Acknowledgments/Recording Act

Deeds executed before but recorded after the recording of a contract of sale with a prior contract vendee were canceled by the Supreme Court, Saratoga County. The Court directed the seller to complete the sale with the plaintiff; the purchase price paid by the grantee of the recorded deed was to be refunded. The Appellate Division, Third Department, affirmed.

The Defendants, the seller and his grantee, claimed that the grantee was a bona fide purchaser entitled to the protection of New York's recording act because the Plaintiff's recorded contract included an improper acknowledgement. Under Real Property Law Section 291 ("Recording of conveyances"), "[a] conveyance of real property, within the state, on being duly acknowledged by the person executing the same…may be recorded…Every such conveyance not so recorded is void as against [a bona fide purchaser]."

According to the Appellate Division, the acknowledgment initially used in the contract (before a different form provided by the county clerk was substituted), was "boilerplate language that had commonly been used" prior to the enactment in 1997 of Real Property Law Section 309-a(1) ("Uniform form of certificates of acknowledgment or proof within this state"), and the acknowledgment in the recorded contract did not "undermine the viability of the contract recording." Section 309-a (1) provides that a certificate of acknowledgement "…must conform substantially with the following form...", the uniform form of acknowledgment included in the Section. "[T]he deviation in verbiage was one of form not substance…" Parillo v. Morehouse, 2019 NY Slip Op 05042, decided June 20, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_05042.htm.

Adjoining Owners/Easement by Necessity

The Plaintiff and the Defendant own adjoining properties. The Plaintiff claimed that a right of way was recorded in 1946 allowing for the use of both properties for ingress and egress and that the Defendants were obstructing the Plaintiff's use of the right of way. Although a legible copy of a recorded instrument could not be found, the Supreme Court, Queens County, held that the Plaintiff had established an easement of necessity for ingress and egress over the strip of land in question to enable vehicular access to the garage on his property. To establish an easement by necessity, "the movant must prove that their use of the disputed strip was absolutely necessary for the beneficial enjoyment of [his] property…"

The Plaintiff had to park his car in the street for the past year and one-half and the car while so parked had been broken into. According to the Court, the Plaintiff had sufficiently established that the disputed strip of land was "'absolutely necessary' to the enjoyment of his property." The Court granted the Plaintiff's motion for a preliminary injunction temporarily enjoining the Defendants from obstructing the Plaintiff's ingress and egress until further Order of the Court. The Plaintiff was directed to file an undertaking in the amount of $5,000. Luk v. Briedj, 2019 NY Slip Op 31556, decided April 17, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_31556.pdf.

Adjoining Owners/Encroachments

The initial purchase price of $8,000,000 under a contract for the sale of the Plaintiff's property was reduced by 10% because the adjoining owner, a Defendant, refused to remove air conditioners in its building which encroached on the airspace above the Plaintiff's building. The Supreme Court, New York County, after a non-jury trial on damages, awarded the Plaintiff damages in the amount of $800,000. The Appellate Division, First Department, affirmed, stating that "[t]he court correctly concluded that the measure of damages was the difference between the purchase price its predecessor in interest (the seller) obtained in the initial sale agreement and the subsequent reduced purchase price."

The Appellate Division also affirmed the award of $2.00 in nominal damages to the Defendant, which was awarded because the underpinning of the Plaintiff's building encroached on the Defendant's property. According to the Appellate Division, the Defendant "failed to demonstrate that the de minimis encroachment of the [Plaintiff's] underpinning onto its yard resulted in any injury to it, and its claim that the encroachment might diminish the value of the real property to a future developer is speculative." Madison 96th Associates, LLC v. 17 East 96th Owners Corp., 2019 NY Slip Op 03735, decided May 14, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_03735.htm.

Bona Fide Purchasers/Recording Act

The owner of real property conveyed it to herself and her son; they then mortgaged the property. After the mother passed away, the son's half-sisters brought an Action to set aside the deed and the mortgage on the grounds of undue influence and fraud. The mortgagee moved to have the complaint dismissed as to it, asserting that it was a bona fide encumbrancer. The Supreme Court, Queens County, denied the motion. The lower court's Order was affirmed by the Appellate Division, Second Department.

According to the Appellate Division, a mortgagee's interest is not protected if the mortgagee "had notice of a previous fraud affecting the title of its grantor (see Real Property Law Section 266…)" or if the mortgagee was aware of facts that should have led it "to make inquiries of the circumstances of the transaction at issue." Under Section 266 ("Rights of purchaser or incumbrancer for valuable consideration protected"), this article [8, "Conveyances and mortgages"] does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of the immediate grantor, or of the fraud rendering void the title of such grantor." In this case, "the documentary evidence [including the mother's medical records] did not conclusively establish, as a matter of law, that the appellant was a bona fide purchaser for value." Feggins v. Marks, 2019 NY Slip Op 02852, decided April 17, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02852.htm.

Condominium and Cooperative Offering Plans

New York State Department of Law's Real Estate Finance Bureau issued as a guidance document "Disclosure Requirements Regarding New York State's Additional Transfer Tax and New Supplemental Tax", which taxes apply to transfers of real property or of interests therein occurring on and after July 1, 2019. The Bureau's Memorandum, dated June 28, 2019, is posted at https://ag.ny.gov/sites/default/files/disclosure_requirements_regarding_new_york_states_additional_transfer_tax_and_new_supplemental_tax_6-28-2019.pdf.

The Real Estate Finance Bureau also announced that it is affording access to submitted offering plans, offering plan amendments, cooperative policy statement applications and no-action letter applications which are maintained in a database accessed on the Department's website. The database is at https://ag.ny.gov/real-estate-finance-bureau/database.

Contracts of Sale/Causes of Action for Fraud

The Defendants-Sellers had completed a mold remediation project in the pool wing of the house prior to entering into a contract of sale with the Plaintiffs. Under the contract, the property was sold "as is", no express representations as to the condition of the property were made, and the Sellers paid the Plaintiffs $500 in lieu of completing a Real Property Law Section 465 property condition disclosure statement. After closing, mold began to appear in the pool wing, and, to avoid future recurring humidity and mold issues, the Plaintiffs renovated the pool area at a cost of approximately $1,114,000.

The Plaintiffs sued the Defendants, the Sellers and the real estate brokers for fraud for not informing the Plaintiffs of the humidity and mold issues. The Plaintiffs also claimed that the Sellers had actively concealed the conditions. The Defendants argued that the express language of the contract of sale barred the fraud causes of action and moved for the complaint to be dismissed.

The Supreme Court, Westchester County, denied the Defendants' motions to dismiss. According to the Court, "[t]o plead a prima facie case of fraud, plaintiffs must show that defendants made a material misrepresentation or omission of fact which was false, which defendants knew to be false, made for the purpose of inducing plaintiffs to rely upon same, justifiable reliance thereon by plaintiffs, resulting in injury." The Plaintiffs' complaint "set forth allegations sufficient to state causes of action for fraud…,which allegations have not been negated beyond substantial question by defendants." Comora v. Franklin, 2016 NY Slip Op 33002, decided May 3, 2016 and issued by the New York State Law Reporting Bureau Slip Opinion Service on June 5, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2016/2016_33002.pdf.

Contracts of Sale/Time of the Essence

The seller sent a letter dated May 6, 2014 to the buyer of real property under a contract of sale, setting the closing at the office of the seller's attorney on June 5, 2014 at 10 AM, "time of the essence." The buyer failed to appear at the closing; the seller cancelled the contract and declared that the down payment was forfeited. In an Action by the buyer for specific performance, the Supreme Court, Kings County, granted the seller's motion to dismiss and cancel the notice of pendency. The Appellate Division, Second Department, affirmed the lower court's Order. According to the Appellate Division,

> *"[t]he seller showed that he properly set a law day for closing and indicated that time was of the essence, by providing a 'clear, distinct, and unequivocal notice to that effect giving the other party a reasonable time in which to act' [citations omitted]. The seller further established, prima facie, that the buyer was in default when it failed to appear, and was not ready, willing, and able to close on that date [citations omitted]."*

Brickstone Group, Ltd. V. Randall, 2019 NY Slip Op 03313, decided May 1, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_03313.htm.

Equitable Subrogation/Mortgage Foreclosures

Gerald and Marjorie Adee conveyed real property to a trust under which they reserved life estates. In 2003, after the death of Gerald, Marjorie and the trust executed a mortgage to M&T Bank. In 2012, Marjorie, alone, executed a note and a reverse mortgage to Bank of America, N.A., which assigned that mortgage to the Plaintiff. Proceeds of the Bank of America mortgage were applied to satisfy the mortgage held by M&T Bank. In the foreclosure of the reverse mortgage, the Supreme Court, Broome County, granted the Defendants' motion to dismiss on the grounds that the trust had not executed the mortgage.

The Plaintiff argued that it should be equitably subrogated to the extent that the proceeds of the loan were applied to satisfy the prior mortgage. According to the Appellate Division, Third Department, in affirming the lower court's ruling,

> *"[i]f the subrogee had actual notice of the intervening interest, equitable subrogation is inapplicable [citation omitted]. Given that the quitclaim deed [to the trust] reflecting Adee's interest in the subject property was validly recorded and the documentary evidence establishes that plaintiff's predecessor had actual notice of it, plaintiff cannot rely on the doctrine of equitable estoppel [citations omitted]."*

Nationstar Mortgage LLC v. Adee, 2019 NY Slip Op 03873, decided May 16, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_03873.htm.

Leases/Yellowstone Injunction

Plaintiffs commenced an Action seeking a declaratory judgment that they were not in default under the terms of their lease and sought a Yellowstone injunction to prevent the landlord from terminating the lease or commencing a summary proceeding during the pendency of the proceeding for a declaratory judgment. The Supreme Court, New York County, denied the Plaintiffs' motion for an injunction and, granting the Defendant's cross-motion for summary judgment, dismissed the Action. A rider to the lease provides that the "[t]enant waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease…[I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings." The Appellate Division, Second Department, affirmed, ruling that this waiver was enforceable. The Court of Appeals affirmed the Order of the Appellate Division. According to the Court of Appeals,

> *"the declaratory judgment waiver is clear and unambiguous and adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract…The right to commence a declaratory judgment action, although a useful litigation tool, does not reflect such a fundamental public policy interest that it may not be waived by counseled, commercial entities in exchange for other benefits or concessions."*

The dissenting Opinion stated that "[t]he majority has now undone the faithful work of the courts in the past 50 years in creating the Yellowstone injunction, based on the uniform understanding of the Appellate Division departments that the declaratory judgment act, which applied in the context of commercial leases, requires a specialized form of augmenting injunction [citations omitted]." 159 MP Corp. v. Redbridge Bedford, LLC, 219 NY Slip Op 03526, decided May 7, 2019, is posted at http://nycourts.gov/reporter/3dseries/2019/2019_03526.htm.

Mechanics' Liens/Defamation

A general contractor sued a subcontractor and the President of the subcontractor for breach of contract and for defamation. The Plaintiff alleged that the mechanic's lien filed by the subcontractor contained false and damaging information. The Supreme Court, Kings County, granted the Defendants' motion to dismiss the defamation cause of action. According to the Court, "…it is clear that the filing of a Mechanic's Lien is privileged from which no defamation may follow…The legal basis for a rule categorizing a Mechanic's Lien as privileged is to permit the efficient administration of justice [citation omitted]." Centrifugal Associates Group LLC v. Newell Contracting, Inc., 2019 NY Slip Op 31509, decided May 21, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_31509.pdf.

Mechanics' Liens/Res Judicata

In 2011, a subcontractor filed a mechanic's lien and in 2014 it commenced an Action against the Town of Huntington, the owner of the property being improved, and the general contractor, claiming breach of contract and unjust enrichment and seeking to recover amounts allegedly owed for work done and materials furnished. The Supreme Court, Suffolk County, granted the general contractor's motion to dismiss the complaint as to it on the grounds that the action was time-barred by a contractual limitations clause in the subcontract and by the statute of limitations for foreclosing a mechanic's lien.

In 2015, the Plaintiff field a new mechanic's lien containing the same allegations and in 2016 commenced a foreclosure of the lien. The Supreme Court, Suffolk County, denied the general contractor's motion to dismiss, holding that res judicata did not apply to the enforcement of a different mechanic's lien. The Appellate Division, Second Department, reversed and granted the general contractor's motion to dismiss the complaint as to it. According to the Appellate Division,

> *"[w]hile a subcontractor may have the right to file a second mechanic's lien within the statutory time period, at least to cure an irregularity in a lien first filed, or to reassert a lien when the prior one has been lost by delay in its enforcement [citations omitted], a second mechanic's lien is not immune from the doctrine of res judicata. Although the plaintiff framed its causes of action in the 2014 action as breach of contract and unjust enrichment causes of action, and its cause of this action as one to foreclose a mechanic's lien, these are merely different theories for the plaintiff's cause of action to recover monies allegedly owed to it under the subcontract. As such, the plaintiff's cause of action against the [general contractor] in this action is barred by the doctrine of res judicata [citations omitted].'*

County Wide Flooring, Corp. v. Town of Huntington, 2019 NY Slip Op 04354, decided June 5, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04354.htm.

Mortgage Foreclosures/Abandonment of Action

There having been no action on a mortgage foreclosure commenced in 2008, the case was marked off the Supreme Court, Nassau County's active calendar. In 2016, the Plaintiff moved to have the case restored to the court's active calendar, for leave to enter a default judgment, and for an order of reference. The Supreme Court, Nassau County, granted the Plaintiff's motion and denied the Defendant-mortgagor's motion to dismiss the complaint as to him. The Appellate Division, Second Department, reversed, granted the Defendant's cross-motion and dismissed the complaint as to him as abandoned.

Under Civil Practice Law and Rules Section 3215(c) ("Default judgment"), "[i]f the plaintiff fails to take proceedings for entry of judgment within one year after the 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." According to the Appellate Division, "[t]he language of CPLR 3215(c) is mandatory in the first instance...[and] the plaintiff failed to proffer a reasonable excuse." The Plaintiff's "conclusory and unsubstantiated assertions that its delay was attributable to compliance with certain administrative orders…were insufficient to excuse the lengthy delay [citations omitted]." Bank of America, N.A. v. Shami, 2109 NY Slip Op 04901, decided June 19, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04901.htm.

Mortgage Foreclosures/Change of Referee

The Defendants in a mortgage foreclosure moved to set aside the sale and for other relief, arguing that the sale was defective because it was not conducted by the referee authorized by the judgment of foreclosure and sale. The referee appointed to conduct the sale did not appear on the scheduled date and the Supreme Court, Nassau County, appointed a substitute referee. The Order of the Supreme Court denying the Defendants' motion was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"[m]ere irregularities by a referee may be disregarded if they do not affect a substantial right of a party [citations omitted]. Here, the defendants failed to establish that any alleged defects in the sale of the subject property prejudiced a substantial right of a party. Furthermore, the defendants failed to demonstrate that the sale was the product of fraud, collusion, mistake or overreaching, and there is no claim that the sale price was unconscionable."*

Emigrant Mortgage Company, Inc. v. Hartman, 2019 NY Slip Op 04914, decided June 19, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04914.htm.

Mortgage Foreclosures/One Action Rule

Under Real Property Actions and Proceedings Law Section 1301(3) ("Separate action for mortgage debt"), "while [an] action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought."

In 2010, HSBC Mortgage Services, Inc., the prior holder of a mortgage, commenced a foreclosure. In 2013, HSBC signed and delivered to the Defendant a stipulation discontinuing the foreclosure. There was no further prosecution of the foreclosure. In 2014, the Plaintiff, the assignee of the mortgage, commenced a new foreclosure. The Defendant moved for the complaint to be dismissed on the ground that there was another Action pending to foreclose the same mortgage. The Supreme Court, Nassau County, denied the Defendant's motion. The Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division,

> *"[t]he record supports the conclusion that the plaintiff's assignor, the former mortgagee, effectively abandoned its prior action to foreclose the mortgage. Although the 2010 foreclosure action was not formerly discontinued, due in part to the defendant's failure to sign the stipulation of discontinuance, 'the effective abandonment of that action is a de facto discontinuance which militates against dismissal of the present action pursuant to RPAPL 1301(3)' [citations omitted]."*

U.S. Bank Trust, N.A. v. Humphrey, 2019 NY Slip Op 04445, decided June 5, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04445.htm.

Mortgage Foreclosures/Standing/UCC

The Appellate Division, Second Department, affirming the entry of a judgment of foreclosure and sale by the Supreme Court, Richmond County, held that the Plaintiff "established its standing as a holder of the note and of the mortgage endorsed to it in blank, which it physically possessed prior to the commencement of the action (see UCC 3-201[1]; 3-204[2])." The dissent took the position that "the plaintiff failed to show, prima facie, its status as the holder of the note at the time of the commencement of the action." According to the dissent, "[w]here there is no allonge or note that is either endorsed in blank or specially endorsed to the plaintiff, mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing…" Green Tree Servicing, LLC v. Molini, 2019 NY Slip Op 02686, decided April 10, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02686.htm.

Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance announced that the interest rate charged for the period July 1, 2019 – September 30, 2019 on late payments and assessments of Mortgage Recording Tax and the State's Real Estate Transfer Tax is 9% per annum, compounded daily. The interest rate to be paid on refunds will be 4% per annum, compounded daily. This information is posted at https://www.tax.ny.gov/pay/all/int_curr.htm.

Parkland/Public Trust Doctrine

Under the public trust doctrine, land impliedly dedicated as parkland cannot be alienated without approval of the state legislature. The party asserting the public trust doctrine has the burden of proving that the land was dedicated to a public use.

Tax Lot 142 in Block 7071, located along the Coney Island Boardwalk in Kings County, was used as a community garden until 2004 under at will licenses granted by agencies of The City of New York. The last license issued was terminated in 1999 when the City intended to develop the parcel into a parking lot. The Lot was not converted into a parking lot and the City re-licensed the community garden in 2000 and 2003. In 2004, the license was terminated, and the City proceeded with a plan to develop Lot 142 and adjoining parcels into an amphitheater. Community members continued to use Lot 142 as a garden, without permission.

In 2014, the Petitioners/Plaintiffs commenced a hybrid proceeding under Civil Practice Law and Rules Article 78 and for declaratory relief, seeking to have the City's conversion of Lot 42 into an amphitheater invalidated, and for a judgment declaring that land was parkland which was alienated without legislative approval. The Supreme Court, Kings County, granted the Defendants' motion for summary judgment, holding that Lot 142 was not parkland at the time it was alienated for use as part of the amphitheater project, and, therefore, that there no violation of the public trust doctrine. The Appellate Division, Second Department, affirmed. According to the Appellate Division,

> *"[h]ere the defendants submitted evidence showing that the City's actions and declarations did not unequivocally manifest an intent to dedicate Lot 142 as parkland. Their exhibits showed that the City permitted the community garden to exist on a temporary basis as the City moved forward with its plans to develop the parcel. Their exhibits also demonstrated that any management of Lot 142 by the City's Department of Parks and Recreation was understood to be temporary and provisional [citation omitted]."*

Matter of Coney Island Boardwalk Community Gardens v. City of New York, 2019 NY Slip Op 04162, decided May 29, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04162.htm.

Partition/Right of First Refusal

The Plaintiff, Cathy Tuminno, and Defendant Marjorie Waite acquired property from their mother's Estate as tenants in common, subject to an agreement settling the Estate, which they and others executed, providing that Waite and James Flagella each had a right of first refusal to purchase the property if Tuminno or Waite "either jointly or severally, determine to sell, assign or transfer the…property to someone other than each other." At the partition sale of the property at public auction, Waite was the successful bidder. Flagella and another Defendant sought to exercise his right of first refusal. The Supreme Court, Chautauqua County, confirmed the report of the referee in directing the sale of the property to Waite, but the Court rejected the report insofar as it concluded that the right of first refusal was triggered. The Appellate Division, Fourth Department, affirmed the lower court's ruling. According to the Appellate Division,

> *"[w]e reject Flagella's contention that the auction triggered his right of first refusal. By the terms of the settlement agreement, the right of first refusal is triggered by a determination of [Tuminno] and Waite to sell the property 'to someone other than each other.' Because Waite, not a third party, purchased the property at the auction, the auction did not trigger Flagella's right of first refusal."*

Tuminno v. Waite, 2019 NY Slip Op 04611, decided Jun 7, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04611.htm.

Statute of Limitations/Mortgage Foreclosure

The foreclosure of a mortgage commenced in 2009 was dismissed in 2015. In 2015, an assignee of the note and mortgage brought a new foreclosure of the mortgage. The Supreme Court, Kings County, granted the motion of the Defendant, who had executed the note and mortgage, to dismiss the complaint insofar as asserted against him as being time-barred. The Appellate Division, Second Department, affirmed the lower court's Order. According to the Appellate Division,

> *"the defendant demonstrated that the six-year statute of limitations (see CPLR 213[4]) began to run on the entire debt on June 24, 2009, when HSBC Mortgage accelerated the mortgage debt by commencing the prior mortgage foreclosure action [citations omitted]. Since the plaintiff did not commence the instant foreclosure action until July 28, 2015, which was more than six years after acceleration of the debt, the defendant met his initial burden of demonstrating, prima facie, that the instant action was untimely [citations omitted]. In opposition, the plaintiff failed to raise a question of fact as to whether it revoked its election to accelerate the mortgage within the six-year limitations period."*

HSBC Bank USA, N.A. v. Gold, 2019 NY Slip Op 02858, decided April 17, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02858.htm.

Other recently issued decisions applied the statute of limitations to a mortgage foreclosure. In Deutsche Bank National Trust Company v. Sewdial, the Supreme Court, Queens County, granted a motion to dismiss the complaint on the grounds that the statute of limitations to enforce the obligation secured by the mortgage had run. The limitations period commenced on September 21, 2007; it expired on September 21, 2013 and the Action was commenced on September 23, 2017. The Appellate Division, Second Department, reversed, denying the motion to dismiss the complaint.

According to the Appellate Division, September 21 was a Saturday and under General Construction Law Section 24-a (1) ("Closing of banking organizations on Saturday…") the Plaintiff had until Monday, September 23, 2013 to commence the foreclosure. Section 25-a (1) states that for a banking organization lawfully doing business within New York, a Saturday is not a "'full business day'" nor a "banking day.". The Court's Opinion, reported at 2019 NY Slip Op 04357, decided June 5, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04357.htm.

In US Bank National Association v. Murillo, a mortgage foreclosure was commenced in 2008 and the real property was sold to the Plaintiff at a foreclosure auction in 2010. The judgment was vacated in 2011.

In 2014 the Supreme Court, Nassau County, set aside the foreclosure sale, ruling that the referee's deed was null and void. In 2015, the Plaintiff moved for leave to amend its complaint to add a cause of action to foreclose the mortgage. The Supreme Court granted the Plaintiff's motion; that Order was affirmed by the Appellate Division, Second Department. According to the Appellate Division, "…under the circumstances of his case, we agree with the Supreme Court's determination to apply the relation-back doctrine to find that the statute of limitations did not bar the amendment of the complaint [citations omitted]." The Appellate Division's Opinion, at 2019 NY Slip Op 02743, decided April 10, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02743.htm.

In Federal National Mortgage Association v. Onuoha, the foreclosure of a mortgage was commenced by Washington Mutual Bank on December 21, 2007. However, the assignment of the note and mortgage to WAMU did not occur until December 24, 2007. The Appellate Division, Second Department, held that the commencement of that foreclosure "was ineffective to constitute a valid exercise of the option to accelerate the debt since WAMU did not have the authority to accelerate the debt or to sue to foreclose at that time [citations omitted]." Therefore, the current foreclosure, commenced in 2015, was not time-barred. The Appellate Division's Opinion, reported at 2019 NY Slip Op 03953, decided May 22, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_03953.htm.

Uniform Commercial Code/Mezzanine Loans

The Plaintiff sought a ruling that the sale of equity interests in eleven commercial properties, which interests were pledged as collateral for a mezzanine loan, was commercially unreasonable because the auction sale was not conducted in a commercially reasonable manner as required by Section 9-610 ("Disposition of collateral after default") of New York's Uniform Commercial Code and should therefore be unwound. Under Section 9-610(b), "[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." UCC Section 9-627 ("Determination of whether conduct was commercially reasonable") sets forth guidelines to determine if a sale was commercially reasonable.

The Supreme Court, New York County, denied the Defendants' motion to dismiss the complaint. The Appellate Division, First Department, modifying the lower court's Order, dismissed the causes of action seeking a declaratory judgment and an Order overturning the sale. According to the Appellate Division,

> *"…if UCC sales could be unwound, it would only serve to muddy the waters surrounding nonjudicial sales conducted pursuant to article 9 of the UCC, and to deter potential buyers from bidding in nonjudicial sales, which would, in turn, harm the debtor and the secured party attempting to collect after a default."*

Atlas MF Mezzanine Borrower, LLC v. Macquarie Texas Loan Holder LLC, 2019 NY Slip Op 04495, decided June 6, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_04495.htm.

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