Adjoining Owners/Bamboo

It has been unlawful to plant running bamboo, an invasive species of plant, on any property in New York State since 2015. In the 1990s, the Defendants planted a grove of running bamboo on their property in Shelter Island. Asserting causes of action based on nuisance, negligence and trespass, the Plaintiffs, the owners of an adjoining property, sought damages to cover the cost of excavating and removing bamboo that had spread to their property from the Defendants' property and to pay for the installation of a barrier to prevent the future spread of bamboo. The Plaintiffs also sought compensation for the resulting loss of the use of their property. The County Court of Suffolk County, although finding that the "plaintiffs have not met their burden of proof as to the value of the loss of use of plaintiffs' real property causally connected to the spread of [the] bamboo from defendants' property…", found that "defendants are responsible for the eradication of the bamboo…and the installation of a barrier to prevent the spread in the future." The Courts awarded the Plaintiffs $57,149.38 for bamboo eradication and to install a barrier.

As to the claim of private nuisance, "…the bamboo spread onto plaintiffs' property was a substantial, intentional, unreasonable interference with plaintiffs' right to use and enjoy their property and [that] it was caused by the failure of defendants to act to prevent the migration of the bamboo from their property onto plaintiffs' property." The Court also held that the encroachment of the bamboo constituted a trespass, and that "the defendants were negligent in failing to take timely action to prevent the spread of bamboo onto neighboring properties."

The causes of action were not barred by the statute of limitations. The negligence cause of action ran from when the damages became "apparent"; the Plaintiffs first became aware of the bamboo encroachments in 2017. The nuisance and trespass claims were not barred "because of the continuing nature of the condition."

The Defendants did not establish that their land benefitted from a prescriptive easement. There was "no evidence that any of the parties were aware of the encroachment of the defendants' bamboo onto plaintiffs' property…prior to 2017…[E]ncroachment of bamboo roots underground not visible hardly amounts to a 'use' of real property or [a use which is] 'open and notorious.'" Sultan v. King, 2021 NY Slip Op 21227, decided August 19, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_21227.htm.

Contracts of Sale/Caveat Emptor

The certificate of occupancy for a barn on property in the Town of Farmington was voided because the barn encroached onto adjoining land. After the sale of the land with the barn, the purchaser was ordered by the Town to relocate or remove the barn. The Plaintiff knew of the encroachment before the closing but he did not know that the certificate of occupancy had been voided. He believed that any issue as to the encroachment had been resolved by a boundary line agreement. The purchaser commenced an action, claiming that the Defendants-sellers had committed fraud in representing that there was a certificate of occupancy. The dismissal of the cause of action by the Supreme Court, Ontario County, was upheld by the Appellate Division, Fourth Department. According to the Appellate Division,

> *"[h]ere, even assuming, arguendo, that defendants' alleged representations in the property condition disclosure statement constituted active concealment, we conclude that defendants met their initial burden on the motion by establishing that those representations did not 'thwart' plaintiff's ability to conduct his own investigation into the property [citation omitted] inasmuch as the status of the certificate of occupancy 'was readily ascertainable from the public record' [citation omitted]…Further, an action for fraud requires, inter alia, 'justifiable reliance by the plaintiff [citation omitted]. Here, defendants met their initial burden of establishing the absence of justifiable reliance on defendants' alleged representations by submitting evidence that plaintiff was aware, prior to closing, that the barn encroached on the adjoining property [citation omitted]."*

Chapman v. Jacobs, 2021 NY Slip Op 04794, decided August 26, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_04794.htm.

Judgment Creditors/Divorce

Laura Tiozzo and Pascal Dangin, as husband and wife, purchased a condominium unit in 2003. In 2004, they entered into a stipulation of divorce, which, that year, was incorporated by reference into the judgment of divorce. Under the stipulation, Tiozzo was granted the "sole ownership and exclusive use and occupancy" of the unit, and Dangin was to convey his interest to Tiozzo if doing so would not "cause a termination or modification of the terms of the existing mortgage." In 2019, Tiozzo demanded that Dangin deed his interest to her; he refused to do so.

In 2018, Dangin executed a confession of judgment in favor of Lenz Capital Group LLC ("Lenz") for $1,948,909.50, which judgment was entered in New York County. In July 2019, Tiozzo brought an action seeking a ruling that she held a 100% equitable interest in the unit and that the Lenz judgment was of no legal effect as to her interest. The Supreme Court, New York County, denied Tiozzo's motion for summary judgment on her causes of action seeking a declaration that she held all equitable interests in the condominium unit and an injunction barring Dangin and Lenz from creating, perfecting or enforcing any lien against the unit. The Appellate Division, First Department, reversed and granted Tiozzo's motion. According to the Appellate Division, the stipulation of divorce

> *"divested Dangin of his rights in the subject property. Under CPLR article 52 a judgment creditor may only seek to enforce its money judgment against a judgment debtor's property…[T]he determining factor as to whether a judgment debtor's interest can constitute property vulnerable to a judgment creditor is whether it 'could be assigned or transferred' [citation omitted]. In the stipulation of divorce Dangin gave up any right to assign or transfer to a third party an interest in the subject property. The subject property is therefore beyond the reach of Lenz [citations omitted].*

As to application of the statute of limitations, "[a]s there was no deadline for delivery of a quitclaim deed under the stipulation of divorce, the court correctly concluded that Tiozzo's conduct in this regard would not provide a basis for Lenz to assert a statute of limitations or equitable estoppel defense against Tiozzo's claims."

Defenses of laches or of unclean hands did not apply. "…Tiozzo's interest in the subject property vested when the judgment of divorce was entered. Her decision to delay her demand for a quitclaim deed from Dangin was pursuant to a right provided to her under the stipulation of divorce…Accordingly, Tiozzo is entitled to what she bargained for in settling her divorce: a 100% interest in the subject property that is beyond the reach of Dangin, and of Lenz." Tiozzo v. Dangin, 2021 NY Slip Op 04739, decided August 19, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04739.htm.

Leases/Pandemic

Under New York City Administrative Code Section 22-1005 ("Personal liability provisions in commercial leases"), also known as the "Guaranty Law", as amended effective September 28, 2020, "[a] provision in a commercial lease…that provides for one or more natural persons…to become, upon the occurrence of a default or other event, wholly or partially personally liable for [amounts] owed by the tenant under such agreement…shall not be enforceable against such natural persons if…[certain conditions, including the following] are satisfied…(a) The tenant was required to cease serving patrons food or beverage for on-premises consumption or to cease operation under executive order number 202.3 issued by the governor on March 16, 2020; and…2. [t]he default or other event causing such natural persons to become wholly or partially personally liable for such obligation occurred between March 7, 2020 and March 31, 2021, inclusive."

Due to the pandemic, after transitioning the operation of its restaurant to take-out and delivery service, the tenant notified its landlord in April 2020 that it would vacate and surrender the premises in six months, and it stopped paying rent in May 2020.The lessor sued to enforce the Defendant's personal guarantee. The Defendant cross-moved to dismiss based on the Guaranty Law and counterclaimed for damages under the "Commercial harassment law", Administrative Code Section 22-902.

The Supreme Court, New York County, found that the temporary use of the premises for take-out and delivery did not frustrate the overall purpose of the lease, eliminating defenses of impossibility or frustration of purpose. The Court also ruled that although the guarantee was not contained in the lease itself, but was in a separate document, Section 22-1005 applies to guarantee provisions "in and related to commercial lease agreements", not merely guarantees contained in leases. The Court further held that the amendment to Section 22-1005, expanding the Section to include guarantees of commercial leases, could be retroactively applied, and that Section 22-1005 did not violate the Contracts Clause of the United States Constitution.

The Court dismissed the Defendant's claim of harassment under Section 22-902 for lack of standing. The Section grants a right of action for harassment to commercial tenants but not to their guarantors. 45-47-49 Eighth Avenue LLC v. Conti, 2021 NY Slip Op 50691, decided July 23, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_50691.htm.

Lien Law/Trust Funds (Errata)

Current Developments dated August 9, 2021 reported on Matter of Mayrich Construction Company v. Oliver L.L.C., decided on March 15, 2010 but only posted to the New York Official Reports Slip Opinion Service on June 17, 2021. In that decision, the Supreme Court, New York County, ordering production of a verified statement under Lien Law Section 76, found that that funds advanced under two acquisition mortgage loans were held in trust by the borrower for the payment of improvements. It was pointed out by a reader of the Bulletin that later in 2010 the Judge issued, upon re-argument, a Superseding Decision, Order and Judgment vacating his prior Order and dismissing the Petition, that this determination was affirmed in 2011 by the Appellate Division, First Department (90 A.D.3d 509), and that an appeal to the Court of Appeals was withdrawn and discontinued in 2013 (20 N.Y.3d 1008).

According to the Judge in his Superseding Order, "...because the parties to the mortgage agreements did not intend to create a trust fund for the benefit of contractors who do work at the property or to require any portion of the proceeds to be used to fund improvements to the property, respondent has no contractual duty to provide petitioner a statement of the use of the proceeds of the loan."

According to the Appellate Division, "[t]he two mortgages…were obtained for the purpose of acquiring property and air rights, respectively. Neither contains an express promise by respondent to improve property. Accordingly, no funds were received by respondent 'under or in connection with a contract for the improvement of real property,' as required by Lien Law Section 70(1), and petitioner has not established that the trust provisions of Lien Law article 3-A are applicable."

Mortgage Foreclosures/Certificate of Merit

Civil Practice Law and Rules Section 3012-b ("Certificate of merit in certain residential foreclosure actions"), effective August 20, 2013, requires the complaint in a mortgage foreclosure on owner-occupied property securing a home loan (defined in Real Property Actions and Proceedings Law ("RPAPL") Section 1304) to be accompanied by a certificate of merit signed by the attorney for the plaintiff. The certification must state that the attorney "has reviewed the facts of the case and that, based on consultation with representatives of the plaintiff identified in the certificate and the attorney's review of pertinent documents [such as the note, the mortgage and any assignments], to the best of such attorney's knowledge, information and belief there is a reasonable basis for the commencement of such action and that the plaintiff is currently the creditor entitled to enforce rights under such documents." For the willful failure to comply with the requirements of Section 3012-b, a Court may dismiss a complaint without prejudice or deny to the lender interest, and its costs and attorneys' fees. The Appellate Division, Third Department, in HSBC Bank USA, N.A. v. Sage, 2021 NY Slip Op 04583, decided July 29, 2021, confirmed that Section 3012-b does not apply to this foreclosure, which was commenced in 2009. "[T]he certificate of merit requirement…does not apply to actions commenced prior to August 30, 2013." Chapter 308 of the Laws of 2013 states that Section 3012-b "shall apply to actions commenced on or after such effective date." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04583.htm.

Mortgage Foreclosures/Complaints

RPAPL Section 1302 ("Foreclosure of high cost home loans and subprime loans"), enacted in 2002 and effective April 1, 2003, requires that the complaint in an action to foreclose a high-cost or subprime home loan (as defined in the Banking Law) contain affirmative allegations that the plaintiff "is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note", and that the plaintiff has complied with Banking Law Section 95-a (and any rules and regulations promulgated thereunder) and RPAPL Section 1304. Section 1302 has provided that it "shall be a defense to an action to foreclose a mortgage for a high-cost home loan or subprime home loan that the terms of the home loan or the actions of the lender violate any provision of [Banking Law Sections 6-l or 6-m or RPAPL Section 1304]."

RPAPL Section 1302 was amended effective January 1, 2022 by Chapter 395 of the Laws of 2021. The Chapter changes the caption of Section 1302 to read "Foreclosure of certain residential mortgages" and amends its scope to apply to all "residential mortgage[s] covering a one to four family dwelling", not just to high-cost home loans and subprime loans. The legislation (Senate Bill 05785-A/Assembly Bill 2502-A) can be found at Bill Search and Legislative Information | New York State Assembly (nyassembly.gov).

Mortgage Foreclosures/Intervention

The notice of pendency for a mortgage foreclosure commenced in 2006 expired in 2009. In 2013 the property was conveyed to Quincy St. III Corp. ("Quincy"). In 2015, a new lis pendens was filed for the foreclosure and, in 2017, a judgment of foreclosure and sale was entered. In 2018, Quincy moved for leave to intervene in action and other relief. The Supreme Court, Kings County, denied Quincy's motion to intervene as untimely, and that ruling was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"[h]ere, Quincy moved for leave to intervene approximately five years after the November 2013 conveyance [to Quincy] and approximately seven months after the order and judgment of foreclosure and sale was issued. While it is undisputed that the notice of pendency had lapsed and a new one had not been filed by November 2013 when Quincy purchased the property, it is also undisputed that Quincy had actual notice of the open and unsatisfied mortgage at that time…"*

1077 Madison Street, LLC v. Dickerson, 2021 NY Slip Op 04591, decided August 4, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04591.htm.

Mortgage Foreclosures/Licensed "Debt Collection Agency"

Under Section 20-490 ("License required") of New York City's Administrative Code ("Code"), "[i]t shall be unlawful for any person to act as a debt collection agency without first having obtained a license…" Under Code Section 20-489 ("Definitions"), a "debt collection agency" is defined, in part, as "a person engaged in business the principal purpose of which is to regularly collect or attempt to collected debts owed or due or asserted to be owed or due to another…"

In an action to foreclose a mortgage, the Defendant raised, as an affirmative defense, the Plaintiff's failure to obtain a license to act as a "debt collection agency." The Appellate Division, Second Department, in affirming the Order of the Supreme Court, Queens County, which had entered a judgment of foreclosure and sale, held that the Plaintiff was not required to be so licensed to foreclose on the mortgage. According to the Appellate Division,

> *"'[a]n action to foreclose a mortgage is not an action to recover the mortgage debt from the mortgagor personally, but to collect it out of the land by enforcing the lien of the mortgage' [citations omitted]. Thus, the foreclosure action is properly characterized as an action to enforce a security interest in property, rather than to collect money directly from a debtor [citations omitted]. In any case, to the extent a mortgage foreclosure constitutes debt collection[citation omitted], the plaintiff was not a 'debt collection agency' (Administrative Code Section 20-489[a])…Since the plaintiff is the owner of the subject note, its foreclosure action does not constitute an 'attempt to collect debts owed or due or asserted to be owed or due to another' (id. [emphasis added]; [citations omitted])."*

Citibank, N.A. v. Yanling Wu, 2021 NY Slip Op 04902, decided September 1, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04902.htm.

Mortgage Foreclosures/Necessary Parties

The Supreme Court, Richmond County, denied the foreclosing Plaintiff's motion to vacate the stay imposed on the death of the mortgagor, Janice Miglino ("Miglio" in the caption for the action). The Plaintiff sought to have the caption of the action amended to substitute as Defendants the decedent's known and unknown heirs at law. The Court ordered that the stay remain in effect until the appointment of a representative for the mortgagor's Estate. The Appellate Division, Second Department, reversed and granted the Plaintiff's motion. According to the Appellate Division,

> *"…the plaintiff submitted evidence establishing that Miglino died intestate. Accordingly, since the plaintiff does not seek a deficiency judgment, Miglino's death did not affect the merits of the action, and the Supreme Court should have granted the plaintiff's motion, inter alia, to vacate the automatic stay of the action imposed by the death of Miglino and to amend the caption to substitute for Miglino her known and unknown heirs at law [citation omitted]."*

Wells Fargo Bank, N.A. v. Miglio, 2021 NY Slip Op 04780, decided August 25, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04780.htm.

Mortgage Foreclosures/Notices RPAPL Section 1304

RPAPL Section 1304 ("Required prior notices") requires that "a lender, an assignee or a mortgage loan servicer [commencing] legal action against the borrower, including [a] mortgage foreclosure" send a notice, in the form specified in Section 1304, to the borrower at least ninety days before litigation on a "home loan" is commenced. The Appellate Division, Second Department, reversing entry of a judgment of foreclosure and sale by the Supreme Court, Nassau County, held that the Plaintiff had failed to establish strict compliance with the requirements of Section 1304. According to the Appellate Division,

> *"…the plaintiff failed to establish, prima facie, that the mailing of the RPAPL 1304 notice by first-class mail actually occurred. [The affiant for the Plaintiff, a document management specialist for the loan's subservicer] did not describe a standard office procedure designed to ensure that items are properly addressed and mailed, and did not attach proof of first-class mailing of the RPAPL notice [citations omitted]."*

Federal National Mortgage Association v. Donovan, 2021 NY Slip Op 04748, decided August 25, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04748.htm.

Mortgage Foreclosures/Standing

At a special meeting of shareholders, fifty percent of the Plaintiff's shareholders authorized the corporation to foreclose on a defaulted mortgage it held. The shareholder holding the remaining interest objected and did not attend the meeting. The Appellate Division, First Department, affirming the granting of the Plaintiff's motion for summary judgment and the denial of the Defendants' motion to dismiss the complaint by the Supreme Court, New York County, ruled that the Plaintiff had standing to foreclose the mortgage. The Supreme Court correctly determined that a 'fifty-percent shareholder causing the entity to forego recovery on its only remaining asset goes against every principle of equity.'" True Gate Holding, Ltd. V. Baroukhian, 2021 NY Slip Op 04588, decided July 29, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_04588.htm.

In CitiMortgage, Inc. v. Goldberg, the Appellate Division, Second Department, held in part that the assignee of a consolidated mortgage lacked standing to foreclose because the copy of the consolidated note submitted with the pleadings lacked either an endorsement or an allonge and the mortgage assignment "did not purport to also assign the consolidated note." Therefore, the Supreme Court, Nassau County, should have denied the Plaintiff's motion for summary judgment. However, the Supreme Court properly denied the Defendant-mortgagor's cross-motion for summary judgment; the Defendant "failed to establish, prima facie, that the plaintiff lacked standing [citation omitted]." The decision, 2021 NY Slip Op 04697, decided August 18, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_04697.htm.

Mortgage Foreclosures/Statute of Limitations

The Supreme Court, Suffolk County, granted the Defendant's cross-motion for summary judgment dismissing the complaint in a mortgage foreclosure on the ground that the action was time-barred. The Defendant asserted that the statute of limitations expired in 2014 because the debt was accelerated when a prior foreclosure of the mortgage was commenced in 2008. The Appellate Division, Second Department, citing the February 18, 2021 decision of New York's Court of Appeals in Freedom Mortgage Corp. v. Engel (37 N.Y.3d 1) holding that a lender's voluntary withdrawal of a mortgage foreclosure revokes its election to accelerate absent a statement to the contrary, modified the lower court's Order insofar as it dismissed the complaint. The Appellate Division also affirmed the lower court's denial of the Plaintiff's motion for summary judgment, finding that it had failed to establish strict compliance with the requirements of RPAPL Section 1304 and the notice of default provisions in the mortgage. U.S. Bank N.A. v. Tiburcio, 2021 NY Slip Op 04629, decided August 4, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_04629.htm.

In Wells Fargo Bank, N.A. v. Portu, 2018 NY Slip Op 33999, decided July 27, 2018, an action was commenced in 2016 to foreclose a mortgage as to which a prior foreclosure was dismissed in 2013. The Defendant asserted that the statute of limitations ran on the entire debt from December 9, 2008, the date of the default, and the limitations period therefore expired on December 9, 2014. The Plaintiff countered that it revoked its acceleration of the indebtedness on March 2, 2016, was the date on which its letter to the Defendant purporting to deaccelerate the loan was dated and purportedly mailed, and which was within the six-year limitations period. The Supreme Court, Greene County, dismissed the complaint. According to the Court,

> *"the statute of limitations period began to run on December 10, 2008 and expired on December 10, 2014. Thus, the attempt to de-accelerate the loan on March 3, 2016, was without effect."*

The Court also stated that even if the statute of limitations had not expired before the second foreclosure was commenced, the de-acceleration letters sent by the Plaintiff were not delivered to the Defendant before March 8, 2016, the date which the Plaintiff asserted would apply for application of the statute of limitations. Further, "the notice of de-acceleration, used herein as a scheme to re-start a foreclosure case which was dismissed in 2013 and for a default in 2008, must equally be clear, unequivocal, and give actual notice…Plaintiff failed to do that here."

The Appellate Division, Third Department, affirmed the lower court's ruling in a decision dated January 2, 2020 and reported at 2020 NY Slip Op 00025 and 179 AD3d 1204. While it held that the de-acceleration letter was issued within the period of the statute of limitations,

> *"[a]lthough the letter expressly 'reinstates the [l]oan as an installment loan,' it does not demand the resumption of monthly payments or provide monthly invoices for payment due. Instead, the letter specifies that defendant remained in default for failing to make the required monthly payments since November 1, 2008 and offers to discuss 'a variety of homeowner's assistance programs'…In our view, this proffer does not constitute a valid de-acceleration , as plaintiff simply put defendant on notice of its obligation to cure an eight-year default and then promptly embarked on the notices required to initiate a second foreclosure action. It follows that plaintiff's second action was properly dismissed as untimely."*

The Supreme Court's decision was posted on August 3, 2021 at https://www.nycourts.gov/reporter/pdfs/2018/2018_33999.pdf.

The Appellate Division's decision is posted at http://www.nycourts.gov/reporter/3dseries/2020/2020_00025.htm.

Mortgages/Erroneous Satisfaction

In an action to foreclose the first executed and recorded (but satisfied of record) mortgage on the Defendant's property, the Supreme Court, Suffolk County, denied the Defendant's motion to vacate the judgment of foreclosure and to enjoin the scheduled sale. The Court granted the Plaintiff's cross-motion to expunge the satisfaction; the Plaintiff claimed that the satisfaction should have been recorded against a second mortgage it held on the same property. Although the debt secured by the first mortgage was not paid in full, and it was not alleged that the mortgagor relied on the recorded satisfaction, the Appellate Division, Second Department, ruled that the motion to expunge the mortgage should have been denied. The affidavit of an officer of the Plaintiff's loan servicer, averring that she was familiar with the Plaintiff's business records and asserting that the satisfaction was prepared in error. However, the affiant's "assertions as to the contents of those [business] records were inadmissible since the records themselves were not submitted with her affidavit [citations omitted]. Therefore, her averments were inadmissible hearsay…" U.S. Bank National Association v. Kandra, 2021 NY Slip Op 04679, decided August 11, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04679.htm.

Pandemic/Evictions and Mortgage Foreclosures

Chapter 417 of the Laws of 2021 was signed into law on September 2, 2021. As stated in Governor Hochul's Press Release issued September 2, this legislation provides

> *"a new moratorium on COVID-related residential and commercial evictions for New York State which is in effect until January 15, 2022. Under the new law, all protections under the Tenant Safe Harbor Act [Chapter 127 of the Laws of 2020] for residential tenants who are suffering financial hardship as a result of the pandemic will remain in place, along with new protections on commercial evictions…*
>
> *"The legislation places a moratorium on residential foreclosure proceedings so that homeowners and small landlords who own 10 or fewer residential dwellings can file hardship declarations with their mortgage lender, other foreclosing party, or a court that would prevent foreclosure.*
>
> *"The legislation's moratorium on commercial evictions and commercial foreclosure proceedings apply to small businesses with 100 or fewer employees that demonstrate a financial hardship…"*

On September 9, 2021, to implement Chapter 147, the Chief Administrative Judge of the Courts of New York State issued Administrative Order 262/21 setting forth, effective immediately, "procedures and regulations [which] shall apply to the conduct of foreclosure matters before the New York State Unified Court System."

Chapter 417 (Senate Bill S50001/Assembly Bill A40001), the Governor's Press Release, and AO 262/21 can be obtained at:
Bill Search and Legislative Information | New York State Assembly (nyassembly.gov), Governor Hochul Signs New Moratorium on COVID-related Residential and Commercial Evictions into Law, Effective Through January 15, 2022 (ny.gov), and AO262.pdf (nycourts.gov).

Recording Act/Erroneous Satisfaction

The foreclosure of the Plaintiff's mortgage was commenced in 2012. A satisfaction of that mortgage was recorded, purportedly in error, in 2013. The notice of pendency for the foreclosure expired in May 2015. The mortgage held by a Defendant was executed on July 14, 2015 and recorded on July 30, 2015. The Plaintiff sought to have the discharge of its mortgage expunged and its mortgage reinstated, asserting that the satisfaction was "recorded in error" and the debt was still "due and owing". The Defendant-mortgagee's answer stated that it had relied on the recorded satisfaction in making its mortgage loan.

The Appellate Division, Second Department, affirmed an Order of the Supreme Court, Kings County, granting the motion of the Defendant-mortgagee to dismiss the complaint as to it and for a judgment that the Plaintiff's mortgage, if reinstated as a lien on the property, was subject and subordinate to the lien of the latter mortgage. The Defendant-mortgagee's answer stated that it had relied on the recorded satisfaction in making its mortgage loan.

According to the Appellate Division, the Defendant's mortgage had priority. It "gave valuable consideration for its recorded mortgage, and…it did not have actual knowledge of the plaintiff's alleged mortgage or knowledge of facts that would have put it on 'inquiry notice' of that mortgage [citations omitted]." Deutsche Bank National Trust Company v. Rose, 2021 NY Slip Op 04907, decided September 1, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04907.htm.

Usury/Mortgage Foreclosure

The Defendant in an action to foreclose a mortgage claimed that her payment of a mortgage broker's commission, a title insurance charge and a fee paid to her attorney at closing rendered the loan usurious. The Supreme Court, Suffolk County, denied the Defendant's motion for summary judgment and the Appellate Division, Second Department, affirmed that ruling. According to the Appellate Division,

> *"[i]f itemized in writing to the borrower, reasonable fees, charges and costs for, among other things, title insurance and legal services are not considered interest on a loan secured by a one-or-two family owner-occupied residence [citation omitted]…[The Defendant] failed to establish, as a matter of law, that the plaintiff entered into the transaction with the usurious intent necessary to support a finding of usury [citation omitted]."*

Zanfini v. Chandler, 2021 NY Slip Op 04681, decided August 11, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_04681.htm.

Zoning Lots/New York City

As previously reported in Current Developments, in the case of Matter of Committee for Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates LLC, the Supreme Court, New York County, on February 13, 2020, ordered New York City's Department of Buildings to "revoke the [building] Permit and compel [the] Owner to remove all floors that exceed bulk permitted under the Zoning Resolution." The Appellate Division, First Department, in an opinion dated March 2, 2021, 144 N.Y.S.3d 1, reversed the ruling of the Supreme Court and dismissed the petition seeking revocation of the building permit. A motion for leave to appeal to the Court of Appeals was denied on September 9, 2021 in a ruling available at 2021 N.Y. LEXIS 1835. No opinion was published.

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