payment records submitted by the defendant demonstrated that he could not have relied on the satisfaction of the 2002 mortgage as he made mortgage payments in 2009-well after the recording of the mortgage satisfaction in 2007 [citations omitted]."*

Nationstar Mortgage, LLC v. Krit, 2022 NY Slip Op 01168, decided February 23, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01168.htm.

Similarly, in Ocwen Loan Servicing LLC v. Pacheco, 2021 NY Slip Op 32959, decided December 23, 2021, the Supreme Court, New York County, granted the foreclosing Plaintiff's motion for summary judgment on the cause of action to discharge an erroneous satisfaction of a mortgage executed by the mortgagee after it assigned the note and mortgage. After its assignment, the mortgage was twice consolidated when the Defendant borrowed additional funds. The Court held that the satisfaction was executed when the original mortgagee had no interest in the mortgage and the Defendants "failed to establish any detrimental reliance on the discharge…" Further, "[w]here, as here, balances of first mortgage loans are increased with second mortgage loans and CEMAS are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist [citation omitted]."

The Defendants asserted that setting aside the mortgage satisfaction was time barred because the action was commenced more than six years after the discharge was executed. However, the satisfaction was void at its inception and "'a statute of limitations cannot validate what is void at its inception' [citation omitted]." This decision is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_32959.pdf.

Notices of Pendency

A notice of pendency for a mortgage foreclosure was filed in May 2013. In July 2013, the Defendant property owner conveyed her interest to Deborah Ahrem, a nonparty, who, together with another nonparty, moved for leave to intervene to have the judgment of foreclosure and sale vacated. The Supreme Court, Suffolk County, denied the motion, and that ruling was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"…the appellants had constructive notice of the foreclosure action, and their interest in the property was effectively foreclosed upon entry of the judgment of foreclosure and sale [citations omitted]. Accordingly, the appellants failed to demonstrate a real and substantial interest in the outcome of the action so as to warrant intervention[citations omitted]."*

The Appellate Division also found that the motion to intervene, made more than four years after Ahrem took title and several months after the foreclosure judgment was entered, was untimely. HSBA Bank USA, N.A. v. Minogue, 2022 NY Slip Op 00653, decided February 2, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_00653.htm.

In Wells Fargo Bank, NA v. Rodriguez, 2022 NY Slip Op 01478, decided March 9, 2022, after the lis pendens in a mortgage foreclosure expired, the property was conveyed to a corporation which then moved to be substituted as a defendant and for the vacating of the judgment of foreclosure and sale. Although the Supreme Court, Kings County, granted the motion to the extent of substituting the corporation as a defendant, it denied the branch of the motion seeking to vacate the judgment. The Appellate Division, Second Department, affirmed the lower court's ruling. While "a notice of pendency serves to establish constructive notice of an action [citations omitted]", the corporation "failed to establish…that it lacked actual notice of the open and unsatisfied mortgage at the time of the conveyance or of the plaintiff's claim [citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01478.htm.

Partition

The owner of real property in Kings County died intestate. There were six distributees of his Estate, three of whom conveyed their interests to a corporation, which then brought an action to partition and sell the property. The Supreme Court, Kings County, dismissed the action without prejudice to bring a proceeding for the same relief in the Surrogate's Court, as an administrator had been appointed for the Estate. The Appellate Division, Second Department, reversed and remitted the matter for consideration of the Plaintiff's motion for summary judgment. According to the Appellate Division,

> *"[c]ontrary to the Supreme Court's determination, dismissal of this action was not warranted on the ground that the Surrogate's Court issued letters of administration…When a property owner dies intestate, title to real property automatically vests in his or her distributees as tenants in common [citations omitted]. This vesting by decedent occurs by operation of law at the time of the decedent's death, regardless of any failure to appoint an administrator or to file new deeds [citation omitted], or, if an administrator is appointed, without the necessity for any act by the administrator [citation omitted]… [The corporation], as the alleged holder of a 50% interest in the subject property as a tenant in common with the defendants, had the right to maintain this action…in the Supreme Court, Kings County [citations omitted]."*

LCD Holding Corp. v. Powell-Allen, 2022 NY Slip Op 01447, decided March 9, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01447.htm.

Title Insurance

The Plaintiffs, whose property abutted two public streets, were litigating the ownership and use of a driveway with an adjoining owner. They sought covered under their title insurance policy for the possible lack of access to and from their property and sought to recover legal fees and expenses incurred and to be incurred in the litigation with the adjoining owner. The Appellate Division, Second Department, affirmed the dismissal of the action by the Supreme Court, Westchester County. The title insurance policy issued to the Plaintiffs excepted the encroachment of the driveway encroachment onto adjacent property, as shown on a survey, and the title insurer "demonstrated that the plaintiffs have a legal right of access to the property because it abuts a public street [citation omitted]." Pierot v. Chicago Title Insurance Company, 2022 NY Slip Op 01057, decided February 16, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_01057.htm.

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