Adjoining Owner's/Licenses

The New York Public Library petitioned for a license, pursuant to Real Property Actions and Proceedings Law ("RPAPL") Section 881 ("Access to adjoining property to make improvements or repairs"), to enable the Library to enter onto the adjoining condominium's property to erect protective work in the condominium's plaza. The Supreme Court, New York County, granted the Petition and denied the condominium's request for the awarding of license fees. The Appellate Division, First Department, modified the Order of the lower court to grant the condominium's request, and remanded the case for a hearing to determine what would be a reasonable license fee. According to the Appellate Division,

> *"[a]lthough the determination to award a license fee is discretionary, the grant of a license pursuant to RPAPL 881 often warrants the award of contemporaneous license fees…Here, the Condo showed that it had previously been inconvenienced for over six years by NYPL's use of the Plaza pursuant to a license, and that the grant of a license would entail interference with the residents' use and enjoyment of the Condo, as well as a reduction in the resale and rental value of the Condo's units".*

Matter of New York Public Library v. Condominium Board of the Fifth Avenue Tower, 2019 Ny Slip Op 02045, decided March 19, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02045.htm.

Adjoining Owners/Statute of Limitations

The Defendants' 30-story building was completed by 2004. In 2014, the Plaintiff commenced an Action alleging that the Defendants had not provided the Plaintiff with the notice of their plans and did not extend the chimneys and flues of the Plaintiff's building, both being required by New York City Administrative Code Section 27-860 ("Adjoining chimneys"). Section 27-860 provides, in part, that

> *"…[w]henever a building is erected, enlarged, or increased in height so that any portion of such building, except chimneys or vents, extends higher than the top of any previously constructed chimneys within one hundred feet, the owner of such new or altered building shall have the responsibility of altering such chimneys to make them conform to the requirements of section 27-859 ["Chimney heights and locations"] of this article…The owner of the new or altered building shall notify the owner of the building affected in writing at least forty-five days before starting the work required and request written consent to do such work…".*

The Appellate Division, First Department, affirmed the Order of the Supreme Court, New York County, granting the Defendants' motion to dismiss the complaint. The causes of action under Section 27-860 and for trespass accrued on the completion of construction of the Defendants' building and are governed by the three-year statute of limitations under Civil Practice Law and Rules ("CPLR") Section 214 ("Actions to be commenced within three years"). Paragraph "2" of Section 214 requires that "an action to recover upon a liability, penalty or forfeiture created or imposed by statute" must be commenced within three years. Paragraph "4" of Section 214 requires that "an action to recover damages for an injury to property" be commenced within three years. New York Yacht Club v. Lehodey, 2019 NY Slip Op 02643, decided April 4, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02643.htm.

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Contracts of Sale

The purchasers under a contract for the sale of real property in Brooklyn sent a notice to the seller setting a time of the essence closing date. In response, the seller purported to cancel the contract, in a letter asserting that he was unable to transfer title as required. The purchasers commenced an Action for specific performance; the Supreme Court, Kings County, granted the Plaintiffs' motion for summary judgment. The Supreme Court's Order was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

> *"…the contract did not permit the defendant [seller] to cancel the contract where the defects in title were either waived by the plaintiffs or if the defendant had expressly agreed to remove, remedy, or discharge such defects [citation omitted]. The record demonstrates that the defendant had expressly agreed to discharge or remedy all mortgages, government violations and orders, and taxes, and the plaintiff timely waived the remaining encumbrances against the property. Therefore, the defendant's purported cancellation of the contract prior to the law date set by the plaintiffs' time of the essence closing notice was not a valid cancellation, but an anticipatory repudiation of the contract [citations omitted]".*

Herzog v. Marine, 2019 NY Slip Op 01574, decided March 6, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_01574.htm.

Easements of Light and Air/Condominiums

The Plaintiff owned two adjoining units on the 16th floor of the Essex House Condominium. The Defendant owned two units on the 15th floor, directly below the Plaintiff's units. The Board of Directors of the Condominium, also a Defendant, authorized the Defendant to replace a greenhouse on a terrace which is part of one of the Plaintiff's units. The Plaintiff alleged that the new greenhouse was larger than the one it replaced, that it obstructed the view of Central Park from windows in one of its units, that the new construction was done without its consent, and that the new greenhouse diminished the market value of its unit. The Plaintiff asserted that the Defendants had violated Real Property Law ("RPL") Sections 339-j ("Compliance with by-laws and rules and regulations") and 339-k ('Certain work prohibited") and that the Board of Managers breached its fiduciary duty. RPL Section 339-k, part of New York's Condominium Act, provides that

> *"[n]o unit owner shall do any work which would jeopardize the soundness or safety of the property, reduce the value thereof or impair any easement or hereditament, nor may any unit owner add any material structure…without in every such case the consent of all the unit owners affected being first obtained".*

The Plaintiff sought a permanent injunction requiring that the greenhouse be removed. The Supreme Court, New York County, however, granted the Defendants' motions for summary judgment and dismissed the complaint.

On the claim that the Board of Managers had breached a fiduciary duty owed to the Plaintiff, the Court found that the claim against the condominium Board was conclusory because the Plaintiff had not established that the Board failed to follow applicable rules and procedures. As to the Plaintiff's claim that it was adversely affected by the construction of the greenhouse and that the greenhouse was erected without the Plaintiff's consent, the Court found that those claims were "entirely speculative and wholly unsubstantiated on this record". Further, according the Court,

> *"…assuming arguendo that plaintiff could even show that the new greenhouse was taller than the old structure [which was in dispute], plaintiff's claims fail as a matter of law. Generally, an adjoining landowner does not have an easement for light or air absent an express agreement [citations omitted]. Based on the foregoing, plaintiff cannot claim any damages for an alleged partial obstructed view of Central Park from any of the windows in the apartment".*

ESX Services LLC v. The Board of Managers of the Essex House Condominium, 2019 NY Slip Op 30881, decided March 19, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30881.pdf.

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Eminent Domain/"Prior Public Use"

The City of Yonkers adopted a resolution to condemn, in furtherance of an Urban Renewal Plan, property in Yonkers owned by New York City and used as a bus depot by the Metropolitan Transportation Authority and the MTA Bus Company. New York City commenced a proceeding pursuant to Eminent Domain Procedure Law Section 207 ("Judicial review") to review Yonkers' determination. The Appellate Division, Second Department, although finding that there were legitimate public purposes to support the proposed condemnation, held that the condemnation was prohibited under the doctrine of "prior public use". "Under the doctrine of prior public use, land already devoted to a public use may not be condemned absent legislative authority for the particular acquisition at issue [citations omitted]".

Land that is devoted to a public use may be condemned without legislative authority when the new use does not materially interfere with the existing public use. The Appellate Division found that condemning this property in furtherance of the Urban Renewal Plan would materially interfere with the4 existing use of the property as a bus depot. Matter of City of New York v. Yonkers Industrial Development Agency, 2019 NY Slip Op 02087, decided March 20, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02087.htm.

Equitable Subrogation/"Voluntary payment" Doctrine

Nicolas Auvray and Milton Rainford, real estate investors, paid the NYCTL 2014-A Trust and the NYCTL 2015-A Trust (collectively, "the Trusts") amounts required to prevent the foreclosure of tax liens on a certain property. They then assigned any rights accruing to them from the payment of the tax liens to All Saints 2081 LLC ('2081 LLC"). 2081 LLC sought a ruling that it was an equitable subrogee and, as such, held an equitable lien on the property with the same priority as the original liens held by the Trusts.

The Supreme Court, New York County, dismissed all claims asserted by 2081 LLC, holding that 2081 LLC was not entitled to equitable subrogation or to an equitable lien due to application of the voluntary payment doctrine. That doctrine "'bars recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law [citations omitted]'". The tax lien payments were voluntarily made by the investors, not to protect their interests. At no time have they had any interest in the property. All Saints Cooperative Realty Corporation v. All Saints Co Realty Corporation, 2019 NY Slip Op 30684, decided March 18, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30684.pdf.

Lien Law/Itemization

Petitioner, the owner of real property against which a mechanic's lien was filed, moved to have the Supreme Court, Kings County, require that a mechanic's lienor provide a revised itemized statement pursuant to Lien Law Section 38 "(Itemized statement may be required of lienor") or, alternatively, that the Court dismiss the lien. The Court denied the motion, The Respondent mechanic's lienor sufficiently itemized all labor costs by submitting statements setting forth the date, name, hours worked and rate of pay for each worker and provided an itemized list of all materials. There is no authority requiring the lienor to provide "supplier purchase orders and/or invoices detailing the quantity, price and date of delivery of all materials", as requested by the Petitioner. Matter of Red Hook 160 LLC v. Borough Construction Group LLC, 2019 NY Slip Op 30827, decided March 19, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30827.pdf.

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Mortgage Foreclosures/Abandonment of Action

The foreclosure of a mortgage was commenced in 2007. The Defendant did not appear or answer the complaint. In 2008, the Supreme Court, Suffolk County, granted the Plaintiff's motion for an Order of Reference. In 2010, the Plaintiff moved for entry of a judgment of foreclosure and sale; the motion was denied in April 2011. In July 2012, the Court directed the Plaintiff to resume prosecution of the case, and in November 2012, the Court, sua sponte, dismissed the complaint, finding that the plaintiff, "without good cause or explanation, failed and neglected to comply with the express directive of the [c]ourt and has failed to resume prosecution of this action". In 2016, the Plaintiff's successor-in-interest moved to vacate the Court's Order and to restore the action to the calendar. The Supreme Court denied the motion; the Appellate Division, Second Department, vacated the Supreme Court's Order and directed that the case be restored to the calendar.

Under subsection (c) ("Default not entered within one year") of CPLR Section 3215 ("Default judgment"), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall...dismiss the complaint as abandoned". In this case, according to the Appellate Division,

> *"{w]ithin one year after the defendant's default, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (see RPAPL 1321[1]) and, thus, did not abandon this action [citations omitted]. Accordingly, the court had no basis to, sua sponte, direct dismissal of the complaint pursuant to CPLR Section 3215 (c) as abandoned".*

The Appellate Division also held that the Supreme Court lacked the power to dismiss the proceeding for lack of prosecution under CPLR Section 3216 ("Want of prosecution") because the issue was never joined in the Action, as required by Section 3216.

US Bank, N.A. v. Picone, 2019 NY Slip Op 02141, decided March 20, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02141.htm.

Mortgage Foreclosures/Deficiency Judgments

In the foreclosure of mortgages encumbering two parcels, the Plaintiff moved for a judgment of foreclosure and sale for one property, representing that it would seek reformation of an erroneous legal description in the mortgages of the other parcel. If the first sale's proceeds failed to satisfy the debt, the Plaintiff would move for an additional judgment of foreclosure and sale for the other property. Based on that representation, the Supreme Court, Tompkins County, granted the motion; the first parcel was sold, for less than the amount of the foreclosure judgment.

The Plaintiff abandoned its plan to sell the second parcel on learning that the County had commenced a tax foreclosure. While a hearing on the Plaintiff's motion for a deficiency judgment was pending, the second parcel was sold for unpaid taxes. The Supreme Court denied the Plaintiff's motion and issued an Order holding that the sale of the first parcel fully satisfied the judgment. The lower court's ruling was affirmed by the Appellate Division, Third Department. According to the Appellate Division,

> *"[i]f, as claimed by plaintiff, the second parcel were subject to the mortgage liens, plaintiff abandoned the liens on the second parcel by affirmatively electing to allow them to be extinguished by the tax foreclosure proceeding., and plaintiff's abandonment of the liens on this portion of the collateral precluded it from seeking a deficiency judgment. If the second parcel were not subject to the mortgage liens, then plaintiff's motion for a deficiency judgment, made more than 90 days after the referee's deed conveying the first parcel was delivered to the purchaser of that parcel [as required by RPAPL Section 1371[2]], was untimely".*

Unity Bank v. St. John's Dryden Realty Corp., 2019 NY Slip Op 02597, decided April 4, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02597.htm.

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Mortgage Foreclosures/Notices

RPAPL Section 1304 ("Required prior notices") requires "a lender, an assignee or a mortgage loan servicer [commencing] legal action against the borrower, including [a] mortgage foreclosure" to send a notice, in the form specified in Section 1304, to the borrower at least ninety days before an Action on a "home loan" is commenced. The notice is required to be sent by registered or certified mail and by first class mail to the last known address of the borrower.

In a mortgage foreclosure commenced in Nassau County, the Defendant opposed the Plaintiff's motion for summary judgment on the ground, among others, that the Plaintiff had not demonstrated compliance with Section 1304. The Appellate Division, Second Department, reversed the lower court's Order and vacated the appointment of a referee to compute. The Appellate Division found that the Plaintiff failed to establish, prima facie, that it had complied with the requirements of Section 1304. According to the Appellate Division,

> *"…the plaintiff relied upon the affidavit of an employee who claimed that the plaintiff's business records showed that RPAPL 1304 notices were sent by certified and first-class mail. However, the documentary evidence submitted in support of those claims redacted certain tracking numbers and failed to establish, prima facie, that the notices were mailed by first-class mail [citations omitted]".*

Citimortgage, Inc. v. Succes, 2019 NY Slip Op 02058, decided March 20, 2019, is posted at
http://www.nycourts.gov/reporter/3dseries/2019/2019_02058.htm.

Mortgage Foreclosures/Referee Compensation

Under CPLR Section 8003 ("Referees"), "[a] referee is entitled, for each day spent in the business of the reference, to $350, unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead". Further, a referee's compensation for selling real property pursuant to a judgment "cannot exceed seven hundred fifty dollars, unless the property [is] sold for fifty thousand dollars or more, in which event the referee may receive such additional compensation as the court may seem proper".

A Referee appointed in the foreclosure of a mortgage, having sold the subject real property at public auction for $577,000, received a fee of $550. The Referee sought a greater fee, claiming that he had spent 20.25 hours of work on the matter. The foreclosing Plaintiff opposed the Referee's motion, asserting that the payment to him of additional fees would be excessive. The Supreme Court, Suffolk County, directed that the referee be paid an additional $950 to compensate him for his computation of the amount due, for the Plaintiff's last-minute adjournment of the foreclosure sale, and for time he spent on certain telephone calls. The Appellate Division affirmed the Supreme Court's Order, holding that the fee awarded was appropriate; "…the court may provide for the payment of additional compensation where the Referee renders unusual or exceptional services [citations omitted]". Citibank, N.A. v. Dulfon, 2019 NY Slip Op 02496, decided April 3, 2019, is posted at
http://www.nycourts.gov/reporter/3dseries/2019/2019_02496.htm.

Mortgage Foreclosures/Statute of Limitations

The complaint in a mortgage foreclosure commenced in 2007 was dismissed in 2008 for lack of standing. A second foreclosure of the mortgage brought in 2009 was discontinued in 2014 on motion of the assignee of the note and mortgage. Later in 2014, another foreclosure was brought. The assignee's motion for summary judgment and for an order of reference was granted by the Supreme Court, Kings County, and the Appellate Division, Second Department, affirmed.

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The Defendant had asserted as an affirmative defense that the statute of limitations to enforce the indebtedness had expired. However, according to the Appellate Division, "…the commencement of the 2007 action did not cause the statute of limitations to begin to run. The Supreme Court granted [the then Defendant's] motion to dismiss the 2007 action because U.S. Bank did not have standing to prosecute the action. Accordingly, service of the 2007 complaint did not constitute a valid exercise of the option to accelerate the debt and the statute of limitations did not begin to run at that time [citations omitted]". MLB Sub I, LLC v. Grimes, 2019 NY Slip Op 02081, decided March 20, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02081.htm.

Mortgage Foreclosures/Statute of Limitations/Reverse Mortgages

The Appellate Division, Third Department, affirmed the ruling of the Supreme Court, Ulster County, which dismissed the complaint in the foreclosure of a reverse mortgage as being barred by application of the statute of limitations. The note and mortgage both authorized the lender to require immediate payment in full on the death of the borrower, who died in 2009; therefore, "[the] cause of action was untimely because it was commenced more than six years after decedent's death (see CPLR 213[4]. According to the Court,

> *"'[w]here the claim is for payment of a sum of money allegedly owed pursuant to a contract, the cause of action accrues when the party making the claim possesses a legal right to demand payment. In other words, the statute of limitations [is] triggered when the party that was owed money had the right to demand payment, not when it actually made the demand' [citations omitted]…This rule applies even though the party that is owed money does not have knowledge of the event giving rise to a cause of action [citations omitted]".*

The Appellate Division also ruled that enforcement of the indebtedness was not exempt from the application of the statute of limitations because the mortgage was insured by HUD. Bank of America, N.A. v. Gulnick, 170 AD3d 1365, 2019 NY Slip Op 01878, decided March 14, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_01878.htm.

Mortgage Foreclosures/Statute of Limitations/Standing

In 2010, the Supreme Court, Nassau County, dismissed a mortgage foreclosure, without prejudice, because the Action, commenced in 2006, was brought before the Plaintiff was assigned the note and mortgage. In 2014, the Plaintiff brought another foreclosure. One of the Defendants, an obligor under the note secured by the mortgage, moved to dismiss the complaint as to her as being time-barred. The Supreme Court denied the motion, holding that because the Plaintiff had lacked standing the commencement of the prior foreclosure did not accelerate the debt. The Appellate Division, Second Department, affirmed.

On appeal the Defendant did not contest the holding that the prior foreclosure did not accelerate the debt. Instead, the Defendant argued that the limitations period began to run when a notice of default letter was sent to her in 2006 by the loan servicer. However, according to the Appellate Division, the notice was "an expression of future intent" to accelerate and, even if the notice was clear and unequivocal, the Plaintiff lacked standing to send the notice. U.S. Bank National Association v. Sopp, 2019 NY Slip Op 01637, decided March 6, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_01637.htm.

Mortgage Foreclosures/ Stipulation of Settlement Res Judicata

In accordance with the terms of an agreement which settled a mortgage foreclosure, the borrower paid the mortgagee to fully satisfy its obligations. A stipulation of discontinuance was executed "with prejudice". The borrower later commenced an Action to recover damages for his alleged overpayment of the amount of the mortgage payoff. The Supreme Court, Kings County's grant of the Defendant-mortgagee's motion for summary judgment was affirmed by the Appellate Division, Second Department. According to the Appellate Division,

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> *"…the issue of the proper amount due under the mortgage loan…was resolved when the foreclosure action was settled and the plaintiff entered into the stipulation of discontinuance with prejudice…[T]he stipulation of discontinuance with prejudice was entitled to preclusive effect under the doctrine of res judicata so as to preclude relitigation of the issue of the proper amount owed under the mortgage loan".*

DeSouza v. LSREF2 Apex 2, LLC, 2019 NY Slip Op 02499, decided April 3, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02499.htm.

Notice of Pendency/Party Wall Dispute

The Plaintiffs and a Defendant own two adjoining townhouses in Manhattan that share a common party wall. The Plaintiffs claimed that during renovations to the Defendant's building the Plaintiffs' half of the party wall was damaged. The Plaintiffs requested a declaration that the Defendants had trespassed onto its property, and an award of damages and injunctive relief. In addition to denying the Defendants' motions to vacate a temporary restraining order and to dismiss certain causes of action, the Supreme Court, New York County, denied the Defendants' motion to cancel a notice of pendency that was filed by the Plaintiffs. As to the propriety of the filing of the notice of pendency, the Court stated the following:

> *"Because plaintiffs and defendants share a party wall dividing their parcels. plaintiffs only hold title to 'so much of the wall as stands upon [their] own lot' but also an 'easement in the other strip for purposes of the support' of their building [citation omitted]. Thus, plaintiffs' request for injunctive relief - requiring removal of defendants' additions to the party wall and restoration of the party wall to its preexisting condition – would not simply affect the [Plaintiffs'] Property but would also protect plaintiffs' support easement over the [Defendant's property's] half of the party wall and affect [the Defendant's' title to and use of its property. Plaintiffs' filing the notice of pendency therefore was proper".*

The Court also noted that the "plaintiffs' 'effort to stop the sale of the [Defendant's] property' is a 'legitimate use of the notice of pendency'". Chang v. 127 East 92 LLC, 2019 NY Slip Op 30614, decided March 12, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30614.pdf.

Notice of Pendency/Successive Filings

Subdivision (c) of CPLR Section 6516 ("Successive notices of pendency") states: "[e]xcept as provided in subdivision (a) [relating to the filing of a successive notice of pendency to comply with Real Property Actions and Proceedings Law Section 1331] of this section, a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective". This subsection codified what has been referred to in common law as the "no second chance" rule.

A mortgage foreclosure commenced in 2009 was dismissed "without prejudice" due to the lender's failure to comply with various directives of the Court. The notice of pendency was cancelled. In 2014, the assignee of the mortgagee commenced a second foreclosure, filing a notice of pendency. The Defendant asserted that the Plaintiff was prohibited from filing a second notice of pendency due to Subsection 6516(c).

The Supreme Court, Schenectady County, granted the Plaintiff's motion for summary judgment and appointed a referee to compute. The Defendant's cross-motion for summary judgment dismissing the complaint was denied. The Appellate Division, Third Department, affirmed the ruling of the lower court. According to the Appellate Division, on the issue of the filing of the second notice of pendency,

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> *"CPLR Section 6516(a) clearly and unambiguously creates a broad exception to the 'no second chance' rule codified by CPLR Section 6516(c), thereby allowing for the filing of successive notices of pendency in mortgage foreclosure actions, without limitation. Although CPLR 6516(a) specifically references circumstances under which successive notices of pendency may be filed…, the Legislature, tellingly, did not include any limiting language that would indicate that those circumstances presented the only ones under which a successive notice of pendency could be filed [citation omitted]. Thus, based upon our plain reading of the statutory language, plaintiff was not prohibited, as defendants contend, from filing a second notice of pendency following the court-ordered cancellation of its prior notice of pendency [see CPLR Section 6516(a)".*

Bank of America, N.A. v. Kennedy, 2019 NY Slip Op 02603, decided April 4, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_02603.htm.

Recording Act

In 1977, James Foote conveyed certain property to Milton Wilson. The deed was recorded but indexed against the wrong tax block and lot. A mortgage made by Wilson to Foote was also recorded but properly indexed. In 2016, the Plaintiff purchased the property from the purported heirs of James Foote, then deceased. After the deeds to the Plaintiff were recorded, the New York City Register re-indexed the deed to Wilson. The Plaintiff brought an Action to quiet title in his name and to have the deed to Wilson canceled and expunged from the record.

The Supreme Court, New York County, on re-argument, upheld Wilson's title to the property and declared that the Plaintiff's claim to the property was invalid. The Court granted Wilson's motion to dismiss and dismissed the Action, sua sponte, as against the New York City Department of Finance. Although the deed to the Plaintiff was the first deed properly recorded, the Plaintiff was not a "good faith" purchaser within the meaning of Real Property Law Section 291 ("Recording of conveyances'), New York's "Recording Act". A title search conducted in 2016 would have disclosed the existence of the mortgage that Wilson executed to Foote. According to the Court,

> *"[c]harged with constructive knowledge of [the mortgage made by Wilson to Foote, the fee owner of record], [the Plaintiff] had a duty to inquire as to the nature and scope of Wilson's interest in the Property. The complaint and affidavits lack any indication that [the Plaintiff] fulfilled its duty of reasonable inquiry as to Wilson's claim to the Property".*

Zucker Real Estate Corp. v. Wilson, 2019 NY Slip Op 30932, decided April 8, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30932.pdf.

Religious Corporations/Mortgage

A Church in East Harlem filed a petition seeking court approval for a mortgage on its house of worship, which was its sole asset, under Not-for-Profit Corporation Law Sections 510 ("Disposition of all or substantially all assets") and 511 ("Petition for court approval") and Religious Corporations Law ("RCL") Section 12 ("Sale, mortgage and lease of real property of religious corporation"). The purpose of the loan, in the amount of $7,200,000, was to fund expenses to be incurred to achieve the up-zoning of the property, the construction and sale of a new building on the site, the repayment of an unsecured bridge loan, debt service, and other costs to be incurred in the redevelopment of the property. The interest reserve was sufficient to cover four years of interest payments. Repayment was to be made from sales proceeds realized from the sale of the property once improved. The estimated cost to construct a new building, including transaction expenses, was estimated to be as much as $25,000,000. The Church had limited reserves.

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The New York State Attorney General's Office did not approve the transaction, finding that "[t]his is a highly speculative and risky undertaking, involving substantial entitlement risk; should the rezoning and plan approval not occur, or be held up by litigation, or should the New York real estate market be unfavorable to the development at the end of the loan term, the organization would lose its property to the lender". The Supreme Court, New York County, then denied the Petition, holding that "petitioner does not demonstrate that the [mortgage loan] is fair and reasonable and that petitioner's interests will be thereby promoted". According to the Court,

> *"…when a religious corporation seeks to sell or mortgage its real property, approval by the court, upon notice to the Attorney General, or approval by the Attorney General, is required to confirm that 'the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of its members will be promoted [citations omitted]'…As a future development deal, with petitioner acting as its own developer/contractor, and given its financial status at the time of the application, the value of the property, and petitioner's questionable ability to carry the financial burden of the increase in its liabilities, the petition falls short of demonstrating an ability to support the financial burden and increased risk associated with the transaction. Thus, the [mortgage] is not 'fair and reasonable' or a sound financial decision when petitioner's sole valuable asset is placed at risk".*

Matter of the Application of La Hermosa Church, 2019 NY Slip Op 30691, decided March 22, 2019, is posted at http://www.nycourts.gov/reporter/pdfs/2019/2019_30691.pdf.

In another case involving the execution of a mortgage by a religious corporation, the foreclosing mortgagee moved for an Order granting it summary judgment, appointing a referee to compute, reforming the mortgage to include a full legal description, and confirming the validity of the mortgage being foreclosed. It also requested that the Court direct the execution of a confirmatory mortgage or the recording of an Order confirming the mortgage. The Defendant cross-moved for an Order dismissing the complaint, declaring that the note and mortgage were unenforceable. The Supreme Court, Kings County, declined to approve the mortgage nunc pro tunc, held that the mortgage was invalid under RCL Section 12, and dismissed the complaint without prejudice for the Plaintiff to sue on the indebtedness. According to the Court,

> *"it is clear that nunc pro tunc approval of a $350,000 mortgage with a 16% rate of interest and default interest rate of 24%, upon which it was previously determined that the amount of indebtedness due and owing as of November 30, 2017 exceeded one million dollars, would not be in defendant's best interest as it will likely result in the loss of its house of worship in foreclosure".*

John F. Walsh Enterprises, LLC v. Grace Christian Church, 2019 NY Slip Op 50247, decided February 28, 2019, is posted at http://www.nycourts.gov/reporter/3dseries/2019/2019_50247.htm.

Zoning Lots/New York City

A "zoning lot" is defined in Section 12-10(d) of the Zoning Resolution ("ZR") of the City of New York, in relevant part, as "a tract of land, either **unsubdivided** or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block, which…is declared to be a tract of land to be treated as one zoning lot for purposes of this Resolution". (Emphasis added) On formation of an expanded zoning lot, combining what had been separate zoning lots, development rights can be transferred within the new zoning lot for development. The definition in ZR Section 12-10 also states that "[a] zoning lot…may or may not coincide with a lot as shown on the official tax map of the City of New York…".

On May 18, 1978, Irving E. Minkin, the then Acting Commissioner of the Department of Buildings ("DOB"), issued a Departmental Memorandum (the "Minkin Memo") with the subject line "Zoning Lot Certification Pursuant to Section 12-10 of the Zoning Resolution". The Minkin Memo stated the following:

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> *"Under this [1977] amendment [to the zoning resolution, which amended the definition of a zoning lot] an applicant for new development or enlargement who desires to permit the use of a tract of land within a single zoning lot, which may consist of one or more tax lots* ***or parts of tax lots****, as shown on the official tax maps whether in common ownership or not…is required to furnish certain information which is to be certified by a title company…before he can obtain a building permit or certificate of occupancy". (Emphasis added)*

In reliance on the Minkin Memo, and on generally accepted practice, the DOB issued a building permit for the construction of a 55-story tower on a 110,794 square foot development site within a tax block in Manhattan bounded by Amsterdam Avenue, West 66th Street, West End Avenue and West 70th Street. Development rights for the project were acquired though the creation of a combined zoning lot which included several partial tax lots. New York City's Board of Standards and Appeals ("BSA") issued a Resolution affirming the issuance of the permit.

Petitioners, the Committee for Environmentally Sound Development and the Municipal Arts Society, challenged the issuance of the building permit. After the BSA determination, Petitioners commenced an Article 78 proceeding seeking a judgment vacating the BSA Resolution. They claimed the building permit was invalid because the zoning lot assembled by the developer was not a proper zoning lot; in including several partial tax lots the zoning lot was not, as required by the ZR, either "unsubdivided" or "consisting of two or more lots of record". Petitioners requested an Order directing the DOB to revoke the permit and halt construction at the development site.

The Supreme Court, New York County, annulled the BSA Resolution because it was "unreasonable and inconsistent with the plain language of the governing statute" which requires a zoning lot to be "a tract of land, either unsubdivided or consisting of two or more lots of record contiguous for a minimum of ten linear feet, located within a single block…". The Court noted that the BSA had not taken into account the DOB's announced position that the Minkin Memo, in allowing a zoning lot to include partial tax lots, was incorrect.

Further, although, as the Court noted, the DOB intends to issue a correction to the Minkin Memo after resolution of this litigation, to give the new interpretation prospective effect, the DOB, in its submission to BSA, "…shows that its intended revision of the ZR's 'zoning lot' definition is just a correction of a long-standing, albeit untested, misinterpretation of statutory language. As it does not state a new legal principle, DOB's corrected interpretation would be entitled to retroactive application [citations omitted], which will invalidate the Permit".

The Court remanded the matter to the BSA, which was directed to review DOB's approval of the building permit application "in accordance with the plain language of the [zoning resolution] and in accordance with this decision and order". The Committee for Environmentally Sound Development v. Amsterdam Avenue Redevelopment Associates LLC, 2019 NY Slip Op 30621, decided March 14, 2019, is posed at http://www.nycourts.gov/reporter/pdfs/2019/2019_30621.pdf.

Michael J. Berey
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