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LEGAL BRIEFS

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Adjoining Parcels – Under Section 27-1031 (b) (1) of New York City’s Administrative Code (“Excavation Operations”) of the Building Code, “when an excavation is carried to a depth more than ten feet below the legally established curb level, the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures...”. Under Code Section 27-724 (“Construction required for or affecting the support of adjacent properties or buildings”), “except in cases where a proposed excavation will extend less than ten feet below the legally established grade, all underpinning operations...or other construction or excavations required for or affecting the support of adjacent properties or buildings shall be subject to controlled inspection. The details of underpinning...or other constructions required for the support of adjacent properties or buildings shall be shown on the plans...approved by the architect or engineer who prepared the plans”. Further, Code Section 27-723 (“sub-grade for footings...”) provides that “[t]he soil material directly underlying footings...shall be inspected by an architect or engineer immediately prior to the construction of the construction of the footings. If such inspection indicates that the soil conditions do not conform to those assumed for the purpose of design and described on the plans...remedial measures shall be adopted, as required. A copy of a report or reports on such inspection or inspections describing the conditions found and any necessary modification of the design, and bearing the signature of the architect or engineer making the inspections, shall be filed with the commissioner”.

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The owner of a property in Brooklyn sued the adjoining property owner and its architect for damage to the building on the Plaintiff's property which was alleged to have occurred by reason of the construction of a new building on the adjoining lot. Although the plans for the new building called for its footings to be at the same depth as those of the Plaintiff's building, the excavation for the foundation of the new building was more than ten feet below the curb level and below the level of the footings of the Plaintiff's building, resulting in the damage to the Plaintiff's building.

The architect moved for summary judgment to dismiss the case as to him on the ground that he owed no duty to the Plaintiff, but the motion was denied by the Supreme Court, Kings County. ***According to the Court, the architect owed a duty to adjacent owners for any injury suffered as a result of his improper certifications to the Buildings Department and for the failure to provide necessary underpinning. "Where a regulation imposes a duty for the benefit of an adjacent property owner, that owner may maintain an action against a party that does not comply with the regulation".*** 27 Jefferson Avenue, Inc. v. Emergi

Contracts of Sale – The contract of sale entered into with the successful purchaser at a Court ordered auction sale of a two story residential building in Queens County provided that the closing take place within 30 days of the auction. The closing did not take place because the contract vendee alleged that there were problems with title and with the condition of the property. Three to four months after the contract was entered into, the City of New York demolished the second story of the building pursuant to two unsafe building proceedings, and the vendee moved for a reduction in the purchase price due to the resulting diminution in the property's value. The Supreme Court, Queens County, denied the motion. It held the vendee in breach of the contract for failing to close as required, and that the vendee was subject to damages in the amount of the down payment unless the closing took place within ten days of service upon the vendee of a copy of the Court's Order. ***The Court noted that the vendee ordered a title report more than thirty days after the auction, and that escrow could have been held in connection with the title issues.*** Matter of Brownlee

Ethics Opinion 817 – On November 2, 2007 the Committee on Professional Ethics of the New York State Bar Association issued Opinion 817 concerning whether an attorney's participation in a residential closing with a "seller's

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concession” and a “grossed up” sales price violates New York’s Code of Professional Responsibility. The facts considered by the Opinion are that the agreed sales price is increased by 3% to cover the purchaser’s closing costs and the seller grants the purchaser a “seller’s concession” in the same amount. The purchaser obtains a mortgage based upon the increased amount. According to the Opinion:

“...We hold that a lawyer may not ethically participate in such a ‘gross up’ of the actual purchase price and concomitant seller’s concession unless there is neither deception nor misrepresentation at work in the transaction and its predictable consequences. At a minimum this means that the gross-up (and not merely the grossed-up price) must be disclosed in the transaction documents. We are persuaded that merely reporting a ‘seller’s concession may imply either that the seller has agreed to reduce the purchase price he or she would otherwise have obtained or that the reported sales price is the actual price of the property, less certain costs the seller has agreed to pay. If neither of these is the case, then reporting a concession, without more, is misleading under DR 1-102.

“On the facts presented here, and for the reasons above, we conclude that participation in such transactions is unethical unless there is no unlawful conduct, and there is full disclosure in the transaction documents of the substance and effect of the transaction”.

Mortgage Foreclosure – On an Action to foreclose a first mortgage held by MERS, Defendants (the “Intervening Defendants”) who had purchased the property at the foreclosure of the second mortgage raised as an affirmative defense that the first mortgage had been executed pursuant to a fraudulent power of attorney. The Supreme Court, Nassau County, denied the Intervening Defendants’ motion for summary judgment and granted MERS’ motion for summary judgment, holding that there was no triable issue of fact. ***Having purchased at a judicial sale expressly subject to prior liens, the Intervening Defendants were “equitably estopped from later challenging the validity of those liens even if the liens were concededly invalid”.*** (The Court noted that the Intervening Defendants’ bid was \$362,000 on property with an estimated value of \$3,000,000). Mortgage Electronic Registration Systems Inc. v. Darden

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Mortgage Foreclosures/Kings County – On May 3, 2006 the Judges of the Supreme Court, Kings County, issued a standard form of Order of Reference and a standard form of Judgment of Foreclosure and Sale for mortgage foreclosures in that County. The form Judgment provides, in part, that “the closing of title shall take place...within forty-five days after such sale unless otherwise stipulated by all parties...Any delay or adjournment of the closing date beyond forty-five days may be stipulated among the parties, with the Referee’s consent, up to ninety days from the date of sale, but any adjournment beyond ninety days may be set only with the approval of this Court”.

Kings County Justice Herbert Kramer has, as to cases before him, issued a ruling further impacting the period in which title may close pursuant to a judgment of foreclosure. In *Bardi v. Morgan*, decided October 16, 2007 and reported at 2007 WL 3023001, Justice Kramer held that ***“[I]n any case where an auction sale has been scheduled more than one year after the entry of the judgment of foreclosure and sale, the Notice of Sale is invalid and the Clerk of this Court is directed to reject it, unless an amended and updated order of reference and a supplementary foreclosure judgment reflecting the corrected amount is provided”***.

In this case, a judgment of foreclosure and sale was entered in 1996. There were four scheduled auction sales. The mortgagee, the successful bidder at the last auction on August 15, 2006, did not appear for closing, did not seek an adjournment, and was declared to be in default of the Terms of Sale which called for a closing on September 15, 2006.

Notice of Pendency – Plaintiffs brought suit alleging that title to two single family homes in Suffolk County purchased by Defendant Ira Cohen was an asset of a partnership created by an oral agreement entered into between the Plaintiffs and Defendant Cohen. The Supreme Court, Suffolk County, denied Defendant Cohen’s motion to dismiss the notice of pendency in the Action. ***It noted that a partnership may be created by an oral agreement and held that an action seeking a ruling that real property is a partnership asset is an action affecting title for which a lis pendens is properly filed.*** *Martin v. Cohen.*