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…The licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as the result of the entry."

In West End Ave Development LLC v. Ngamwajasat, 2023 NY Slip Op 31656, decided May 15, 2023, the Petitioner, intending to construct a building on land adjoining the Respondents' property, filed a petition under RPAPL Section 281 seeking a license to access the Respondents' property. On January 22, 2021, the Petitioner's counsel, by e-mail, advised Respondents' counsel that the pending petition for a Section 881 license would be withdrawn. The Respondents' counsel responded, by email, on January 25, 2025, that she would draft the stipulation of discontinuance. However, the Respondents' counsel interposed an answer counterclaiming for professional fees (including fees incurred in opposing the Section 881 petition) and expenses relating to the engagement of an architect.

The Petitioner contended that the Respondents were not entitled to any fees because a license was not granted or, if fees were to be awarded, they should be limited to actual fees incurred up to and until. January 22, 2021, when Respondents' counsel was informed that the petition for a Section 881 license would be withdrawn.

The Supreme Court, Kings County, held that the Petitioner was liable to pay the Respondents' architectural fees but only its legal fees incurred prior to January 25, 2021. According to the Court,

> *"[Section 881] is sufficient statutory authority to award reasonable attorneys' fees as well [as] architectural fees as a condition of a license, where the circumstances warrant it…Once the petitioner asked the respondents for a license and then commenced a special proceeding to obtain same by a court order, it was to be expected that the respondents would engage an architect to review, assess and inform them of the petitioner's plan and the respondents' potential options. It was also perfectly reasonable for the respondents to engage counsel to help them navigate and negotiate a reasonable license agreement.*
>
> ……
>
> *"However, as of January 25, 2021, the respondents had reneged on an agreement to draft a stipulation of discontinuance...Therefore, in determining the reasonableness of the attorney's fees generated in negotiating the RPAPL 881 license, no attorneys' fees are compensable on or after January 25, 2021, regardless of whether they were incurred in opposing the petition or in prosecuting the counterclaim."*

This decision is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31656.pdf.

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Civil Rights Law/Anti-SLAPP Statute

Chapter 250 of the Laws of 2020 amended Civil Rights Law Sections 70-a and 76-a and Civil Practice Law and Rules ("CPLR") Section 3211 to, according to the Memorandum In Support of Legislation (Assembly Bill No. 5991A/Senate Bill No. 00052A), "extend the protection of New York's current law regarding Strategic Lawsuits Against Public Participation ('SLAPP Suits')." Further, according to the Memorandum, "[t]he amendment will protect citizens from frivolous litigation that is intended to silence their exercise of the rights of free speech and petition about matters of public interest."

In 215 West 84th St Owner LLC v. Bailey, 2023 NY Slip Op 03188, decided June 13, 2023, a real estate developer commenced an action against counsel for a holdout tenant in response to statements made by counsel asserting that Plaintiff had harassed his client to get the tenant to vacate his apartment, enabling the Plaintiff to develop the property for luxury condominiums. The Supreme Court, New York County, granted the Defendants' motion to dismiss the complaint; the Appellate Division, First Department, modified the lower court's Order to grant the Defendants' request for an award of attorneys' fees. According to the Appellate Division,

> *"Defendants are entitled to recover costs and attorneys' fees against plaintiff pursuant to the anti-SLAPP statute…Plaintiff's action involved 'public petition and participation' [under Civil Rights Law Section 76-a], as defendants' statements, which concern a landlord/tenant dispute between a large real estate developer and a sole holdout tenant, constitute comments and an exercise of free speech in connection with an issue of public interest, rather than a purely private matter [citations omitted]."*

The matter was remitted to the Supreme Court to determine the amount to be awarded. This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_03188.htm.

Condominiums/Limited Common Elements/RPAPL Section 2001

RPAPL Section 2001 ("Actions to enforce certain covenants restricting use of land…") "applies to actions to enforce a covenant or agreement restricting the use of land or to recover damages for breach thereof…2. An action to enforce the covenant or agreement by compelling the removal or alteration of a structure, or to recover damages for breach of the covenant or agreement…cannot be maintained unless it is commenced (a) before the expiration of two years from the completion of the structure concerned…"

The Plaintiff in Schoen v. Board of Managers of 255 Hudson Condominium, 2023 NY Slip Op 02746, decided May 18, 2023, owns a condominium unit with an exclusive right of access to the backyard of the condominium's property, which yard is a limited common element appurtenant to the Plaintiff's unit. The Supreme Court, New York County, denied the Plaintiff's motion seeking a declaratory judgment that the Board's counterclaims, seeking removal of a structure in the yard, were barred by RPAPL Section 2001. The Appellate Division, First Department, affirmed the lower court's ruling. According to the Appellate Division,

> *"Defendant's counterclaims are not time barred by RPAPL 2001(2). Defendant is not seeking to enforce a negative easement to restrain plaintiff from having a structure on her land [citations omitted]…Since plaintiff does not own the land where the structure is constructed, RPAPL 2001(2) is not applicable to the action…"*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02746.htm.

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Contracts of Sale/Injunctions

Plaintiff, the purchaser under a contract of sale for an apartment building, sued the Defendant-seller for breaching the contract and moved for a preliminary injunction restraining the Defendant from entering into new leases or modifying or renewing existing leases in the building without the Plaintiff's consent, as required by the contract. The Supreme Court, New York County, denied the Plaintiff's motion.

According to the Court, the Plaintiff was seeking to enforce a contractual provision even though the Plaintiff had not shown that the contract had been breached. Second, as the contract provides for monetary relief to the Plaintiff in the event of the seller being in breach, "a preliminary injunction is unnecessary [citations omitted]. Finally, maintaining the status quo is consistent with…the contract, which requires defendant seller to continue to manage and lease the property similarly to how it was being operated when the parties executed the contract [citations omitted]." 321 W16 Property Owner, LLC v. 321 W. 16th, LLC, 2023 NY Sip Op 31722, decided May 17. 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31722.pdf.

Contracts of Sale/Specific Performance/Inclusionary Air Rights

A developer contracted to purchase Inclusionary Air Rights for a development in Manhattan. However, after the seller sought to increase the price to be paid for the Rights, the developer sued for specific performance and other relief. Reversing the ruling of the Supreme Court, New York County, the Appellate Division, First Department granted the Plaintiff's motion for summary judgment on its claims for specific performance, injunctive relief and attorneys' fees. The Defendant was directed to "obtain a new certificate of eligibility [for a zoning bonus] from [New York City's Department of Housing Preservation and Development] and convey that certificate to plaintiff."

The Appellate Division held that while "there is no automatic contractual right to specific performance", this contract afforded the Plaintiff-purchaser "the right…to seek specific performance of Seller's obligations under this Agreement." According to the Appellate Division, "[a] court reviewing an agreement that provides for specific performance should accord deference to the parties' manifest intent, unless enforcement of the provision would produce an inequitable result."

301 East 60th Street LLC v. Competitive Solutions LLC, 2023 NY Slip Op 02842, decided May 30, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02842.htm.

Contracts of Sale/Time of the Essence

The seller's attorney scheduled the closing of title for May 15, 2019, "time being of the essence" to close. According to the purchaser, after receiving notice of the closing date, its managing member had a telephone call with the seller's President in which the managing member was assured that the purchaser would not be held in default if the purchaser did not appear at the closing on May 15. On May 15, the seller's attorney, in a letter to the purchaser's attorney, advised that the closing had taken place, that the purchaser had defaulted, that the contract was terminated, and that the contract deposit was being retained by the Seller as liquidated damages. The purchaser commenced an action for specific performance, to recover damages, and to foreclose a vendee's lien. The Supreme Court, Kings County, granted the Defendant-seller's motion for summary judgment on the cause of action for a declaration, among other things, that the buyer was in breach. The Appellate Division, Second Department, reversed the lower court's Order. According to the Appellate Division,

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> *"…'[i]t is well settled, in New York, that an oral waiver of the time for the sale of real property will be given effect' [citations omitted]…[The assertion], made under the penalties of perjury, that [the managing member] was assured by the defendant's president that the plaintiff would not be held in default in the event that it failed to close the transaction on May 15, 2019, was sufficient to raise a triable issue of fact as to whether the defendant's president made a statement…that operated as a waiver of the defendant's right to enforce the May 15, 2019 deadline for the closing."*

LG723, LLC v. Royal Development, Inc., 2023 NY Slip Op 02653, decided May 17, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02653.htm.

Contracts of Sale/Zoning/Sidewalks

The Plaintiff-seller and the Defendant-buyer executed a contract for the sale of vacant land. The buyer sent a letter to the seller averring that "the zoning will require the Buyer to widen the sidewalk to 15 feet, which will then shorten the property by 3 feet. Hence, Buyer will not be purchasing what the contract represented the property to be. Accordingly, the Seller is in breach of contract, and the Buyer is demanding the return of the contract deposit…" The Plaintiff sought a finding that the Defendant had breached the contract and a declaratory judgment directing the contract deposit to be forfeited to the Plaintiff, as well awarding Plaintiff its legal fees. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment.

In the contract, no representations or warranties were made as to the width of the sidewalk or as to "compliance…with any laws, rules, ordinance or regulations of any government authority", and the property was being sold subject to all existing zoning regulations. Therefore, the Court found "that defendant's counterclaims are utterly refuted by the sales agreement as they are solely premised on the zoning violation, which is not covered by the sales agreement." Plaintiff was also awarded its attorneys' fees and costs for the litigation, as provided for in the contract. EQR-Gowanus Development LLC v. Yael Garden LLC, 2023 NY Slip Op 31594, decided May 11, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31594.pdf.

Cooperatives/Conversion to an HDFC

On June 20, 2013, the Office of New York State's Attorney General issued a revised memorandum captioned Requirements for Exemption Application for Conversions of [Private Housing Finance Law] Article II ["Limited Profit Housing Companies"] Cooperatives to PHFL Article XI ["Housing Development Fund Companies"] Cooperatives." The memorandum states, in part, that

> *"[t]he Department of Law has determined that the conversion of a Mitchell-Lama mutual housing company to a cooperative Housing Development Fund Company…is governed by [the] New York General Business Law ('GBL') Section 352-e ["Real estate syndication offerings"] and 13 N.Y.C.R.R. Part 18 ("Regulations Governing the Conversion of Occupied Residential Property to Cooperative Ownership. Notwithstanding, a [Mitchell-Lama] Cooperative proposing to convert to an HDFC Cooperative may provide shareholders with a Proxy Statement in lieu of an offering plan, so long as the minimum disclosure requirements set forth herein are met."*

The memorandum can be found at the following link: Requirements for Exemption Application For Conversions of PHFL Article II Cooperatives to PHFL Article XI Cooperatives (6-20-2013) (ny.gov)

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In Fowley v. James, 2023 NY Slip Op 31903, decided June 6, 2023, the Attorney General's Office issued a non-action letter permitting a building in Brooklyn, the Board of which sought to convert its Mitchell-Lama cooperative building to a HDFC cooperative, to hold a shareholder vote based on the filing and issuance of a proxy statement without the filing of an offering plan. Petitioners, owners of units in the building, brought an Article 78 petition to stop the shareholders' vote, claiming that the determination not to require the filing of an offering plan was contrary to applicable law. The Supreme Court, New York County, denied the Petitioners' motion for a preliminary injunction and ordered that voting on the conversion take place. According to the Court,

> *"[t]he General Business Law does not require that changing the classification of a building requires that there be an offering plan. In fact, the statute is clear that an offering plan is necessary only in a 'public offering or sale'. Because there is no public offering at issue, no offering plan was required for the Attorney General to review."*

This decision is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31903.pdf.

Leases/Yellowstone Injunction

A landlord served a notice of default on its tenant, alleging that the tenant violated the lease by using the basement of the leased space as a residence. The lease allows for only commercial use. The tenant, seeking time to cure its alleged default, sought a Yellowstone injunction staying and tolling the cure period. The Supreme Court, New York County, granted the Plaintiff's motion for a Yellowstone injunction, contingent upon residential use ceasing within seven days of notice of entry of the Court's Order. According to the Court,

> *"…plaintiff established each of the requirements for a Yellowstone injunction. Plaintiff is a tenant occupying the Premises pursuant to a commercial lease. Defendants served a notice of default…Plaintiff's motion was made prior to the expiration period provided in the notice of default and plaintiff is willing and able to cure the alleged default by ceasing any residential use of the Premises."*

Marks v. Ventura, 2023 NY Slip Op 31861, decided June 1, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31861.pdf.

Lien Law/Foreclosure of a Mechanic's Lien

In an action to foreclose a mortgage, a mechanic's lienor, which is a Defendant in the action, asserted crossclaims to foreclose its mechanic's liens. The Defendant-borrower moved for summary judgment dismissing the crossclaims, arguing that the second and third liens filed were invalid because they increased the amount claimed in the mechanic lienor's first filed lien. The Supreme Court, New York County, denied the motion. According to the Court,

> *"Section 10 ["Filing of notice of lien"] of the Lien Law places no limitation on the number of liens that may be filed within the applicable period, in this case eight months, and sufficient under Lien Law Sections 9 ["Contents of notice of Lien"] and 23 ["Construction of article"]…Here, Borrower failed to conclusively establish any of the liens are willfully exaggerated…The mere fact that [the lienor] filed successive liens with overlapping costs does not ipso facto mean it is seeking double recovery for the same costs. Both the second and third liens are referred to as 'corrected' and 'amended' as opposed to new or independent. Further, these successive liens refer to the initial lien and specify the differences in the latter two."*

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Malayan Banking Berhad, New York Branch v. Park Place Development Primary LLC, 2023 NY Slip Op 31569, decided May 5, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31569.pdf.

Lien Law/Itemized Statement

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…a statement in writing which shall set forth the items of labor and/or materials and the value thereof which make up the amounts for which he claims a lien." If the lienor fails to comply or delivers an insufficient statement, a Court may issue an Order directing the lienor to deliver an itemized statement within a time period specified in the Order.

In Matter of 125 Broad CHP, LLC v. Fine Craftsman Group, LLC, 2023 NY Slip Op 31549, decided May 8, 2023, the Petitioner served the Respondent-lienor with demands for itemized statements for each of three mechanic's liens the Respondent had filed. In response, the Petitioner received a two-page statement which did not itemize any item of labor or materials, accompanied by 212 pages of exhibits consisting of applications for payment, invoices, worksheets and diagrams.

The Supreme Court, New York County, finding that the lienor's response was insufficient, ordered the Respondent to serve upon the Petitioner "fully and properly itemized statements of labor and materials that support the amounts claimed to be owed…" within 10 days of service upon the Respondent of a copy of the Court's Order with notice of entry. Failing to do so, the liens would be vacated, cancelled and discharged. According to the Court,

> *"[t]he statement supplied by the respondent here is not sufficiently itemized to permit the petitioner to check the claim, and does not meet the requirements of Lien Law Section 38 [citations omitted]. The 200-plus pages of exhibits that were attached to the respondent's statement are not self-explanatory, do not clarify what items of labor and materials are in dispute or how the lien is supported, and do not seem to correlate to the amounts claimed in the lien. The respondent otherwise does not explain how these materials support its claims or where such support would be found, and neither the petitioner nor the court should be required to 'make out a statement' from the voluminous materials [citations omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31549.pdf.

Lien Law/"Permanent Improvements"

The Appellate Division, First Department, affirming a ruling of the Supreme Court, New York County discharging a filed mechanic's lien, held that the work for which the lien was filed, the erection of scaffolding and a sidewalk shed, were not "permanent improvements" of real property and, therefore, were "outside the scope of labor and materials protected under the Lien Law. [citations omitted]." Matter of W 54-7 LLC v. Intersystem S&S Corp., 2022 NY Slip Op 06189, decided November 3, 2022, is reported at 175 N.Y.S. 3d 8976 and posted at https://www.nycourts.gov/reporter/3dseries/2022/2022_06189.htm.

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Mortgage Foreclosures/Necessary Parties

A mortgage foreclosure commenced in 2009 named as defendants, among others, the heirs of the then deceased mortgagor. In 2020, grantees of the mortgaged property moved to intervene and, upon grant of their motion, for the complaint to be dismissed for the failure to join the Estate of the mortgagor as a necessary party. The Supreme Court, Kings County, granted leave to intervene but denied the branch of the motion to dismiss the complaint. The Appellate Division, Second Department, modified the lower court's Order by adding a provision that the denial of the motion to dismiss was without prejudice to renew and remitted the case to the Supreme Court for a determination of whether a representative of the Estate could be summoned and, if not, whether the action could nevertheless proceed. According to the Appellate Division,

> *"[d]ismissal of an action for nonjoinder of a necessary party 'is only a last resort' [citations omitted]. When a necessary party has not been made a party and is 'subject to the jurisdiction' of the court, the proper remedy is not the dismissal of the complaint, but rather for the court to order that the necessary party be summoned [citations omitted]...In any event, when jurisdiction over an absent necessary party 'can be obtained only by [that party's] consent or appearance, the court, when justice requires, may allow the action to proceed without [that party]', upon consideration of various enumerated factors (CPLR 1001[b]…]."*

U.S. Bank Trust N.A. v. Germoso, 2023 NY Slip Op 02704, decided May 17, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02704.htm.

Mortgage Foreclosures/Notices/RPAPL Section 1304

The Appellate Division, Second Department, reversed the ruling of the Supreme Court, Suffolk County, denying the Defendants' cross-motion for summary judgment dismissing the complaint and granted the Defendants' motion, holding that the foreclosing Plaintiff had failed to comply with the requirements of RPAPL Section 1304 ("Required prior notices"). Two identical copies of the notice, one for each Defendant, jointly addressed to both Defendants, were mailed in the same envelope. HSBC Bank USA, N.A. v. Schneider, 2023 NY Slip Op 02869, decided May 31, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02869.htm.

In Bethpage Federal Credit Union v. Hernon, 2023 NY Slip Op 02638, decided May 17, 2023, the Supreme Court, Suffolk County, denied the foreclosing Plaintiff's motion for summary judgment, holding that the Plaintiff had failed to establish that it had complied with the requirements of RPAPL Section 1304. The Appellate Division, Second Department, affirmed the lower court's ruling. According to the Appellate Division, the affidavit submitted on behalf of the Plaintiff

> *"was insufficient to establish that the RPAPL 1304 notices were properly mailed, because [the affiant's] affidavit did not contain proof of the plaintiff's standard office mailing procedure at the time the RPAPL 1304 notices allegedly were sent [citations omitted]. Although [the affiant] averred that loan records reflected that the plaintiff followed its standard practice with respect to mailing the RPAPL 1304 notices, those records were not attached to [the] affidavit, and as such, [the affiant's] statements regarding them constitute inadmissible hearsay, lacking probative value [citations omitted]. Further, the plaintiff did not provide proof of the actual mailing, such as affidavits of mailing or domestic return receipts with attendant signatures."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02638.htm.

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Mortgage Foreclosures/Standing/Allonges

The Appellate Division, Second Department, reversing the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Richmond County, held that the foreclosing Plaintiff had failed to establish, prima facie, that it had standing. "[T]he plaintiff did not demonstrate that the purported allonge, which was a piece of paper completely separate from the [consolidated] note, 'was so firmly attached thereto as to become a part thereof, as required by UCC 3-202(2)' [citations omitted]." UCC Section 3-202 ("Negotiation") states that "(2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly attached thereto as to become a part thereof." Wells Fargo Bank, N.A. v. Mitselmakher, 2023 NY Slip Op 02709, decided May 17, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02709.htm.

In a similar decision, the Supreme Court, New York County, held that the foreclosing Plaintiff had failed to establish, prima facie, that it had standing when the action was commenced because the endorsements to the note secured by the mortgage, in two allonges, revealed "no discernable evidence of firm attachment from a visual inspection." 1S REO Opportunity 1, LLC v. Harlem Premier Residence LLC, 2023 NY Slip Op 31748, decided May 19, 2023, is posted at https://www.nycourts.gov/reporter/pdfs/2023/2023_31748.pdf.

In Deutsche Bank Trust Company Americas v. McDonald, 2023 NY Slip Op 02494, decided May 10, 2023, the Appellate Division, Second Department, held that the Supreme Court, Suffolk County, "properly determined that the plaintiff established, prima facie, that it had standing to commence this action by attaching a copy of the note endorsed in blank to the complaint when the action was commenced [citations omitted]". This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02494.htm.

Mortgage Foreclosures/Statute of Limitations/CPLR Section 205-a

New York's Foreclosure Abuse Prevention Act, Chapter 821 of the Laws of 2022, added Civil Practice Law and Rules ("CPLR") Section 205-a ("Termination of certain actions related to real property"), effective December 30, 2022. Under Section 205-a, as applicable, "(i)f an action …is timely commenced and is terminated in any other manner than by a voluntary discontinuance … the original plaintiff…may commence a new action upon the same transaction…within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period…"

In Islam v. 495 McDonald Avenue, LLC, 2023 NY Slip Op 02501, decided May 10, 2023 by the Supreme Court, Kings County, the purchaser under a contract of sale brought an action for specific performance in 2001. On several occasions the case was marked off the calendar but then restored to active status. The notice of pendency expired. In 2015, the property was transferred and a second action for specific performance, alleging breach of contract and a fraudulent conveyance, was brought by the same Plaintiff against its seller and the transferee. In 2019, when the 2001 action was to commence, the Plaintiff obtained an Order allowing the discontinuance of the 2001 action without prejudice. The Defendants moved to dismiss the complaint as being time-barred. The Supreme Court, Kings County, denied the Defendants' motion; the Appellate Division, Second Department, reversed the lower court's ruling and granted the Defendants' motion. According to the Appellate Division,

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> *"[i]n this case, CPLR 205(a) was not available to extend the limitations period beyond the termination of the 2001 action, since that action was terminated by means of a voluntary discontinuance…Contrary to the plaintiff's contention, a discontinuance sought by a plaintiff and effectuated by a court order under CPLR 3217(b) ["Voluntary discontinuance"] is no less voluntary within the meaning of CPLR 205(a) than a discontinuance effectuated by a stipulation or notice under CPLR 3217(a) [citations omitted]."*

This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02501.htm.

In HSBC Bank USA, N.A. v. IPA Asset Management, LLC, 2023 NY Slip Op 23151, decided May 16, 2023, the Supreme Court, Suffolk County, dismissed an action commenced in 2022 to foreclose a mortgage, holding that it was time-barred. Prior actions brought in 2008 and 2012 were discontinued. The Defendant contended that the prior actions accelerated the loan and that under the Foreclosure Abuse Prevention Act the voluntary discontinuance of the prior actions did not reset the statute of limitations. The Court concurred.

The Plaintiff argued that the prior discontinuances de-accelerated the loan and reset the statute of limitations, and, if the Foreclosure Abuse Prevention Act were to be applied, it should only be applied prospectively; that the statute would be unconstitutional if it were applied retroactively.

The Court held that the Act applied retroactively, to "all actions…in which a final judgment of foreclosure and sale has not been enforced", that its retroactive application would not be an unconstitutional taking of the Plaintiff's property, that it would not be violative of due process under the Fourteenth Amendment to the United States Constitution, and that it would not violate the Constitution's contract clause (U.S. Constitution, Article I, Section 10). This decision is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_23151.htm.

Mortgage Foreclosures/Surplus Funds/Abandoned Property

Surplus finds resulting from a real estate tax foreclosure were transferred to New York City's Department of Finance. It was asserted that the Department intended to deem the funds abandoned and release them to the Office of New York State's Comptroller pursuant to Abandoned Property Law Sections 600 ("Unclaimed or Unknown Owner Court Funds") and 602 ("Payment of abandoned property"), which provide, in relevant part, as follows:

> *"Section 600.1 The following unclaimed property shall be deemed abandoned property. (a) Any moneys… shall have remained in the hands of…the commissioner of finance of the city of New York, for three years…"*

> *"Section 602.1 In such succeeding month of April, and on or before the tenth day thereof…the commissioner of finance of the city of New York shall pay or deliver to the state comptroller all abandoned property specified in paragraph (a) of subdivision one of section 600, which was so abandoned as of the first day of January next preceding."*

The Supreme Court, Queens County, enjoined the Department of Finance from releasing the funds to the Comptroller's Office. The Court found that there were multiple claimants to the surplus funds, including the Estate of the prior owner, and "[i]inasmuch as the owner of the surplus funds is known and the funds are being actively pursued, the funds are not abandoned property as set forth in the Abandoned Property Law." NYC 1998-2 Trust v. Ugochukwu, 2022 NY Slip Op 34554, decided October 24, 2022, was posted to the New York Slip Opinion Service on June 8, 2023 at https://www.nycourts.gov/reporter/pdfs/2022/2022_34554.pdf.

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Similarly, in Wells Fargo Bank, N.A. v. Wai Chiu Leong, 2022 NY Slip Op 34556, decided December 19, 2022. posted to the New York Slip Opinion Service on June 8, 2023, the Supreme Court, Queens County, granted a preliminary injunction enjoining New York City's Department of Finance from releasing post-foreclosure surplus funds to the State Comptroller's Office as abandoned funds. According to the Court, a Defendant "has sought to reject the referee's Report of Sale in order to avoid certain disbursements and increase the amount of surplus funds, thus demonstrating that the funds are not abandoned." This decision is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_34556.pdf.

In addition, the Supreme Court, Queens County, issued a preliminary injunction in Live Well Financial, Inc. v Robinson, 2022 NY Slip Op 34553, decided June 21, 2022, posted to the New York Slip Opinion Service on June 8, 2023, holding that the issuance of letters testamentary to a possible heir of the prior owner "would make it unfair and unjust for the money to be described as 'abandoned property." This decision is posted at https://www.nycourts.gov/reporter/pdfs/2022/2022_34553.pdf.

Mortgages/Joint Tenants

In 2007 title to certain property was deeded to Marlene and Marjory as joint tenants with rights of survivorship. In 2009 a deed transferring the property to Marlene, individually, was drafted but Marjorie failed to execute the deed at or prior to a closing at which the mortgage being foreclosed was executed by Marlene to the Plaintiff's assignor. The Supreme Court, Queens County, held that the mortgage was null and void and granted Marjory's motion to dismiss the complaint. The joint tenancy was not severed because the 2009 deed was not recorded prior to Marlene's death, as required under Real Property Law Section 240-c ("Joint tenancy severance"); therefore, Marjory owned the property as the surviving joint tenant, free and clear of the mortgage. Champion Mortgage Company v. Antoine, decided July 29, 2019, was posted to the New York Slip Reporting Service on May 9, 2023 at https://www.nycourts.gov/reporter/pdfs/2019/2019_34957.pdf.

Right of Access/Appropriated Lands

Land appropriated by New York State's Department of Transportation ("DOT") for the construction of a highway (that was never built) included parcels identified on Appropriation Maps as Parcels 723 and 734. Taken together, those two parcels formed a right of way to Bay Boulevard, a public street. In 2009 the Plaintiff acquired land abutting Parcel 734. The Plaintiff, having been informed by the DOT that it did not have the right to access Parcels 723 and 734 for access to Bay Boulevard, commenced a quiet title action. The Supreme Court, Queens County, granted the Plaintiff's motion for summary judgment, holding that the Plaintiff had the "absolute" right of ingress and egress over and through Parcels 723 and 734. The Appellate Division, Second Department, affirmed the lower court's Order, as modified to delete the provision that the Plaintiff's right of access was "absolute". According to the Appellate Division,

> *"[t]he plaintiff established its prima facie entitlement to judgment as a matter of law…since the respective appropriation maps did not label Parcels 723 and 724 'without access' [citations omitted]. [However,] [a]n abutting landowner's right to access a State highway is compensable, but not absolute [citations omitted]."*

Inwood Land Holdings, Inc. v. State of New York, 2023 NY Slip Op 02500, decided May 10, 2023, is posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02500.htm.

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Tax Foreclosures

In three cases, each captioned Matter of Tax Foreclosure Action No. 53, the Supreme Court, Kings County, vacated judgments foreclosing certain tax liens and deeds executed after entry of those judgments by New York City's Department of Finance to the Neighborhood Restore Housing Development Fund Corporation pursuant to New York City's Third Party Transfer Program.

The Third Party Transfer Program was established by New York City's Local Law 37 of 1996. Under certain circumstances, it authorizes the Commissioner of Finance to deed tax delinquent properties deemed distressed to third parties designated by the City's Department of Housing Preservation and Development. Following entry of a judgment of foreclosure, there is a four-month period in which to redeem a property by paying all tax arrears or by entering into an installment payment agreement. After expiration of the redemption period, the Commissioner of Finance may transfer title to the property.

In these cases, the Appellate Division, Second Department, reversed the rulings of the lower court, and held that the motions to vacate the judgments and the deeds to Neighborhood Restore were time-barred because of the failure to move to vacate the judgments of foreclosure or to take any action to redeem the property within the redemption period. Therefore, the Court found that there was no basis to consider whether any of the properties was not distressed. These decisions, all dated May 17, 2023, at 2023 NY Slip Op 07211, 2023 NY Slip Op 02712 and 2023 NY Slip Op 02713, are posted at https://www.nycourts.gov/reporter/3dseries/2023/2023_02711.htm, https://www.nycourts.gov/reporter/3dseries/2023/2023_02712.htm, and https://www.nycourts.gov/reporter/3dseries/2023/2023_02713.htm.

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