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Recent Investigation, Prosecution and Legislation Regarding Fraudulent Deeds

By Carol A. Sigmond

New York City, particularly gentrifying areas of Brooklyn, Harlem, and Washington Heights, are seeing an upsurge of deed theft. Attorneys, architects, title companies, real estate brokers, agents, contractors, developers and construction managers need to be alert to this potential issue when blocks of properties are assembled for development in these neighborhoods.

There have been complaints of fraudulent deeds received by the New York City Department of Finance (DOF) over the years. Families, particularly families of color, were forced to navigate the judicial system to try and recover properties on their own, with only a few able to afford lawyers to represent them. Moreover, these unfortunate victims of theft were required to post a bond as a precondition of litigating to recover their homes from the thieves. This impediment made recover of stolen homes more difficult.

Beginning in 2017, that began to change. FY 2018/2019 1st Quarter Report Notice of Recorded Document Program Local Law 249-2017, which became effective July 1, 2018, requires the DOF to notify property owners when documents are recorded against their property. It further requires DOF provide a report to the City Council that includes complaints regarding any claims of fraudulent deeds being used to convey property.

Attention to this issue has increased. For example, approximately a year ago, questions about fraudulent deeds were raised by Brooklyn Borough President Eric Adams and City Council Member Robert Cornegy, Jr. Messrs. Admas and Cornegy demanded an investigation. Simultaneously, Manhattan District Attorney Cyrus Vance had a Grand Jury investigate the issue. On Dec. 13, 2018, the Manhattan Grand Jury issued a 53-page report with recommendations. The Grand Jury Report found that owners of "single family brownstones in culturally diverse and rapidly gentrifying" areas of Brooklyn, Harlem, and Washington Heights were being dispossessed by a variety of fraudulent schemes. A copy of the report is available at http://bit.ly/2Qo1Pc4.

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Fraudulent Deeds

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The Grand Jury reported that homes in these neighborhoods had been in the same family for many years, up to two or three generations. As the current owners age, the properties accumulate liens. If the current owner passes away, the property might become unoccupied or dilapidated. The fraudsters would scour city records, visit targeted neighborhoods, and locate properties that appeared vulnerable. The fraudsters were so brazen that they would forge the last owner's signature on a deed. The fraudsters would then be free to sell, mortgage, or develop the properties. "SLAP" suits were also used to frighten legitimate owners into allowing the fraudsters to retain the properties.

In response to the Grand Jury Report, the DOF placed a "Deed Fraud Alert" on its website and initiated an on-line reporting slink and a brochure entitled "Protect Your Home: Deed Fraud Guide." *See*, https://on.nyc.gov/2NT0Ped.

New York State Attorney General Letitia James has been investigating individual cases and pressing charges with success. On Jan. 8, 2019, James announced the first sentence for theft of residential property by filing fraudulent deeds with the New York City Register's Office. Marilyn Sanchez of Brooklyn was sentenced to 60 days in jail and five years' probation for fraudulently acquiring two properties in Brooklyn by means of fraudulent deeds. Sanchez returned the properties to the rightful owners as part of her agreement with James' office. On March 14, 2019, James announced the indictment of two Long Island residents for fraudulently acquiring ownership of residential properties, one each in Brooklyn and Queens. These latter cases were brought with multiple felony charges.

Likewise, Brooklyn District Attorney Eric Gonzalez has been aggressively prosecuting individuals using fraudulent deeds and false filings to steal homes from the heirs of decedents. In addition, the Sheriffs for New York, Kings, Queens, Richmond and The Bronx are also combating deed fraud. Deed fraud alert information, including how to protect yourself from deed fraud by registering on ACRIS, as well as how to report a theft, are found on line at https://on.nyc.gov/2XpUREU.

New legislation, Senate Bill 1688/Assembly Bill 5615, has passed both houses of the New York legislature and been signed by the Governor. This bill amends the Home Equity Theft Act of 2006 by increasing protections to home owners where the properties are in default or foreclosure. This new legislation provides additional time to homeowners to cancel contracts with so called "distressed property consultants" and overall mandates that the terms of these contracts be more consumer friendly.

This legislation eliminated the condition of a bond requirement for victims of deed theft to litigate in order to recover a stolen home. Moreover, where there has been a criminal conviction for deed theft, there is now a mechanism to allow the victims to use the criminal conviction of the thief to quiet title to the property.

In passing this legislation, the State Senate and State Assembly recognized that "savvy scammers" were 'exploiting loopholes' in the law to avoid prosecution and retain their ill-gotten gains. The goal of the legislation was to expose these schemes to criminal prosecution and to provide the victims with fair opportunity to recover the property.

On Oct. 22, 2019, Governor Cuomo directed the New York State Department of Financial Services (DFS) to conduct a full investigation of deed fraud in Brooklyn. The Governor directed the DFS to send a Foreclosure Relief Unit to Brooklyn to assist victims of deed theft. The hotline to report deed theft is 1-800-342-3736.

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Landlord's Relet Does Not Relieve Breaching Tenant From Liability for Rent

Chelsea 8th Ave. LLC v. OA 21st LLC

NYLJ 9/19/19, p. 21, col. 2
Supreme Ct., N.Y. Cty
(Kahn, J.)

In landlord's action for past and future rent and attorneys' fees resulting from tenant's breach of the lease, landlord moved for summary judgment. The court granted landlord's motion, rejecting tenant's contention that landlord had accepted surrender of the premises.

Landlord and tenant's assignor entered into a 10-year lease in 2012. Three years later, when the assignor filed for bankruptcy, assignor signed the lease to tenant, who paid a security deposit to landlord. In 2017, when tenant failed to pay rent, landlord brought a nonpayment proceeding resulting in tenant's eviction. Landlord subsequently brought this action seeking back rent, rent to the end of the lease term, and attorneys' fees and expenses. Tenant did not contest landlord's right to back rent, but denied liability for future rent, contending that when tenant vacated the premises and landlord relet to a new tenant for a period extending beyond the remainder of the lease term, the result was a surrender by operation of law, excusing tenant from further payment of rent.

In granting landlord's summary judgment motion, the court relied on language in the lease providing that in the event of default or dispossess by summary proceedings, owner was entitled to relet the premises for a period that might be shorter than or longer than the balance of the lease term, and that in the event of such a relet, tenant would remain liable for any deficiency between the rent reserved under the lease and any rent collected on account of the subsequent lease. The lease also made express provision for attorneys' fees and expenses. The court held that these lease provisions barred tenant's surrender defense.

Comment

Courts infer surrender by operation of law when a tenant abandons possession and the landlord relets the property. In Brock Enterprises Ltd. v Dunham's Bay Boat Co. Inc.*, 292 AD2d 681, 682, the Third Department dismissed landlord's claim for rent due from a prior tenant when, after the tenant's abandonment, landlord relet the property to new tenants. The court held that reletting of the property constitutes a situation so inconsistent with the landlord-tenant relationship that it indicates mutual intent to deem the lease terminated and amounted to surrender by operation of law.*

When the lease explicitly authorizes the landlord to relet the property on tenant's account, courts will not infer surrender from landlord's lease to a substitute tenant. In Kottler v New York Bargain House, *242 NY 28 [1926], the court relied on a lease provision in holding that a sublessor who relet after the initial subtenant defaulted and vacated was entitled to recover a deficiency from the defaulting subtenant.. The lease had empowered the sublessor to reenter and relet as agent of the tenant if the property became vacant. When sublessor relet to a new subtenant at a lower rent, the court held that the original tenant remained liable for the balance due.*

Absent an express provision in the lease authorizing the landlord to relet on tenant's behalf, some doubt remains about whether landlord can relet on tenant's account without tenant's express consent. In Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 N.Y.2d 130, the court suggested, in dictum, that landlord could relet on tenant's account so long as landlord provided notice. That dictum, however, is in tension with a much earlier holding denying landlord recovery because landlord did not obtain tenant's consent to the reletting. In* Gray v Kaufman Dairy & Ice-Cream Co.*, 162 NY 388 [1900], the court held that landlord's mere notice to tenant that landlord was reletting on tenant's account was insufficient to permit landlord to recover a deficiency from the original tenant when tenant had not affirmatively consented to the reletting. In* Gray*, after tenant's abandonment, landlord promptly wrote to the tenant refusing to accept tenant's offer to surrender and informing tenant that it would relet the property on tenant's account. The tenant never replied to the proposal to relet on their behalf. The court held that mere silence was insufficient evidence to find tenant's implied consent to reletting of the premises.*

Breaching Landlord Liable For Tenant's Expenses In Preparing Leased Space

Bistro Shop KKC v, N.Y. Park N. Salem, Inc.

NYLJ 9/26/19, p. 23, col. 2
AppDiv, First Dept.
(memorandum opinion)

In tenant's action for rescission damages resulting from landlord's breach by failure to timely complete construction work, landlord appealed from Supreme Court's award of damages with prejudgment interest. The Appellate Division affirmed, holding that tenant was entitled to rescission damages as a result of landlord fundamental breach of the lease.

Landlord owns a building at 30 East 60th Street and agreed to lease space in the building to tenant for restaurant use. The lease contemplated that landlord would add numerous floors to the building, requiring construction work that would involve occupation of the leased space for a short duration. The lease authorized tenant to conduct demolition and preparatory construction work while landlord simultaneously occupied the premises. In December 2007, tenant notified landlord that it had completed preparatory work and sought permission to continue preparing the space as a restaurant. On Jan. 24, 2008, landlord and tenant agreed that tenant could continue to renovate the space while landlord waited for approvals necessary to complete its work. In March

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2008, tenant stopped renovating the premises because landlord was not in compliance with the lease. Landlord offered the premises to tenant eight years later — in 2016. Tenant then brought this action to recover damages for its demolition and preparation expenses. After a non-jury trial, Supreme Court awarded tenant damages, plus prejudgment interest. Landlord appealed.

In affirming, the Appellate Division emphasized that tenant's work had been rendered useless by landlord's fundamental breach, which defeated the object of the parties. As a result, the court held that tenant was entitled to rescission damages. Moreover, because tenant had been deprived of the time value of the money it had expended, the court held that Supreme Court had properly exercised its discretion in awarding tenant interest on the money tenant had expended.

COMMENT

When a landlord fails to deliver possession, the tenant may recover necessary expenses incurred in preparing for the occupation or use of the property, unless the lease provides otherwise. For instance, in Friedland v. Myers*, 139 N.Y. 432 (1893), the Court of Appeals held that the lessee of a drug store was entitled to recover actual expenses paid or incurred in the construction of the necessary fixtures when the lessor was unable to deliver possession because of the superior rights of a prior tenant. The court emphasized that lessor was aware that lessee had contracted for the construction of cases, counters and other fixtures. Similarly, in* Beth David Hosp. v. Terrace Garden, Inc.*, 175 N.Y.S. 498 (1919) the court held that when landlord cancelled a lease for tenant's one-day event, tenant was entitled to recover expenses for the printing and mailing of tickets. The court held that the landlord must have contemplated that a tenant who leased premises for a single event would print and mail tickets before the day of the event.*

By contrast, tenant cannot recover for expenses the landlord could not have contemplated tenant would occur. Thus, in Friedland*, the court denied lessee recovery for perishable drugs the lessee had purchased before commencement of the lease term, holding that there was no reason for landlord to believe tenant would purchase perishable drugs before the lease term began.*

Additionally, Tenant is not entitled to consequential damages when a provision in the lease expressly excuses the landlord from any liability for failure to give possession on the start date of the lease. In Duane Reade, Inc. v. Reade Broadway Assoc.*, 274 A.D.2d. 301 (2000) the Court held that an express exclusion in the lease relieved landlord of liability for lost profits suffered during a five-month delay resulting from the failure of a holdover tenant to leave.*

APARTMENTS WITHDRAWN FROM MITCHELL-LAMA NOT RENT-STABILIZED

West Village Houses Renters v. WHV Housing Development Fund Corp.

NYLJ 9/30/19, p. 18, col. 3
AppDiv, First Dept.
(memorandum opinion)

In a declaratory judgment action brought by a renters union consisting of non-purchasing tenants in a housing complex withdrawn from the Mitchell-Lama program, the renters union appealed from Supreme Court's declaration that their apartments were not rent-stabilized and from that court's award of attorney's fees to the cooperative that now owns the building. The Appellate Division modified to delete the award of attorney's fees, but otherwise affirmed.

The subject housing complex withdrew from the Mitchell-Lama program on June 25, 2004, and was converted to cooperative ownership on March 9, 2006. The prior owner received J-51 tax benefits. In this action, the renters union contended that as a result of those benefits, the non-purchasing tenants were now covered by rent stabilization. Supreme Court dismissed the complaint and awarded attorney's fees to the cooperative.

In affirming, the Appellate Division held first that the units did not become stabilized upon withdrawal from the Mitchell-Lama program because the units were financed by loans from the Housing Development Corporation (HDC), a public benefit corporation, and were subject to rent regulation under the private housing finance law. Because the statute empowered HDC to regulate rents, the receipt of J-51 benefits did not trigger rent stabilization. The court then held that the units did not become stabilized upon conversion to cooperative ownership because rent stabilization does not apply to cooperatives and condominiums regardless of whether the owner receives J-51 benefits. Finally, the court held that even if the units had been rent-stabilized in the interim between withdrawal from Mitchell-Lama and conversion to cooperative ownership, the conversion did not require continuation of rent stabilization regulation because General Business Law section 352-eeee does not apply to cooperative conversions under the Private Housing Finance Law. The court, however, held that the leases authorized attorney's fees only in the cases of tenant default or where landlord was forced to defend due to a tenant's actions. Because this case did not fall into either category, the owner was not entitled to fees.

DEFAULT FORMULA DOES NOT CONSTITUTE PENALTY, AND DOES NOT PRECLUDE CLASS CERTIFICATION

Simpson v. 16-26 East 105, LLC

NYLJ 10/3/19, p. 23, col. 3
AppDiv, First Dept.
(memorandum opinion)

In tenants' action for declaratory relief and damages arising from alleged rent overcharges, tenants appealed from Supreme Court's denial of their motion for class certification. The Appellate Division reversed and granted the motion, holding that the rent stabilization code's "default formula" does not constitute a penalty that would preclude class certification.

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Tenants in a contiguous row of buildings owned by a common landlord contend that landlord improperly deregulated their building while receiving J-51 tax benefits for the building. Tenants brought this action for declaratory relief and damages, and sought class certification. Supreme Court denied their class certification motion, holding that, in certain circumstances, the rent stabilization code's default formula constituted a penalty. CPLR 901 precludes recovery of a penalty in a class action. Tenants appealed.

In reversing, the Appellate Division noted that the default formula becomes applicable when the base date rent cannot be determined, when a full rent history is not provided, or when the owner has engaged in fraudulent practices. The court concluded that because the same formula is applied in cases of fraud as in cases where the base date rent cannot be determined, the formula does not constitute "punishing conduct." Because an action to recover damages measured by reference to the default formula is not an action to recover a penalty, CPLR 901 is not applicable, and the motion to certify the class should have been granted.

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REAL PROPERTY LAW

Ambiguous Time of The Essence Notice Held Ineffective

Krishna v. Jasper Old Westbury 66 LLC

NYLJ 8/23/19, p. 28, col. 4
AppDiv, Second Dept.
(memorandum opinion)

In an action by contract vendee for return of a down payment, contract vendee appealed from Supreme Court's grant of summary judgment to seller, and from Supreme Court's cancellation of contract vendee's notice of pendency. The Appellate Division reversed, awarding summary judgment to contract vendee and restoring the notice of pendency.

Contract vendee contracted to purchase two parcels, and made down payments on both parcels. The contracts provided that the down payments, which were held in escrow by seller's lawyer, were to be liens on the subject property. Contract vendee failed to obtain financing by the date contemplated in the contracts. Seller then sent notices with respect to each contract, purporting to make time of the essence. The notices indicated that contract vendee would be held in default if it failed to close "by the date as indicated herein." The notices indicated that "a closing has been scheduled for December 19, 2016 at 2:00 P.M," but also indicated that contract vendee would be in default unless the transaction were closed "by the end of the business day on December 15, 2015." Contract vendee sent a notice purporting to reject seller's efforts to force time of the essence closings, and seller sent contract vendees notices of default with respect to both contracts for failure to appear on December 19. The notices also indicated that sellers were entitled to release of the down payments.

Contract vendee brought this action to recover damages and to foreclose liens on the property. Contract vendee filed a notice of pendency. Seller counterclaimed for release of the down payment and sought release of the notice of pendency. Contract vendee moved for summary judgment on so much of its complaint as sought release of the down payment. Seller cross-moved for summary judgment with respect to the down payment and release of the notice of pendency. Supreme Court granted seller's motion and contract vendee appealed.

In reversing, the Appellate Division held that seller's time of the essence notice was defective because it failed to clearly and unambiguously set a date for the closing. Contract vendee also established that seller repudiated the contracts by sending the notices of default. As a result, contract vendee was entitled to return of the down payments. Moreover, because the complaints were to foreclose liens on the property resulting from the sale contract, the court held that the notices of pendency were within the scope of CPLR 6501.

Comment

Whether a time of the essence notice can be effective if it sets a deadline for closing rather than a precise closing date remains a question the New York courts have not definitively resolved. Courts appear more willing to hold deadline time-of-the-essence notices effective in cases where the party serving the notice is seeking specific performance than in cases where the party serving the notice is simply trying to hold the counterparty in default. Thus, in Guippone v. Gaias, *13 A.D.3d 339, the Second Department affirmed an order granting seller's motion for summary judgment directing specific performance when seller informed buyer that that seller wished to reschedule the closing "on or before April 23, 2002" and would commence legal action if the buyer failed to comply with such request. When the seller did not receive a response to the letter, seller commenced an action for specific performance of the contract and filed a notice of pendency. The court found that the letter's "on or before" language, coupled with the statement that failure to perform would result in legal action, was clear, distinct and unequivocal notice that made time of the essence.*

By contrast, in In Mazzaferro v. Kings Park Butcher Shop, Inc.*, 121 A.D.2d 434, the Second Department affirmed the order granting buyers' specific performance, holding that seller had not effectively made time of the essence by sending a letter stating that seller was anxious to close "on or before August 26, 1983," and notifying buyers that if not closed by the "aforesaid date" the contract would be deemed null and void. Unlike the*

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buyers in Guippone, *the buyers in* Mazzoferro *made several telephone calls in an effort to arrange for the closing. The notice in* Mazzoferro *was also defective because it did not provide buyer with a reasonable time to close, but the court's suggestion that the "on or before" language was equivocal find support in* 3M Holding Corp. v. Wagner, *166 A.D.2d 580. In* 3M Holding Corp., *where the Second Department affirmed a judgment granting the return of buyers' down payment, when after the closing date in the contract had passed, the seller sent a letter to buyer which purported to set a closing date "no later than July 29, 1985." In dictum, the Second Department indicated that the letter did not make time of the essence because it was not clear, distinct or unequivocal. As in* Mazzoferro, *the seller was not seeking specific performance, but was rather seeking to retain the buyers' down payment. (In* 3M, *the decision ultimately turned on a subsequent time of the essence notice, which the court held inadequate because it did not provide the buyer with adequate notice of the closing date).*

Attorney Review Provision Permitted Cancellation Of Contract

Makris v. Boylan

|NYLJ 9/23/19, p. 22, col. 3
AppDiv, Second Dept.
(memorandum opinion)

In an action by contract vendee for specific performance of a contract to sell real property, contract vendee appealed from Supreme Court's dismissal of the complaint. The Appellate division affirmed, holding that the contract was subject to attorney review, which gave seller the option to cancel within a reasonable time.

On Jan. 16, 2018, the parties entered into a purchase agreement for a price of $1,480,000 with a down payment due upon the signing of a formal contract of sale. The purchase agreement provided that the contract was not subject to a mortgage contingency, that household items were included, and that closing was to occur on April 15, 2008 "or ASAP." The agreement also provided that it was contingent upon the parties obtaining approval of the agreement by their respective attorneys, and it was also subject to a 45-day due diligence period. Seller's lawyer subsequently sent a letter, dated January 22, indicating that after consultation with the lawyer, seller had decided not to proceed. Contract vendee's lawyer contended that the letter was sent on January 25 (nine days after the initial agreement), while seller's lawyer contended that it was sent seven days after the initial agreement. After receiving the letter, contract vendee brought this action for specific performance, but Supreme Court granted seller's motion to dismiss.

In affirming, the Appellate Division started by noting that the contract satisfied the statute of frauds even though the agreement contemplated execution of a more formal contract. But the court then held that in any event, the contract was not enforceable because the agreement was subject to review by seller's attorney, and the agreement included no deadline for that review to occur. The court concluded that even if seller's lawyer did not send the letter for nine days, that period was reasonable as a matter of law in the absence of prejudice to contract vendee. As a result, contract vendee was not entitled to specific performance.

Comment

Neither statute nor case law sets a fixed time during which a party may invoke an attorney-review provision in a real estate contract that is silent on review time, but courts have held that a party cannot invoke the attorney-review provision months after signing the contract. In Calcagno v. Roberts, *134 A.D.3d 1292 (2015), the Third Department held that where the contract did not specify an attorney-review period, the seller could not rely on the attorney-review provision to escape from the contract because seller's attorney delayed in disapproving the contract until almost two months after the contract execution. Similarly, in* Austin v. Trybus, *136 A.D.2d 940, the Fourth Department held that where the contract did not specify an attorney-review period, the buyer was bound by the contract (*see also, Rieter v. Tavella, *157 A.D.2d 894 (1990), noting in dicta that 12 days was "more than ample time" for reviewing a sale contract). Courts are also likely to bar a party from invoking attorney review as an excuse to escape from an imminent closing. In* Calcagno, *the court noted that seller's attorney did not disapprove the contract until less than two weeks before the contracted closing day. 134 A.D.3d, at 1294. In* Austin, *the court emphasized that buyer's attorney delayed in disapproving the contract until the closing day. 136 A.D.2d, at 941.*

Unless the attorney review provision imposes specific criteria on the attorney, an attorney may disapprove the contract for any reason or for no stated reason. In Moran v. Erk, *11 N.Y.3d 452, the Court of Appeals held that buyer's attorney had effectively disapproved the contract when the buyer's attorney disapproved the contract without stating any reason after the buyer felt qualms after signing the real estate contract.* Id. *at 455-56. In* Schreck v. Spinard, *13 A.D.3d 1027, the court held that seller's attorney had effectively disapproved the contract based solely on receipt of a higher-price offer since the parties did not limit matters that attorney could consider in reviewing the contract.*

By contrast, when a party's attorney fails to satisfy the attorney review provision's specific criteria, the party may not invoke the provision to escape the contract. In Christ v. Brontman, *175 Misc.2d 474, the court held that the seller remained bound by the contract since seller's attorney failed to comply with the provision's requirement that the attorney state an objection and give the buyer an opportunity to cure. Similarly, in* Avery v. Zahm, *178 Misc.2d 827, where the attorney-review provision was identical to the one in Christ, the court held that the buyer remained bound by the*

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contract since buyer's attorney only made a general statement of dissatisfaction with the contract and failed to offer seller an opportunity to cure any alleged defect.

Mortgagee Entitled to Cancellation of Erroneously Recorded Satisfaction

OneWest Bank v. Schiffman
NYLJ 9/27/19, p. 28, col. 3
AppDiv, Second Dept.
(memorandum opinion)

In mortgagee's action to quiet title, mortgagor appealed from Supreme Court's declaration that an erroneously recorded satisfaction of mortgage was void. The Appellate Division affirmed, holding that mortgagor had offered no excuse for its default in appearing but holding that, in any event, mortgagor's statute of limitations defense failed on the merits because the satisfaction was void at its inception.

In 2005, mortgagors obtained a first mortgage loan from Fremont in the amount of $315,000. In October 2006, Fremont assigned the note and mortgage to IndyMac. The following month mortgagors secured a second note and mortgage with IndyMac, which was consolidated with the first note and mortgage. Meanwhile, after its assignment to IndyMac, Fremont executed and recorded a satisfaction of the original note and mortgage. In 2011, IndyMac assigned its interests in the consolidated mortgages and notes to OneWest. In 2014, OneWest brought this action to cancel the erroneously filed satisfaction. Mortgagors did not appear in the action. Later, when OneWest moved for declaratory relief, mortgagors moved to extend their time to answer, and moved to dismiss the complaint based on the statute of limitations. Supreme Court granted OneWest's motion based on mortgagors' failure to produce a reasonable excuse for their default. Mortgagors appealed.

In affirming the Appellate Division first agreed that Supreme Court had properly denied mortgagors' motion for an extension of time because mortgagors had not provided any reasonable excuse. Although the Appellate Division indicated that it "need not consider whether they offered a potentially meritorious defense," the court went on to hold that the statute of limitations did not bar the cancellation because the satisfaction was void at its inception. The court emphasized that Fremont had no interest in the mortgage when it recorded the satisfaction, making the satisfaction void. As a result, the statute of limitations was not a bar to cancellation.

Comment

A mortgagee is entitled to cancellation of an erroneously recorded satisfaction where no bona fide purchasers or lenders for value have detrimentally relied on the erroneous recording. For instance, in LNV Corp v. Sorrento*, 154 A.D.3d 840, the Second Department affirmed the trial court's grant of summary judgment for the current mortgagee who sought discharge of a mortgage executed by Mortgage Electronic Registration Systems, Inc. (MERS) after MERS had transferred its interest in the mortgage. The court rejected mortgagor's argument that the statute of limitations barred the action, emphasizing that because the satisfaction was void in its inception, the statute of limitations did not bar the action.*

A mortgagee is not entitled to cancellation of an erroneously recorded satisfaction when the satisfaction was executed while the mortgagee still held a mortgage interest and bona fide purchasers had relied on the satisfaction. Thus, in DLJ Mtge. Capital, Inc. v. Windsor, *78 A.D.3d 645 (2010), the Second Department refused to cancel a satisfaction when a mortgagee who held mortgages on two adjacent parcels erroneously executed and recorded the satisfaction with respect to the wrong parcel, leading subsequent mortgagees to rely on a satisfaction in extending a loan to the property's owner. However, no New York cases have decided whether subsequent purchasers or encumbrances are protected when they have relied on a satisfaction that was "void ab initio" because it was erroneously record by a party who had previously assigned the mortgage.*

Co-Tenant Not Entitled to Appointment of Receiver

Manning-Kranes v. Manning-Franzman
NYLJ 9/23/19, p. 25, col. 3
AppDiv, Second Dept.
(memorandum opinion)

In an action for partition and sale of real property, defendant co-tenants appealed from Supreme Court's grant of plaintiff co-tenants' motion to appoint a temporary receiver. The Appellate Division reversed and denied the motion, holding that plaintiff co-tenants had not made the evidentiary showing necessary to support appointment of a receiver.

Plaintiff co-tenants alleged that defendant co-tenants were using rental income from the property for their own personal benefit. They also challenged expenditures made for renovations of the property. Based on these allegations, Supreme Court appointed a receiver for the property. Defendant co-tenants appealed.

In reversing, the Appellate Division noted that appointment of a receiver is an extreme remedy, to be granted only when the moving party has made a clear evidentiary showing of the need for the conservation of the property and the need to protect the moving party's interest in the property. In this case, the court held that plaintiff co-tenants had made only speculative and conclusory assertions about misuse of rental income. In addition, the court emphasized that the value of the real estate provided plaintiff co-tenants with sufficient security to enable them to protect their interests. Finally, the court noted that plaintiff co-tenants did not demonstrate that any of the challenged renovation work was unnecessaryor wasteful. As a result, the court concluded that Supreme Court abused its discretion in appointing a receiver.

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CO-OPS AND CONDOMINIUMS

Fair Housing Act Claim Against Condominium Board Dismissed

A.L.M. v. Board of Managers
NYLJ 8/21/19, p. 21. col. 3
U.S. Dist. Ct., S.D.N.Y.
(Roman, J.)

In condominium owner's claim against the condo board for violation of the Fair Housing Act, the condominium board moved for summary judgment. The court granted the motion, holding that unit owner had not demonstrated harassment that created a hostile environment, and did not establish a basis to impute any harassing conduct to the condominium board.

Condominium owner and his wife adopted a daughter of Chinese origin. When they moved into the condominium in 2005, their upstairs neighbor allegedly looked at the family disparagingly. Another neighbor would intercept the family when the family left their unit and would, allegedly, stop in such a way that family members would have to walk around him. In addition, packages addressed to unit owner were frequently damages. Unit owner hired an investigator, who discovered that no other packages were damaged, and that unit owner's packages were damaged unless the investigator was in the vicinity to observe. Seven years after moving in, unit owner moved out of the unit and tried to rent it, only to be told by the board that he could not rent the unit because board policy precluded rentals of more than 25% of the units, and the complex had reached the 25% limit. Unit owner then moved back in, returning to the same allegedly harassing behavior. Unit owner then brought this claim under the Fair Housing Act.

In granting summary judgment to the condominium, the court first noted that the Second Circuit had not resolved whether post-acquisition harassment is actionable under the Fair Housing Act, or whether a condominium board is liable for failure to redress harassment among unit owners. The court declined to address those questions because unit owner failed to establish that the harassment was sufficiently pervasive to create a hostile environment, that the harassment was because of his daughter's Chinese origin, or that there was a basis for imputing the harassing conduct to the condominium board. The court emphasized that unit owner continued to live in the unit for seven years after the allegedly harassing behavior started, undermining the claim that the harassment was pervasive. Moreover, unit owner proffered no evidence that any harassment was due to his daughter's Chinese origin rather than due to a feud between neighbors. Finally, the record established that the Board was complicit in any harassment. The court noted that the Board had sent a notice to residents regarding respect for others residents' quiet enjoyment of their units, banned the "interceptor" from the garden area near unit owner's unit, and fined the owner of the offending unit when he violated the rule. Under these circumstances, unit owner could not make out a Fair Housing Act claim or a claim under 42 USC sections 1981 and 1982.

Co-Op Unit Owner Entitled To Emotional Support Dog

Matter of 1 Toms Point Lane Corp. v. New York State Division of Human Rights
NYLJ 10/18/19, p. 25, col. 5
AppDiv, Second Dept.
(memorandum opinion)

The co-op corporation sought judicial review of a determination by the New York State Division of Human Rights (DHR). The Appellate Division upheld the determination, concluding that the Commissioner's determination was supported by substantial evidence.

Co-op unit owner filed a complaint with DHR when the co-op refused to permit her to keep an emotional support dog in her apartment to ameliorate her generalized anxiety disorder. At a hearing before an administrative law judge, both the unit owner and the co-op offered medical testimony about unit owner's disorder. The judge credited the testimony of unit owner's treating psychologist, concluded that unit owner did suffer from the disorder, and that permitting the emotional support dog was a reasonable accommodation for unit owner's disability. The judge also awarded unit owner $1,000 for mental anguish, and $11,961 in attorneys' fees. The Commissioner upheld the determination, and the co-op sought review pursuant to Executive law section 298.

In upholding the commissioner's determination, the Appellate Division acknowledged that testimony from the co-op's expert could support a contrary determination, the court held that it was for the administrative law judge to weigh the conflicting evidence, and not for the court to substitute its judgment for that of the hearing officer.

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