

A.R.S. ABSTRACT, LTD.

LEGAL BRIEFS

From: John A. Kazazis
jkazazis@arsabstract.com

Date: July 27, 2007

Mortgage Foreclosure – Property owned by husband and wife as tenants by the entirety was mortgaged by the husband to secure his note for \$20,000.00. The mortgage was foreclosed and a referee’s deed was delivered to the Defendants, the assignees of the mortgage. The wife, now divorced and still living at the premises with her children, moved for an Order vacating the judgment of foreclosure and sale, revoking the sale and setting aside the referee’s deed on the grounds that although she was a necessary party to the foreclosure she was not named as a party defendant nor served. Noting that the property was now worth approximately \$800,000.00 the Supreme Court, Kings County, granted the requested relief. According to the Court, ***“...justice and fairness calls for a determination that weighs in on the side of resident home owner...If this sale is not vacated, the Defendants may well receive an undeserved windfall at the expense of the home-owner resident who... had no notice of the original foreclosure action and who has been in continued occupancy ...Had she received proper notice, she may well have been able to take steps to avoid this outcome...”*** Mercaldo v. Navarro.

New York State Real Estate Transfer Tax – On May 16, 2007 the Department issued an Advisory Opinion taking the position that the ground lease of less than 50% of the total rentable space, exclusive of common areas, in an existing shopping center, on which leased land a new building and parking is to be constructed, is not subject to the transfer tax because the leased land is not substantially all of the premises constituting the real property. ***Tax Law Section 1401 (c) provides that a***

lease for a term of 49 years, taking into account any options for renewal , on which substantial capital improvements are to be made for the benefit of a lessee, is subject to tax if the lease is for “substantially all of the premises constituting real property”. Under Section 575.7(a) (3) of the Real Estate Transfer Tax Regulations, “substantially all means ninety percent or more of the total rentable space of the premises”. The Advisory Opinion notes the “unique nature of shopping center lease arrangements” and cautions that this ruling does not apply to a lease for property not located in a shopping center, to which Section 575.7(a)(3) of the Real Estate Transfer Tax Regulations applies, and that this ruling does not apply when a lease contains an option to purchase.

Religious Corporations- Plaintiff, Religious Corporation, moved for an Order setting aside the 1994 sale of its property pursuant to an Order of the Supreme Court, Kings County, approved by the Attorney General’s Office. It claimed that certain requirements for a valid transfer of its property under the Religious Corporations Law, the Not-For-Profit Corporations Law, and its constitution and By-Laws were not satisfied. It was alleged, for example, that members of the Plaintiff Corporation were not given notice of a meeting to approve the sale and were not given an opportunity to vote on the sale. There having been two subsequent court-authorized transfers of the premises by Religious Corporations, the Supreme Court, Kings County, granted the current owner’s motion to dismiss the Complaint, and it vacated the notice of pendency. **According to the Court, “were the plaintiff’s in this case to prevail, it would render unstable the title to any parcel of real property in New York State that had been previously owned by a religious or not-for-profit corporation, even if its conveyance had been accomplished pursuant to a court order”.** The Court noted that the **“plaintiff’s remedy is to sue the [Plaintiff’s] allegedly misbehaving corporate officers”.** Congregation Beth Hamedrash Hagodel of Mapelton Park Jewish Center Inc. v. Perr

Tenancy by the Entirety- Real property was sold by a husband and wife holding title as tenants by the entirety. Following the sale the husband died. One-half of the

sale proceeds were distributed to the wife; the disposition of the other one-half was in question. If those funds did not belong to the wife as the surviving tenant by the entirety, they would be an asset of the decedent's estate, subject to the possible claims of creditors. **According to the Dutchess County Surrogate's Court, the tenancy by the entirety terminated when the deed was delivered and the grantors then became owners of the proceeds of the sale as tenants in common. Accordingly, the other one-half of the proceeds was an asset of the decedent's estate.** Matter of Schmitt.

Contract of Sale – Under a contract of sale, property in Kings County was to be conveyed subject to zoning and subdivision laws and regulations, provided that they did not render title unmarketable and were not violated by the existing buildings and improvements on the property and their use. After the contract was executed but before the scheduled closing date the property was down-zoned. As a result of the change in zoning, the Plaintiff-Buyer sought return of his down payment, and the Defendants-Sellers sought an award of liquidated damages for breach of the contract. **The Supreme Court, Kings County, granted the Defendants' motion for summary judgment and awarded them liquidated damages pursuant to the contract's terms. The contract was not conditioned on the zoning remaining unchanged and the Plaintiff, a licensed real estate broker and developer, could have inquired as to pending zoning changes before entering into the contract.** Dunn v. Arniotes.

Foreclosures/Service by Publication – First publication of the summons and complaint against the Defendant in a tax lien foreclosure was not made within thirty days of the date on which the Order authorizing service by publication was entered, as required by CPLR Rule 316(c). The Supreme Court, Kings County, denied the Plaintiff's motion for an Order deeming the affidavits of publication as having been filed timely *nunc pro tunc*. **According to the Court, "failure to comply with the strict time requirements of CPLR Rule 316(c) is jurisdictional". The Court**

granted leave to obtain a new Order for service by publication. NYCTL-1 Trust v. Cruz.

Foreclosures/Surplus Money – Motions were before the Supreme Court, Bronx County, to alternatively confirm or reject the Referee’s report on the disposition of surplus monies from a sale of real property in a tax lien foreclosure. The Referee determined that since the property, acquired by the record owner prior to his marriage, was to be conveyed by him to his spouse pursuant to a 1999 divorce decree, the former spouse’s Estate should be awarded the entire surplus, notwithstanding that the transfer did not occur. ***The Court affirmed the finding, holding that the divorce decree, turned into an Order and Judgment, transferred to the owner’s spouse an equitable interest in the property which is a vested interest entitling her Estate to claim surplus monies.*** However, the Court rejected the claim that a judgment creditor of the record owner had a right to surplus monies, since the 1993 money judgment was rendered in Kings County and docketed solely in Queens County, not in Bronx County where the property is located.

Mechanic’s Liens – The Supreme Court, Kings County, denied a motion to discharge two mechanic’s liens and granted a cross-motion for leave to amend nunc pro tunc notices of lien filed against the name of the sponsor of a newly formed condominium and the tax lots prior to recording of the Declaration. Three of the nine units were sold before the liens were filed. ***According to the Court, the “use of the original block and lot numbers...does not compel the court to find that the liens at issue constitute improper ‘blanket liens’ on the property...The language of both liens limits each on its face to only that property in which [the sponsor] still holds an interest”. Amendment of the mechanic’s liens would not prejudice any “existing lienor, mortgagee or purchaser in good faith”, in compliance with Lien Law Section 12-a (“Amendment”).*** SGS Associates, LLC v. R.A. German Construction Corp