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 144 Barrow Street LLC v. Board of Managers of the 130 Barrow Street Condominium, 2022 NY Slip Op 30601, decided February 22, 2022, the Petitioner sought a license to perform work on the Respondent's adjoining property. The Petitioner and Respondent had previously executed five prior licensing agreements, which provided for a $2,000 a month licensing fee. The last agreement, on March 19, 2021, required that the Petitioner reimburse the Respondent for certain additional professional fees. The Supreme Court, New York County, granted the license to access the Respondent's property, required the payment of a licensing fee of $2,000 a month during the duration of the license, and ordered that the Petitioner reimburse reasonable attorneys', architects', engineering and design fees incurred by the Respondent in connection with the license after March 19, 2021. According to the Court,

> *"[t]he parties do not dispute that the license sought in this petition is another amendment to the SOE ['Support of Excavation Agreement']. As such, the clear terms of the agreement between the parties do not prohibit respondent's entitlement to professional fees since March 19, 2021 [citation omitted]. The Court additionally finds that respondent has not shown why the Court should deviate from the parties' unambiguous terms and order petitioner to pay fees incurred prior to that date [citation omitted]…"*

This case is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30601.pdf.

Condominium/Common Charge Liens

A condominium's board of managers sought to enforce a common charge lien against a commercial unit operated as a garage. The unit owner had not paid assessments levied to enable work to be done on the lobby, and for air conditioning, roof exhaust fan and sidewalk and for other repairs and improvements, and to fund capital reserves. The unit owner asserted that it was not responsible for that part of these costs which related solely to the residential units. The Supreme Court, New York County denied the Plaintiff's motion for summary judgment and the Defendants' motion to dismiss. The Court found that the Plaintiff had not provided a breakdown of the amounts charged to the Unit Owner and the Defendant had not established that the common charge lien was willfully exaggerated under Lien Law Section 39 ("Lien willfully exaggerated is void"). Baxter Street Condominium v. 125 Vertical Parking Group, LLC, 2022 NY Slip Op 30798, decided March 10, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30798.pdf.

Condominiums/Common Elements/Easements

A board of managers agreed to grant an easement allowing a unit owner for $600,000 to enable that owner to alter and use part of the roof and a hallway, both of which are common elements. The amount to be charged was to be applied by the condominium to repair the water tank on the building's roof. All unit owners, except for the Plaintiff, agreed to an amendment to the condominium's Declaration authorizing the easement. (The By-laws require the vote of no less than 66 2/3 % of the unit owners in number and in common interest to amend the Declaration). The Plaintiff, alleging that the easement was improperly granted since it affected the common elements, sought a preliminary injunction preventing the unit owner benefitting from the easement from building permanent structures on the roof and from making permanent alterations to areas in question. Finding that the Plaintiff "falls short of demonstrating a likelihood of success on the merits", the Supreme Court, New York County, denied the Plaintiff's motion for a preliminary injunction.

According to the Court, "[t]he exclusive rights afforded to [the unit owner] do not hinder or encroach upon the easement rights of plaintiff, or of any other unit owner in the Building" and Real Property Law ("RPL") Section 339-i ("Common elements") states, in part, that "this subsection ["4"] shall not be deemed to prevent some unit or units from enjoying substantially exclusive advantages in a part or part of the common elements…" Therefore, "[t]he board rightfully provided [the unit owner] an exclusive advantage to the Building's common elements in the form of an easement agreement, and this easement agreement does not strip anyone else of their rights to the common elements."

Further, since "neither party has presented evidence as to the types of permanent structures or common element alterations…the court [was] not convinced that irreparable harm will occur if a preliminary injunction is not granted." The Court also noted that if it issued an injunction, the board would have to refund the purchase price and "find alternative options to pay for the roof tank repair…and the Building would no longer be in a self-sufficient state." Iwashiro v. Board of Managers of the Museum Building, A Condominium, 2022 NY Slip Op 30654, decided March 1, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30654.pdf.

Contracts of Sale/Apportionments/Real Estate Taxes

Following a real estate tax audit, the Defendant, which had sold the affected real property to the Plaintiff in 2016, received a refund for tax years prior to the closing. The Seller, a limited liability company, was alleged to have deposited the check and then dissolved. The Plaintiff sued, claiming that it was entitled to the refund. Under the Purchase and Sale Agreement between the parties, real estate taxes and assessments were to be apportioned "on the basis of the fiscal year for which assessed", and any real estate tax refund or credit "attributable to the fiscal tax year during which the Closing Date occurs [they] shall be apportioned between Seller and Purchaser." Representations and warranties in the PSA merged into the deed. However, the Bill of Sale stated that the Seller conveyed

> *"all of the assets and all of Seller's rights, whether at common law or otherwise, claims, including the proceeds of any claims which may or may not be assignable, and causes of action arising out of any transaction occurring on or prior to the date hereof with respect to the premises."*

The Supreme Court, New York County, granted the Defendants' motion to dismiss the complaint. According to the Court,

> *"[t]he PSA provisions provide that real estate taxes shall be apportioned based upon the fiscal year in which they were assessed [citation omitted]. To the extent that the PSA refers to refunds [of real estate taxes] issued after closing, it only applies to those attributable to the fiscal year of the closing [citation omitted]. Here the parties do not dispute that the tax assessment being refunded was assessed prior to the fiscal year of the closing. To read the broad language of the Bill of Sale as assigning claims relating to the apportionment of real estate taxes from earlier fiscal years would render the apportionment provisions meaningless…Moreover, the plain language of the Bill of Sale concerns claims related to the premises [and] the entitlement to a refund runs to the person who paid the tax, rather than the property upon which the tax is assessed."*

69 Pinehurst LLC v. Sixty Nine Pinehurst Avenue Associates LLC, 2022 NY Slip Op 30681, decided March 1, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30681.pdf.

Forgery/Laches

In 2009, property in Brooklyn owed by Segun Olowofela and Godfrey Olowofela, as tenants in common, was purportedly conveyed for no consideration to Godfrey alone. Several years later Godfrey sold the property to 1822 Nostrand Realty, LLC ("Realty"). Segun claimed that his signature on the 2009 deed was forged, and he sought to have the deed set aside or to have a constructive trust imposed. The Supreme Court, Queens County, dismissed the complaint insofar as it sought that relief. The Appellate Division, Second Department, reversed, holding that Realty's motion for summary judgment should have been denied. According to the Appellate Division,

> *"…accepting the premise…that the defense of laches is available in an action concerning an allegedly forged deed [citations omitted], Realty LLC did not meet its prima facie burden of demonstrating the bar of laches as a matter of law. In light of the plaintiffs' deposition testimony as to when they first learned of the alleged 2009 forged deed, it cannot be said as a matter of law that the plaintiffs inexcusably delayed in asserting a claim to the property [citations omitted]. Indeed, the plaintiffs made Godfrey aware of their claim to the property [only] prior to the sale to Realty LLC."*

Olowofela v. Olowofela, 2022 NY Slip Op 02424, dated April 13, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02424.htm.

Historic Buildings/Town of Bedford

The Appellate Division, Second Department, reversing a judgment of the Supreme Court, Westchester County, held that the enactment of the Town of Bedford's Local Law No. 1-2017, the "Historic Building Preservation Law of the Town of Bedford", did not violate procedural due process. Local Law No. 1-2017, amending a 2003 Historic Building Preservation Law of the Town, prohibits owners of designated "Historic Buildings" from demolishing or making substantial alterations to such a building and requires the Town Board to designate certain historic buildings as a "Tier 1 Historic Building." For a substantial alteration to be made to a Tier 1 Historic Building which cannot be done "as-of-right", the building inspector first refers the application for such work to the Town's Historic Building Preservation Commission.

According to the Appellate Division, the Petitioners, the owners of a property designated a Tier I Historic Building,

> *"…failed to identify any constitutionally protected property interest that was implicated in the enactment of the 2017 local law and, thus, the petitioners/plaintiffs were not entitled to a hearing prior to the enactment of that law [citations omitted]. Contrary to the petitioners/plaintiffs' contention, the 2017 local law did not require property owners to submit to warrantless searches of their properties in order to challenge a property's classification or inclusion on the Survey [of Historic Buildings adopted as part of LL No. 1-2017]."*

Matter of Santomero v. Town of Bedford, 2022 NY Slip Op 02552, decided April 20, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02552.htm.

Joint Tenancies/Leases

The attorney-in-fact for Kathleen Martinis, the joint tenant of property she owned with the Petitioner, entered into a lease with the Respondent. The Petitioner asserted that the lease was entered into without his knowledge or consent. After Ms. Martinis died the Petitioner, claiming he was the surviving joint tenant, sought to terminate the lease. The District Court of Suffolk County, Sixth District, denied the Respondent-tenant's motion to vacate the previously granted judgment of possession and warrant of eviction.

RPL Section 240-c ("Joint tenant severance") provides that a joint tenancy may be severed, and the joint tenants will then hold title as tenants in common, if a written instrument "that evidences the intent to sever the joint tenancy" is recorded before the death of the severing tenant. In this case, "the fact that [the lease] was not recorded prior to the death of Kathleen Martinis [invalidates] any claim that by granting the lease the petitioner's right to survivorship was thereby terminated." Therefore, the Petitioner "succeeded to full ownership of the property, free and unencumbered" by the lease. Harmon v. Misholy, 2022 NY Slip Op 22102, decided April 8, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_22102.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 Red Hook 160, LLC v. Borough Construction Group, LLC, 2022 NY Slip Op 02267, decided April 6, 2022, the Appellate Division, Second Department, in an action brought to compel the submission of a revised itemized statement, reversed an Order of the Supreme Court, New York County, denying the petition and dismissing the proceeding. "The documents [provided by the respondent]…failed to sufficiently set forth 'the items and cost of labor, or the items and cost of materials' [citations omitted]." This case is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02267.htm.

In Matter of Red Hook 160, LLC v. 2M Mechanical, LLC, 2022 NY Slip Op 01794, decided March 16, 2022, the Supreme Court, Kings County, cancelled a mechanic's lien because the lienor's itemized statement did not meet the requirements of Section 38. The mechanic then filed a second mechanic's lien with additional itemization; the Supreme Court cancelled that lien, holding that the second lien could not be filed after the first lien was cancelled under Section 38. The Appellate Division, Second Department, reversed the lower court's Order and denied the Respondent's motion to cancel the mechanic's lien. According to the Appellate Division, Section 38 "…does not prohibit a lienor from filing a new lien on the same claim following such cancellation [citation omitted], and the courts have generally recognized that the timely filing of a successive lien on the same claim is permissible to cure an irregularity [citations omitted]." This case is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_01794.htm.

Lien Law/Public Improvements/"Pay-If-Paid"

The City of New York engaged Dewberry Engineers, Inc. ("Dewberry") to inspect homes for asbestos, lead paint, and structural issues. Dewberry subcontracted lead paint inspections to the Plaintiff under an agreement including a "pay-if-paid" provision; the Plaintiff would be paid only when Dewberry was paid by NYC. The Supreme Court, New York County, granted Dewberry's motion for summary judgment dismissing the Plaintiff's claims based on the pay-if-paid provision. The Appellate Division, First Department, affirmed the lower court's ruling. According to the Appellate Division, although the pay-if-paid provision is "void and unenforceable as against public policy [citations omitted]", since the Supreme Court had dismissed the cause of action to foreclose on a public improvement lien, the "plaintiff no longer had any Lien Law rights…"

Further, the Plaintiff could not file a private mechanic's lien. Although the inspections were performed with the homeowners' consent, there was no contractual relationship between the Plaintiff and the homeowners, and the work performed was not "labor for the improvement of real property", as required by Lien Law Section 3 ['Mechanic's lien on real property']." Entech Engineering, P.C. v. Dewberry Engineers, Inc., 2022 NY Slip Op 02360, decided April 12, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02360.htm.

Mortgage Foreclosures/Abandonment

Under subsection (c) ("Default not entered within one year") of Civil Practice Law and Rules ("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 PennyMac Corp. v. Weinberg, 2022 NY Slip Op 02010, decided March 23, 2022, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Kings County, and dismissed the complaint as abandoned. According to the Appellate Division,

> *"…the plaintiff failed to take steps to initiate proceedings for the entry of a default judgment against the defendants within one year after their default in the action, and has set forth no reasonable excuse for said failure [citation omitted]…The defendants' participation in a settlement conference did not result in a waiver of their right to seek dismissal pursuant to CPLR 3215(c) since they did not actively litigate…or participate in the action on the merits [citations omitted]. Moreover, the defendants' failure to move to vacate their default in answering the complaint or appearing in this action did not operate as a waiver of their right to seek dismissal of the complaint pursuant to CPLR 3215(c) [citations omitted]."*

This case is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02010.htm.

Mortgage Foreclosures/Default Judgments

The Defendant opposed the foreclosing Plaintiff's motion for a judgment of foreclosure and sale and moved to vacate his defaults, claiming that a foreclosure advisory firm assisting him had failed to do so and then went out of business. The Supreme Court, Queens County, denied the Plaintiff's motion, vacated its default orders and granted the Defendant leave to serve a late answer. The Appellate Division, Second Department, reversed the lower court's Order, granted the Plaintiff's motion and denied the Defendant's motion. According to the Appellate Division,

> *"…the defendant failed to provide any evidence that the two default orders entered in this action were the result of fraud, mistake, inadvertence, surprise, or excusable neglect that would warrant vacatur [under CPLR Section 5015, "Relief from judgment of order") in the interest of substantial justice [citations omitted]…[Further], the defendant's conclusory and unsubstantiated claim of law office failure does not establish a reasonable excuse for his default [citations omitted]. Moreover, the record demonstrates a pattern of willful default and neglect by the defendant over a two-year period, during which he was served with legal notices related to the action that he ignored [citations omitted]."*

Bank of New York Mellon Trust Co. N.A. v. Hsu, 2022 NY Slip Op 02523, decided April 20, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02523.htm.

Mortgage Foreclosures/Notices - RPAPL Section 1304

The Appellate Division, Second Department, reversed the grant of the foreclosing Plaintiff's motion for summary judgment and granted the Defendants' motion for summary judgment dismissing the complaint because the Plaintiff had not established its strict compliance with the notice requirements of Section 1304 ("Required prior notices"). According to the Appellate Division, "the plaintiff failed to establish that it sent a 90-day notice individually addressed to each defendant in separate envelopes, as required by the statute [citation omitted]. Instead…the notice was mailed in a single envelope jointly to both defendants." Deutsche Bank National Trust Company v. Loayza, 2022 NY Slip Op 02392, decided April 13, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02392.htm.

In U.S. Bank N.A. v. Hinds, 2022 NY Slip Op 02150, decided March 30, 2022, the Appellate Division, Second Department, reversed the Supreme Court, Kings County's grant of the Plaintiff's motion for summary judgment because additional material was sent in the same envelope as the Section 1304 notice. An additional notice stated that the Section 1304 notice was for information only if the obligation was discharged or subject to an automatic stay in a bankruptcy. This case is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02150.htm.

A similar, recent ruling of the Appellate Division, Second Department, involving the including of additional material with the Section 1304 notice, is HSBC Bank USA, N.A. v. Jahaly, 2022 NY Slip Op 02254, decided April 6, 2022, posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02254.htm.

The Appellate Division, Second Department, also held in Wells Fargo Bank, N.A. v. Calvin, 2022 NY Slip Op 01837, decided March 16, 2022, that the failure to move to vacate a default in appearing or answering a complaint precludes raising compliance with Section 1304 as a defense. This case is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_01837.htm.

A similar, recent ruling of the Appellate Division, Second Department, involving a Defendant who had not answered the complaint or appeared in the action, held that the defense that the Plaintiff failed to comply with notice requirements of Section 1304 "is waived unless it is raised in a defendant's answer or a motion for leave to amend the answer [citation omitted]." Wells Fargo Bank, N.A. v. Malik, 2022 NY Slip Op 02039, decided March 23, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02039.htm.

Mortgage Foreclosures/Notices/RPAPL Section 1306

RPAPL Section 1306 ("Filing with Superintendent") requires that "[e]ach lender, assignee or mortgage loan servicer shall file [electronically] with the superintendent of [the Department of] financial services within three business days of the mailing of the notice required by [RPAPL Section 1304]" certain information regarding the borrower and the loan as delineated in subparagraph 2 of Section 1306. Further, "[a]ny complaint served in a proceeding initiated pursuant to [Article 14] shall contain, as a condition precedent to such proceeding an affirmative allegation that at the time the proceeding is commenced, the plaintiff has complied with the provisions of this section."

In USA Residential Properties, LLC v. Jongebloed, 2022 NY Slip Op 01835, decided March 16, 2022, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Suffolk County, because the complaint for the foreclosure action "did not contain an allegation that the plaintiff complied with RPAPL 1306." This case is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_01835.htm.

Mortgage Foreclosures/One-Action Rule

RPAPL Section 1301 ("Separate action for mortgage debt") states, in part, that "[w]hen final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff…and has been returned wholly or partly unsatisfied".

In HSBC Bank USA, N.A. v. Kading, 2022 NY Slip Op 02255, decided April 6, 2022, an action to foreclose a mortgage commenced in January 2010 was marked "Disposed" on September 24, 2015. In January 2016, the holder of that mortgage started a second foreclosure. The Plaintiff asserted that it had intended the 2010 action to be dismissed; the Supreme Court, Richmond County dismissed the 2010 action due to inactivity but granted the Defendants' motion for summary judgment dismissing the complaint on the grounds that the new action was barred by RPAPL Section 1301. The Appellate Division, Second Department, reversed and remitted the matter to the Supreme Court for a determination on the merits. According to the Appellate Division, "the defendants were not prejudiced by having to defend against more than one action, and the plaintiff's failure to strictly comply with RPAPL 1303(3) should have been disregarded as a mere irregularity [citations omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02255.htm.

Mortgage Foreclosures/Standing

The Plaintiff sought a declaration under RPAPL Article 15 ("Action to compel the determination of a claim to real property") that the Defendant, which claimed to hold a mortgage, had no enforceable interest. The Supreme Court, Livingston County, granted the Defendant's motion to dismiss. The Appellate Division, Fourth Department, reinstated the cause of action and held that the Defendant had no interest in the property. The original promissory note, endorsed to a non-party, was lost and "it is also undisputed that defendant is not now, and has never been, in physical possession of the original promissory note." According to the Appellate Division,

> *"…defendant lacks noteholder standing because the promissory note upon which defendant relies is neither endorsed in blank nor specially endorsed to defendant [citations omitted]…Moreover, even had the note been endorsed in blank or specifically endorsed to defendant, defendant's admitted failure to physically possess the original note would independently preclude it from foreclosing as a noteholder."*

The Court further noted that UCC-3-804 ("Lost, destroyed or stolen instruments") "is available only to the 'owner' of a lost instrument" and the defendant, not being the assignee or holder of the note, "is not and never has been the 'owner' of that note for purposes of UCC 3-804." Hummel v. Cilici, LLC, 2022 NY Slip Op 01690, decided March 11, 2022, is posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_01690.htm.

Mortgage Foreclosures/Statute of Limitations

In 2009, the foreclosing Plaintiff mailed the Defendant a "Notice of Intent to Accelerate", which advised the Defendant that the failure to pay the sums due within thirty days "may result in acceleration of the sums secured by the [m]ortgage". This was followed by an "Acceleration Warning (Notice of Intent to Foreclose)" advising that if the default was not cured within thirty days the Plaintiff "intends to accelerate the maturity of the loan." In a letter sent to the Defendant in 2016, the Plaintiff advised that it was de-accelerating the loan.

A mortgage foreclosure was commenced in 2016; the Defendant asserted as an affirmative defense that the statute of limitations had expired. The Supreme Court, Suffolk County, granted the Plaintiff's motion for summary judgment. The Appellate Division, Second Department, affirmed the lower court's order. According to the Appellate Division,

> *"…neither the June 5, 2009 letter nor the November 24, 2009 effectively accelerated the mortgage debt, as these letters merely discussed acceleration as a possible future event [citations omitted]. Moreover, the April 26, 2016 letter from the plaintiff purporting to de-accelerate the loan does not establish that the loan had been validly accelerated [citation omitted]."*

JP Morgan Chase Bank, N.A. v. Garcete, 2022 NY Slip Op 02119, decided March 30, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02119.htm.

Mortgage Foreclosures/Surplus Monies/Statute of Limitations

In a surplus money proceeding following the sale of the property in the foreclosure of a first mortgage, the Supreme Court, Richmond County, confirmed the determination of the Special Referee that the claim of JP Morgan Chase Bank, N.A., the holder of the junior home equity mortgage, to the surplus funds was barred by the statute of limitations. The Appellate Division, Second Department, reversed and remitted the matter to the Supreme Court for the distribution of surplus funds to JP Morgan. A letter from JP Morgan to the borrowers informing them that the loan would be accelerated and the mortgage would be foreclosed if their default was not cured "did not reflect a 'clear and unequivocal' election to accelerate [citation omitted], but rather, merely, 'discuss[ed] acceleration as a possible future event [citations omitted]."

The Appellate Division further noted that "JP Morgan was not required to demonstrate that it had appeared and participated in the action to foreclose the primary mortgage, in order to avoid the dismissal of its surplus money claim as time-barred [citations omitted]. Moreover…RPAPL 1361 ["Application for surplus"] did not require JP Morgan to appear in the action to foreclose the primary mortgage prior to the entry of the judgment of foreclosure and sale, in order to preserve its claim to surplus funds [citations omitted]." Wells Fargo Bank, N.A. v. Breuer, 2022 NY Slip Op 02037, decided March 23, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02037.htm.

Mortgages/Forgery/Equitable Mortgage

In 2001, Defendants Julia Mentore and Nitza Jones acquired real property in Brooklyn. Joseph Nykian, as attorney-in-fact for Mentore under a power of attorney executed in 2001, and Jones mortgaged the property to Ameritrust Mortgage Bankers, Inc. In 2009, Mentore purportedly executed to Nykian a second power of attorney with expanded authority. Nykian, as attorney-in-fact, then purportedly conveyed Mentore's interest to Jones who, in turn, mortgaged the property to MERS, as nominee for Lend America. The proceeds of the 2009 mortgage were applied to satisfy the 2001 mortgage. In 2010, Jones and Nykian were indicted for, among other offenses, residential mortgage fraud and forgery. The indictment alleged that they, acting in concert, forged the 2009 power of attorney and stole Mentore's interest in the property. They pleaded guilty.

Mentore, a Defendant in the foreclosure of the 2009 mortgage, asserted that as early as February 2014 she had advised the then holder of the 2009 mortgage that her signature on the 2009 power of attorney was forged, that the transfer of her interest to Jones was invalid, and of the convictions of Jones and Nykian.

In September 2014 the 2009 mortgage was assigned to the Plaintiff, who commenced an action in 2015 for a judgment declaring that it held an equitable mortgage on at least one-half of the property. The Supreme Court, Kings County, while dismissing the complaint and declaring the 2009 mortgage null and void, granted the Plaintiff an equitable mortgage based on the doctrine of equitable subrogation for the amount of the pay-off of the 2001 mortgage. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division, "[a]s the defendant established that the 2009 deed was obtained by false pretenses and is void, the mortgage based on that deed…is also void [citations omitted]." Selene Finance, L.P. v. Jones, 2022 NY Slip Op 02145, decided March 30, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02145.htm.

Mortgages/Tenants-by-the Entirety/Equitable Mortgage

Gladys Pajuelo executed a note and mortgage on property she owned with her husband as tenants by the entirety. Her husband did not sign the note or the mortgage. The Plaintiff sought to have its mortgage declared an equitable mortgage on the husband's interest. The Supreme Court, Kings County, denied the Plaintiff's motion for a default judgment against the husband's interest. According to the Appellate Division, Second Department, affirming that ruling, "[w]here spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot bind the entire fee [citations omitted]." Nationstar Mortgage, LLC v. Pajuelo, 2022 NY Slip Op 02006, decided March 23, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02006.htm.

Notice of Pendency

The Plaintiff asserted that he held a membership interest in four limited liability companies, each of which owned real property. He alleged that he had not received distributions from any of the LLCs and sued, asserting, among other causes of action, breach of contract and fiduciary duty, for an accounting and for a constructive trust. A notice of pendency was filed against each property. The Supreme Court, New York County, directed that the notices of pendency be cancelled and decreed that that the Plaintiff pay the costs and attorneys' fees incurred by the Defendant relating to the filing and cancellation of the lis pendens under subsection (c) of CPLR Section 6514 ("Motion of cancellation of Notice of Pendency") and 22 NYCRR Sections 130-1.1 (a) and (c) ("Costs; sanctions") of the Rules of the Chief Administrator of the Courts. According to the Court,

> *"[a]lthough denominated as a cause of action for a constructive trust, the Court finds plaintiff is seeking to enforce his membership interests in the LLC Defendants, which has no bearing on title, possession, or use of the Subject Properties [citation omitted]. Further, the Court finds that the complaint fails to adequately plead a cause of action for constructive trust, since plaintiff failed to allege that he transferred his right, title, or interest to the Subject Properties in reliance on a promise from defendant. Thus, the filing of the notices of pendency was improper [citations omitted], and mandatory cancellation of said notices is warranted. CPLR 6514 ["Motion for cancellation of notice of pendency] (a) and (b) provides, in relevant part, that a notice of pendency is subject to mandatory cancellation …[if] the plaintiff has not commenced or prosecuted the action in good faith."*

Baharestani v. Baharestani, 2022 NY Slip Op 30898, decided March 15, 2022, is posted at http://www.nycourts.gov/reporter/pdfs/2022/2022_30898.pdf.

Partnerships

Title was held by two individuals as tenants in common. However, "…circumstantial evidence showed that they considered the partnership [they had formed] to be the true owner…" The property was listed on the partnership's tax returns, rental income from the property was included on the partnership's tax returns, and rents were deposited and disbursements were made from the partnership's bank account. The Appellate Division, Second Department, affirming the grant of the Plaintiff's motion for partial summary judgment in an action to enforce a contract of sale entered into by the partnership, held that the Defendants, the tenants in common, treated the property as a partnership asset and, therefore, one of the partners had the authority to sell the property on behalf of the partnership. Partnership Law Section 23 ("Conveyance of real property of the partnership") "recognizes that title to real property of the partnership may be held in the name of one partner, in the name of some but not all of the partners, or in the name of all the partners [citation omitted]."

138-140 West 32nd Street Associates LLC v. 138-140 West 32nd Street Associates, 2022 NY Slip Op 02488, decided April 14, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02488.htm.

Recording Act/Good-Faith Lender

A purchase money mortgage executed in 2000 by Hendrika Vandermulen, held by the foreclosing Plaintiff, was unrecorded when a mortgage on the same property was executed in 2003 by an attorney-in-fact for Eugene John Sheehan, a subsequent owner of the real property, to Homecomings Financial Network, Inc. ("Homecomings"). The Supreme Court, Suffolk County, held that the Plaintiff's mortgage was the superior lien, finding that the holder of the 2003 mortgage was not a good-faith lender for value under New York's Recording Act, RPL Section 291. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division,

> *"the title report provided to Homecomings…alerted that [the] 'devolution of title…to Hendrika Vandermulen…must be obtained and considered and any questions arising therefrom must be satisfactorily disposed of'…BNY Mellon [the assignee of the 2003 mortgage] failed to submit evidence that any inquiry was made…Under these circumstances, the record supports the Supreme Court's determination that Homecomings…was not a good-faith lender for value, as Homecomings possessed facts that would have lead [sic] a reasonable, prudent lender to make inquiries of the circumstances of [that] transaction [citation omitted]."*

WMC Mortgage Corp. v. Vandermulen, 2022 NY Slip Op 02451, dated April 13, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_02451.htm.

Streets/Highway-by-User

The Supreme Court, Suffolk County, held that the designation of eight roads by the Town Board of the Town of Riverhead as public highways by reason of their use under Highway Law Section 189 was "arbitrary and capricious." The Court also ruled that evidence supported the Board's finding that four other roads were public highways under Section 189. Highway Law Section 189 ("Highways by use") states that "[a]ll lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to a width of at least three rods [49.5 feet]."

The Appellate Division, Second Department, found, as to the roads held to have been improperly designated as public highways, although "there was some evidence that the Town performed certain services on the subject roadways, including snow removal, pothole repair and drain cleaning…there was no evidence showing that those eight roadways had a public use in excess of 10 years." The Appellate Division held, for the same reason, that the designation of the other four roads as public highways was "arbitrary and capricious and lacked a rational basis." Matter of Woodson v. Town of Riverhead, 2022 NY Slip Op 01797, decided March 16, 2022, is posted at http://www.nycourts.gov/reporter/3dseries/2022/2022_01797.htm.

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