## Equitable Mortgage

The Plaintiff loaned $217,000 to the Defendant and his entity to enable the purchase of property pursuant to a written agreement providing that "when the house will be sold in about 6-8 months, [the Plaintiff] would receive the profit…approximately $400,000..." The Plaintiff asserted that the Defendants had "willfully" failed to sell the property. The Supreme Court, Kings County, granted the Plaintiff's motion for summary judgment on the cause of action to impose an equitable mortgage in the amount of $217,000. According to the Court,

> *"The imposition of an equitable lien is permitted if there is an express or implied agreement that there shall be a lien on specific property [citation omitted]…In this case the agreement clearly spells out the property was intended to secure the loan obligation."*

Gluck v. Gross, 2021 NY Slip Op 31634, decided May 10, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31634.pdf.

## Husband and Wife/Court Ordered Powers of Attorney

Separation agreements entered into by two sets of spouses, which agreements were incorporated into the judgments of divorce, required the husbands to immediately sell, in one matter, or refinance within two years, in the other, their marital residences. When the mortgage was refinanced the wife would transfer title to her husband. The husbands did not sell or refinance the properties. The Supreme Court, Monroe County, in both matters, granted the wives limited powers of attorney to execute all documents necessary to sell their husbands' interests. Scahill v. Stockton, 2021 NY Slip Op 50597, decided April 22, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_50597.htm.

## Leaseholds/"Yellowstone" Injunction

The Appellate Division, First Department, reversed the Supreme Court, New York County's grant of the Plaintiff-tenant's motion for a Yellowstone injunction. One of the requirements for a Yellowstone injunction is that the injunctive relief be requested prior to the termination of the lease but, here, the "plaintiff failed to move before the cure period expired or argue that the cure period has otherwise been tolled." The Appellate court ordered that "accrued rents for the period of time in which the Yellowstone injunction was in effect and continuing rent" be paid. The appellate Division further held that the Plaintiff's defenses to the payment of rent, those being casualty, frustration of purposes and the impossibility to pay rent on account of the Pandemic should have been dismissed. Gap, Inc. v. 170 Broadway Retail Owner, LLC, 2021 NY Slip Op 04115, decided June 29, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_04115.htm.

As noted by the Supreme Court, Kings County, issuance of a Yellowstone injunction must be predicated on an action for a declaratory judgment. Leases entered into in 2010 provided that the tenants waived the right to bring declaratory judgment ac-tions with respect to any lease provision or any notice sent pursuant to the leases. Based on that waiver, the tenants' motion for a Yellowstone injunction was denied. In 2019, the Court of Appeals, in 159 MP Corp v. Redbridge Bedford, LLC (33 NY3d 353), affirmed the ruling of the Appellate Division, Second Department, hold-ing the waiver in these leases was enforceable.

Real Property Law Section 235-h ("Waiver of right to bring a declaratory judgment action"), was enacted December 19, 2019. "Effective immediately", it states that "[n]o commercial lease shall contain any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action with respect to any provision, term or condition of such commercial lease. The inclusion of any such waiver in a commercial lease shall be null and void as against public policy."

Based on the enactment of Section 235-h, the tenants moved to renew their prior motion seeking a Yellowstone injunction. The Supreme Court, Kings County, denied the motion, holding that Section 235-h was not to be applied retroactively. 159 MP Corp v. Redbridge Bedford LLC, 2021 NY Slip Op 31716, decided April 9, 2021, is posted at http://www.nycourts.gov/reporter/pdfs/2021/2021_31716.pdf.

## Lien Law/Trust Funds

Petitioner, a subcontractor engaged by the Respondent, the owner of real property in Manhattan, claimed to be a trust beneficiary of a Lien Law Article 3-A trust and demanded that the Respondent provide a verified statement under Lien Law Section 76 ("Right of beneficiaries to examine books or records and make copies, or to receive statement'). The Petitioner contended that the loan proceeds received by the Defendant under two mortgages were held in trust; the Defendant countered that those funds were used to purchase the property and, therefore, they were not part of a Lien Law trust. The Supreme Court, New York County, held for the Petitioner, requiring that the Respondent provide a verified statement in accordance with Lien Law Section 76. Notwithstanding that the proceeds of the mortgage loans were applied to purchase the property, each mortgage included a Lien Law trust fund clause and, "[b]y entering into such accord, [the Defendant] has clearly agreed that the funds advanced to it by Bank of America would constitute a trust fund to the extent required for the payment of improvements under the Lien Law [citation omitted]." Matter of Mayrich Construction Company v. Oliver L.L.C., 2010 NY Slip Op 34119, decided March 15, 2010, was posted to the New York Official Reports Slip Opinion Service on June 17, 2021 at https://www.nycourts.gov/reporter/pdfs/2010/2010_34119.pdf.

## Lien Law/Willful Exaggeration

The Plaintiff claimed that it was not paid for work to renovate apartments in the Defendants' buildings. The Defendants counterclaimed, seeking, among requested relief, a judgment declaring that the mechanic's lien filed by the Plaintiff was willfully exaggerated. Under Lien Law Section 39-A ("Liability of lienor where lien has been declared void on account of willful exaggeration"), "[w]here in any action or proceeding to enforce a mechanic's lien…the court shall have declared said lien to be void on account of willful exaggeration the person filing the notice of lien shall be liable in damages to the owner or contractor." The Supreme Court, New York County, granted the Plaintiff's motion to dismiss this counterclaim. According to the Court,

> *"…the instant case is not an action to enforce a mechanic's lien…Certainly defendants' assertion that it should not have to wait for plaintiff to bring a claim to foreclose on a mechanic's lien in order to raise a willful exaggeration claim makes practical sense. However, that is not what the Lien Law provides or what the First Department [in Wellbilt Equip. Corp. v. Fireman, 275 AD2d 162 (2000)] has held on this issue."*

Notias Construction, Inc. v. Genesis Y15 Owners, LLC, 2021 NY Slip Op 31749, decided May 19, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_31749.pdf.

## Mezzanine Loans/UCC Foreclosures

Pursuant to Uniform Commercial Code Section 9-620 ("Acceptance of collateral in full or partial satisfaction of obligation"), the Defendant-lender sent the borrower LLC's managing member a proposal to retain the borrower's interest in satisfaction of its mezzanine loan, which it claimed was in default. The managing member refused the request of the Plaintiff, the holder of an interest in the borrower, to object to the strict foreclosure. Under Section 9-620(a), "a secured party may accept collateral in full or partial satisfaction of the obligation it secures…if: (1) the debtor consents to the acceptance…"

The Supreme Court, New York County, denied the lender's motion to dismiss causes of action asserting an improper UCC foreclosure and seeking a permanent injunction and a constructive trust. (The Appellate Division, First Department, in a 2019 decision reported at 168 AD3d 514, had affirmed the Supreme Court's denial of the Plaintiff's motion for a preliminary injunction barring the strict foreclosure, leaving the right to file an amended complaint seeking damages and a constructive trust). According to the Appellate Division, for a strict foreclosure under UCC Article 9,

> *"…UCC Section 1-2013 'imposes an obligation of good faith on a secured party's enforcement under this article' [citations omitted]…Here, plaintiff alleges that the collateral foreclosed upon greatly exceeds the underlying debt. In addition, while plaintiff, as a member of the LLC that owned the collateral, lacked standing to object to the strict foreclosure, the Complaint alleges that Lender suborned [officers of the borrower's managing member] by promising them economic benefits if they caused [the managing member] to refrain from objecting to the strict foreclosure on plaintiff's behalf."*

The Court also denied the Defendant's motion to dismiss the cause of action alleging that the managing member and its officers breached their fiduciary duty to the Plaintiff. 111 West 57th Investment LLC v. 111 W57 Mezz Investor LLC, 2020 NY Slip Op 34520, decided January 27, 2020, was posted to the New York Official Reports Slip Opinion Service July 1, 2021 at https://www.nycourts.gov/reporter/pdfs/2020/2020_34520.pdf.

## Mortgage Foreclosures/Allonges/Standing

Reversing the Supreme Court, King's County's, grant of the Plaintiff's motion for summary judgment, the Appellate Division, Second Department, held that the Plaintiff lacked standing because evidence was not submitted to establish that a page submitted with a copy of the Note secured by the mortgage captioned "Allonge to Note", containing an indorsement from the original lender to the Plaintiff, "was so firmly affixed to the note as to become a part thereof [citations omitted]." Under UCC Section 3-202 ("Negotiation"), "[a]n indorsement must be…on the instrument or on a paper so firmly affixed thereto as to become a part thereof." Wells Fargo Bank, N.A. v, Maleno-Fowler, 2021 NY Slip Op 03344, decided May 26, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_03344.htm.

## Mortgage Foreclosures/Lost Notes/Reformation

In Wells Fargo Bank, N.A. v. Zolotnitsky, 2021 NY Slip Op 03482, decided June 2, 2021, the Appellate Division, Second Department, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Nassau County. Although a copy of the lost note secured by the mortgage being foreclosed was annexed to the lost note affidavit, "the lost note affidavit failed to establish Wells Fargo's ownership of the note, as it 'failed to establish when the note was acquired and failed to provide sufficient facts as to when the search for the note occurred, who conducted the search, or how or when the note was lost' [citations omitted]." In addition, the Appellate Division held that the lower court should have denied the Plaintiff's motion to reform the mortgage to correct the legal description; the Plaintiff "failed to establish by clear and convincing evidence that reformation of the mortgage to correct the legal description of the premises was warranted based on mutual mistake." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_03482.htm.

## Mortgage Foreclosures/Notices

The Appellate Division, Second Department, reversed the grant by the Supreme Court, Queens County, of the foreclosing Plaintiff's motion for summary judgment. In addition to failing to demonstrate, prima facie, compliance with the notice requirements of Real Property Actions and Proceedings Law ("RPAPL") Section 1304 ("Required prior notices"), the Plaintiff had failed to establish, prima facie, compliance with the notice of default provisions of the consolidated mortgage being foreclosed. "Copies of the notice [of default] without proof of mailing, along with an affidavit of a representative of the loan servicer averring, based on her review of unspecified business records which were not attached to the affidavit, was insufficient to satisfy the plaintiff's prima facie burden [citations omitted]." Wilmington Trust, N.A v. Jimenez, 2021 NY Slip Op 03212, decided May 19, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_03212.htm.

In Ocwen Loan Servicing, LLC v. Malik (2021 NY Slip Op 03596), the Appellate Division, Second Department, reversed the Supreme Court, Nassau County's grant of the foreclosing Plaintiff's motion for summary judgment because the Plaintiff had failed to establish, prima facie, its compliance with the notice requirements of RPAPL Section 1304. While RPAPL Section 1304 notices were allegedly issued by a law firm in New York, the Plaintiff relied on the affidavit of a contract management coordinator in Florida who "failed to provide sufficient proof of the actual mailing, and…did not attest to knowledge of the plaintiff's New York law firm…[citation omitted]." This decision, on June 9, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_03596.htm.

In U.S. Bank Trust, N.A. v. Mehl (2021 NY Slip Op 04159) the Appellate Division, Second Department, held that the Plaintiff had established compliance with RPAPL Section 1304. Since the affidavit of a default service officer at the plaintiff's loan servicer attested "to his personal knowledge of the standard office mailing procedure employed by [the loan servicer] [citation omitted], described that procedure in detail, and attached copies of the relevant records created and maintained by [the loan servicer], the plaintiff demonstrated, prima facie, its strict compliance with the 90-day notice requirement of RPAPL 1304 [citation omitted]." This decision, on June 30, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04159.htm.

In US Bank National Association v. Gurung, 2021 NY Slip Op 04387, decided July 14, 2021, the Appellate Division reversed the grant of the Plaintiff's motion for summary judgment by the Supreme Court, Queens County, because the "notices submitted by the plaintiff…failed to demonstrate that the notices contained five housing agencies that served the region where the defendant resided [as required by the statute]…As a result, the plaintiff did not meet its prima facie burden of establishing that it strictly complied with RPAPL 1304 [citations omitted]." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_04387.htm.

In Deutsche Bank National Trust Company v. Finger, 2021 NY Slip Op 03823, decided June 16, 2021, the Appellate Division, Second Department, held that a property owner who was a "a stranger to the note and mortgage…lacked standing to assert a defense based on the plaintiff's alleged failure to serve the borrower with a notice of default, as required by the mortgage [citation omitted]." This decision, dated June 16, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_03299.htm.

The Appellate Division, Second Department, affirming entry of summary judgment by the Supreme Court, Kings County, held that the defendant owner of the mortgaged property, which was not the original mortgage or an obligor under the note, did not have standing to assert the Plaintiff's failure to comply with the notice requirements set forth in the mortgage or as required by RPAPL Section 1304. According to the Appellate Division,

> *"…[the] failure to comply with RPAPL is a personal defense which cannot be asserted by…a stranger to the consolidated note and mortgage [citations omitted]. Similarly, [it] lacks standing to raise as a defense to this consolidated action the plaintiff's alleged failure to serve a notice of default in accordance with the terms of the consolidated mortgage [citation omitted]."*

Deutsche Bank National Trust Company v. Gendelman, 2021 NY Slip Op 03824, decided June 16, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_03824.htm.

A similar, ruling of the Appellate Division Second Department, dated May 26, 2021, is Bank of New York Mellon v. Ramsamooj, 2021 NY Slip Op 03299 (194 AD3d 997), posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_03823.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 Wells Fargo Bank, N.A. v. Lance, 2021 NY Slip Op 04252, decided July 7, 2021, the Appellate Division, Second Department, affirming entry of the Plaintiff's motion for summary judgment by the Supreme Court, Queens County, ruled that the commencement of two foreclosures of the same mortgage did not violate Section 1301, because the foreclosures were consolidated into a single action under the index number of the first action before the motion was made to dismiss for violating Section 1301. Therefore, "…none of [the Defendants] were placed in the position of having to defend more than one lawsuit to recover the mortgage debt. Under these circumstances, any failure to comply with RPAPL 1301(3) may be disregarded as a mere irregularity which did not prejudice a substantial right of any party [citation omitted]." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04252.htm.

## Mortgage Foreclosures/Standing/Abandonment

In 2006, the Plaintiff entered into a pooling and servicing agreement with the original mortgagor, thereby becoming the trustee of the trust holding the mortgage. The Appellate Division, Second Department, held that the Plaintiff had standing to commence the foreclosure. "[B]y submitting copies of excerpts from the PSA, and its attached mortgage schedule, which included the subject mortgage loan, the plaintiff established, prima facie, that as of July 1, 2006, the plaintiff, as trustee under the PSA, was assignee of the mortgage loan and 'the lawful owner of the note' [citation omitted]."

However, the Appellate Division found that the action had been abandoned by the Plaintiff, reversed entry of a judgment of foreclosure and sale by the Supreme Court, Kings County, and dismissed the complaint against the Defendant currently in title. Under 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 [a defendant's] default, the court shall not enter judgment but shall dismiss the complaint as abandoned…unless sufficient cause is shown why the complaint should not be dismissed." In this case, the Plaintiff's motion for summary judgment and for an order of reference was made almost two years after the alleged default. US Bank N.A. v. Davis, 2021 NY Slip Op 04251, decided July 7, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04251.htm.

## Mortgages/Equitable Estoppel

In Bernard v. Citibank, N.A., 2021 NY Slip Op 03822, decided June 16, 2021, the Plaintiff-borrower brought an action under Real Property Actions and Proceedings Law ("RPAPL") Article 15 ("Action to compel a determination of a claim to real property") seeking a ruling that a mortgage securing a credit line was void ab initio and unenforceable because the mortgage as recorded was not signed by the Plaintiff. The Plaintiff sought "to recoup "'all closing costs paid to Defendants with any payments to [the mortgage lender] since… the date the loan agreement was executed [citations omitted]." The Appellate Division, Second Department, affirming the ruling of the Supreme Court, Kings County, held that the Plaintiff was equitably estopped from denying the validity of the mortgage and dismissing the complaint. The Plaintiff, having retained loan advances of $996,648.85, had received the "'full benefit' of the loan agreement." This decision is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_03822.htm.

## Mortgages/Ratification

In 2003, John Carl Fischer executed a mortgage for $728,000. In 2008, the lender and, purportedly, Fischer executed a modification agreement acknowledging that the outstanding indebtedness was $768,980.49. Fischer had died, however, in 2005. The Supreme Court, Westchester County, in granting a judgment of foreclosure and sale, ruled that although Fischer's signature on the modification agreement was a forgery, by continuing to make payments for four years after Fischer's death his heirs, Defendants in this action, had ratified the notes, the mortgage and the modification agreement. JPMorgan Chase Bank, N.A. v. Fischer, 2021 NY Slip Op 03313, decided May 26, 2021, is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_03313.htm.

## New York City/Real Estate Taxes

New York City's property tax rates per each $100 of assessed value for the tax year commencing July 1, 2021 have been set at 21.045% for Class One properties, 12.267% for Class Two properties, 12.826% for Class Three Properties, and 10.694% for Class Four properties. Class One generally includes one-to-three family residential real property, small stores and offices with one or two apartments attached, vacant land zoned for residential use, and most condominiums that are not more than three stories. Class Two includes all other real property that is primarily residential, such as cooperative buildings. Class Three includes utility real property. Class Four includes all commercial and industrial real property not within the other three tax classes. The tax rates for tax year 2021 and for prior years are set forth on the Department of Finance's websites at the following link - See Property Tax Rates (nyc.gov). The rate for Class Four increased from 10.537% in the prior tax year; the rates for the other Classes were reduced.

## New York City/Relocation Liens

Under NYC Administrative Code Section 27-139 ("Power to order dwelling vacated"), the Department of Housing Preservation and Development ("HPD") can order that a building it deems unfit for human habitation be vacated. Under Administrative Code Section 26-305 ("Expenses of relocation pursuant to relocation order"), HPD may file a notice of lien against a property it orders vacated to recover expenses incurred in providing relocation services. The enforcement of the lien is to be "governed by the provisions of law regulating mechanics liens." Administrative Code Section 27-2140 ("Content and effect of vacate order") provides that a vacate order filed in the County Clerk's office is "notice to any subsequent purchaser, mortgagee or lienor that any lien resulting from such vacate order shall be enforceable against and superior to the rights of such purchaser, mortgagee or lienor."

In City of New York v. 1103 HOE LLC, 2021 NY Slip Op 03545, decided June 8, 2021, Defendant 1103 HOE LLC purchased property in the Bronx after HPD had filed a vacate order; after the purchase HPD filed and served a notice of lien to recover its relocation costs and sought an Order that it was "entitled to foreclose" its relocation lien. The Supreme Court, Bronx County, granted the Defendant's motion to dismiss, vacating the notice of lien and cancelling the lis pendens. The Appellate Division, First Department, reversed the lower court's Order and reinstated the notice of lien. The Defendant, when it purchased the property, was on "constructive notice provided by the vacate order that the property could become encumbered by a later-filed relocation lien." This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_03545.htm.

## Pandemic/Mortgage Foreclosures

The Supreme Court, Kings County, granted the Defendants' motion for an order, pursuant to CPLR Section 5015 ("Relief from judgment or order"), vacating their default in answering for an excusable default and allowing the Defendants to submit a late answer. The Court found that Defendants "demonstrated a reasonable cause for their default based on their counsel's law office failure and difficulties resulting from the COVID-19 pandemic" and that the Defendants had a potentially meritorious defense. The Defendants cited difficulties in communicating with counsel due to a Defendant and their counsel having self-quarantined, the Defendants' inability, due to the pandemic, to locate a technician to remedy the crash of a computer server which resulted in the loss, mix-up and destruction of thousands of files, and "the breakdown" of the Defendants' counsel's internet connection resulting in the loss or emails and E-FILE notifications. NH Smith Lender, LLC v. 232 Smith Street LLC, 2021 NY Slip Op 31673, decided May 11, 2021, is posted at https://www.nycourts.gov/reporter/pdfs/2021/2021_31673.pdf.

## Pandemic/Executive Orders/Filing Deadlines

The Appellate Division, Second Department, held that Governor Cuomo's Executive Order No. 202.8 (9 NYCRR 8.202.8) issued March 20, 2020 and extended through November 3, 2020, tolled, and did not merely suspend, the filing deadlines for litigation in New York, and that the Governor had the authority to do so under Executive Law Section 29-a ("Suspension of other laws"). A toll excludes the period of the toll from the applicable limitations period; a suspension differs from a toll. "'Unlike a toll, a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period under the end date of the suspension [citation omitted]'". Brash v. Richards, 2021 NY Slip Op 03436, decided June 2, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_03436.htm .

## Tax Sales/Notices

In Bayview Loan Servicing, LLC v. City of Middletown, 2021 NY Slip Op 04006, decided June 23, 2021, the Appellate Division, Second Department, held that the provision of that City's Charter "fails to comport with due process requirements because it makes no provision for actual notice of impending tax sales to be given to mortgagees of record." Under Charter Section 93, notice of a pending tax sale is required to be sent only to the owner of the subject parcel; a post-tax lien sale notice is required to divest all rights in the property. In an action to quiet title commenced by the holder of a mortgage, commenced after a tax sale was conducted and the property was sold, the Appellate Division affirmed the Supreme Court, Orange County's grant of the Plaintiff's motion for summary judgment and the lower court's Order vacating and expunging the tax lien on condition that the Plaintiff pay the entirety of the tax lien, with costs and interest. This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04006.htm.

A similar case, also involving the City of Middletown, is Delacorte v. Luyanda, 2021 NY Slip Op 04009, decided June 23, 2001, in which the Court held that a tax sale deed was void for lack of due process because a mortgagee did not receive notice of an impending tax lien sale. This ruling is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_04009.htm.

Real Property Tax Law Section 1125 ("Personal notice of commencement of foreclosure proceeding") requires notice of a proceeding to enforce a tax lien to be sent to those whose interests will be affected "both by certified mail and ordinary first class mail…The notice shall be deemed received unless both the certified mail and the ordinary first class mail are returned by the United States postal service within forty-five days after being mailed."

In James B. Nutter & Company v. County of Saratoga, 2021 NY Slip Op 04074, decided June 24, 2021, the mortgagee of property subject to tax liens brought an action to have the judgment foreclosing the liens vacated. The Supreme Court, Saratoga County, dismissal of the complaint was affirmed by the Appellate Division, Third Department. Although notice to the Plaintiff-mortgagee was sent by certified mail and ordinary mail to the Plaintiff's address in Kansas City, Missouri listed on the mortgage and tracking information indicated that the certified mail was delivered to an unspecified post office box, neither of the mailings to the Plaintiff was returned. According to the Appellate Division,

> *"…although plaintiff's proof established that the certified mailing was delivered to a different address, delivery to a different address is not the same as the certified mailing being returned…[T]here is no indication in the record that both the certified mailing and the first class mailing were returned to defendants. Even if the certified mailing had been returned to defendants, there still was no evidence demonstrating that the first class mailing was returned [citations omitted]…In the absence of evidence that both the certified mail and first class mailings were returned to defendants, the petition and notice of foreclosure were 'deemed received' by plaintiff…"*

This decision is posted at http://www.nycourts.gov/reporter/3dseries/2021/2021_04074.htm.

## Recording Act/Defective Acknowledgment

The Plaintiff, who acquired a condominium unit on the foreclosure of a common charge lien, argued that its rights were superior to a first mortgage lien because the mortgage, as recorded, did not include a notary stamp or any indication that the mortgage was properly acknowledged. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment declaring that the Plaintiff's interest had priority over the mortgage, and ordered that the mortgage be vacated and expunged from the public record. The Appellate Division, First Department, reversed the lower court's Order, granted the Defendant's motion for summary judgment, and held that the Plaintiff's interest was subordinate to the Defendant's mortgage. According to the Appellate Division,

> *"…the bank proffered evidence establishing that the mortgage was properly acknowledged when submitted for recording. The evidence included the original inked mortgage containing the notary public's information; an affidavit from the notary who affixed her notary stamp at that time; an affidavit from the title company that submitted the mortgage for recording, and an expert affidavit and report from a forensic document examiner in which he concluded that the Register's scanner could have caused the notary stamp to disappear from the imaged mortgage. Plaintiff has failed to show by clear and convincing evidence that the acknowledgment was defective [citation omitted]."*

80P2L LLC v. U.S. Bank Trust, N.A., 2021 NY Slip Op 03275, decided May 25, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_03275.htm.

## Title Insurance/Zoning Exclusion

An exclusion from coverage under the 2006 ALTA Owner's Policy is "loss or damage, costs, attorneys' fees, or expenses that arise by reason of: 1(a) any law, ordinance, permit or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting or relating to (1) the occupancy, use or enjoyment of the land…"

The Plaintiffs purchased a golf course intending to construct villas on the property. However, a Declaration of Covenants, recorded as a condition of a zoning resolution, limited the development of the property to 140 residential units. The Plaintiffs claimed they learned of the Declaration after their purchase when they sought to construct additional residential units. The title report for the purchase of the property did not report the Declaration and it was therefore not an exception from the coverage in its title insurance policy.

The Appellate Division, Second Department, affirmed the entry of summary judgment dismissing the complaint by the Supreme Court, Suffolk County. According to the Appellate Division, "[u]nder the plain terms of the policy, the 1997 Declaration was excluded from coverage because it arose from a zoning regulation [citation omitted]. Further, while the Declaration affected the value of the property to the plaintiffs as prospective buyers, it did not affect the marketability of the title, or create a defect, lien, or encumbrance on the title." JBGR, LLC v. Chicago Title Insurance Company, 2021 NY Slip Op 03448, decided June 2, 2021, is posted at https://www.nycourts.gov/reporter/3dseries/2021/2021_03448.htm.

## Transferrable Development Rights/Reversion

A condominium building was constructed in Manhattan by the Defendant-lessee whose lease included the right to use development rights from an expanded zoning lot. The lease was terminated and the Plaintiff-lessor sued to recover for past and, until the action was concluded, for the Defendant's continuing use and occupancy, including amounts for the use of the development rights purportedly payable as additional rent under the lease.

In 2018, the Supreme Court, New York County, awarded the Plaintiff an amount for past use and occupancy and ordered the Defendant to pay for use and occupancy pendente lite. Although the tenant claimed that the development rights were transferred to the condominium, the Supreme Court, New York County, ruled that the Plaintiff "never transferred the development rights" to the Defendant and that the additional rent payable under the lease included payments for the Defendant's use of those rights. In 2020, the Appellate Division, First Department, affirmed the lower court's ruling, stating that the Defendant's claim that it had obtained ownership of the development rights was "unsupported." These decisions are posted to the New York Official Reports Slip Opinion Service at 2018 NY Slip Op 31339 and 2020 NY Slip Op 03733.

In a decision dated June 17, 2021, posted at 2021 NY Slip Op 50563, the Supreme Court, New York County, held that the unused development rights reverted to the Plaintiff when the lease terminated and directed the Defendant to "effect a reversion" of the used development rights "when an event triggers reversion and makes transfer feasible, such as when [the Defendant] redevelops its building." The rulings for these cases, each captioned 862 Second Avenue, LLC v. 2 Dag Hammarskjold Plaza Condominium, are posted at:

https://www.nycourts.gov/reporter/pdfs/2018/2018_31339.pdf,
https://www.nycourts.gov/reporter/3dseries/2020/2020_03733.htm (185 A.D.3d 421), and
https://www.nycourts.gov/reporter/3dseries/2021/2021_50563.htm.

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