LJN LAW JOURNAL NEWSLETTERS

NEW YORK REAL ESTATE LAW REPORTER®

ALM.

Volume 40, Number 1 • September 2023

INDEX

Second Department Rules That Cooperative Apartment Owners' Rights Are Precarious

By Paul Golden

On June 14, 2023, the Second Department decided *Walsh v Ocwen Loan Servicing, LLC*. The court, with little fanfare, appeared to rule that cooperative apartment owners are saddled with an unavoidable risk of loss. That is, if a lender alleges that the owners have defaulted, and then conducts a nonjudicial foreclosure sale, the former owners are left with few remedies. Regardless of whether the owners were truly in default, and regardless of whether they were notified of the sale, they can lose their home — for good.

A co-op shareholder does not have the same protections that a traditional homeowner has. The owner of a house, for example, who defaults on a mortgage, would not lose the home in a foreclosure sale until and unless the lender conducted a judicial foreclosure action, and until and unless the homeowner had the opportunity to present defenses to the court, and then only if the court specified at the end that the foreclosure would take place.

Shareholders of co-ops do not have those protections. Shareholders do not use the mortgage system — they obtain loans which are secured by their shares. If a lender deems the shareholder to have defaulted, the lender can ultimately conduct a nonjudicial foreclosure sale. This is just as it sounds — the court is not involved at all.

In any event, *Walsh* concerned a couple that owned cooperative shares to their home, an apartment, for fifteen years. Their position was that their shares (and corresponding lease) were inexplicably sold at a non-judicial foreclosure sale on Jan. 29, 2019. The closing then took place on July 18, 2019. The couple only found out that their cooperative shares had been sold at a foreclosure sale when the successful bidder arrived at their doorstep and claimed that he was the new owner of those shares. That bidder eventually filed a holdover proceeding to evict the couple from their home.

continued on page 2

In This Issue

Co-Op Owners' Rights

continued from page 1

In September 2019, the couple filed an action against Ocwen Loan Servicing, LLC (Ocwen), the alleged assignee of the underlying note. They claimed they were not in default of their promissory note and security agreement, and that they were not even served with any notice about the auction.

In the context of their case, the couple moved for a preliminary injunction, seeking, among other relief, to enjoin the eviction during the pendency of the action. In May 2020, Hon. Jimenez-Salta of the Kings County Supreme Court granted the preliminary injunction, based in part on her ruling that there were serious questions on whether plaintiffs were actually in default of the promissory note and security agreement. The successful bidder then appealed.

On appeal, there were two diametrically opposed ways of viewing property rights. The successful bidder argued that UCC 9-617(b) gave him absolute rights of ownership. Under that statute, after there is a sale, a "good-faith transferee" obtains full rights to the collateral "even if the secured party [i.e. the lender] fails to comply with this article …." The couple, conversely, argued that UCC 9-617(a) applied – which indicated that a secured party only disposes of collateral after a "default." The couple argued that the Legislature sought to make sure, when they passed UCC 9- 617(a), that parties such as plaintiffs would have to be in "default" in order for the purchaser to potentially obtain rights. They also argued that, to allow them to lose their home even if they were not in default, would violate the Due Process clause of the New York Constitution.

Paul Golden is a partner of the firm Coffey Modica, LLP, and the author of the book *Litigating Constructive Trusts*, published by the ABA (available at https://bit.ly/3YCjA8h). He represented the shareholders in the *Walsh v. Ocwen* appeal

The court did not explicitly discuss the meaning of "default" in the statute. Instead, the court simply ruled that "Where, as here, a debtor pledges cooperative shares and a corresponding proprietary lease as security for a debt, article 9 of the UCC applies to the enforcement of the security interest." Then the court held that the plaintiffs had not established that "that the relief they seek, in effect, to vacate the sale of the shares and proprietary lease following the closing, is available under article 9 of the UCC." Therefore, it held that the plaintiffs' remedy was to seek monetary damages against Ocwen. Finally, it held that plaintiffs were not entitled to a preliminary injunction.

There are several critical issues that arise from this order.

One is that, at least in the Second Department, it appears a potential bidder has relatively few worries about whether he or she will actually obtain viable and enforceable rights, in a nonjudicial foreclosure sale, at least once the closing takes place. Therefore, theoretically, such bidders will be willing to offer closer to the full value of the shares in a nonjudicial foreclosure sale. This is potentially beneficial for a defaulting shareholder; the higher the sales price, the less the debt to the lender. There is even a chance the defaulting shareholder could obtain proceeds, to the degree they exceed the sum owed.

Second, a shareholder's rights are extremely precarious, especially if dealing with a lender that cannot handle accounting records or notices properly. In the lender makes a mistake about: 1) whether there was a default; 2) how and when to serve the borrower with notice about the alleged default; or 3) both, then the borrower may suddenly find he no longer owns the shares at all. In such a case, the borrower apparently has few options except to seek relief against the lender. But the chance to potentially win a money judgment against a lender, years after the sale, will be cold comfort to a person kicked out of his home.

continued on page 3

NEW YORK
REAL ESTATE LAW REPORTER®

New York Real Estate Law Reporter® (ISSN 0894-4903) is published monthly by Law Journal Newsletters, a division of ALM Global.
Telephone: (800) 756-8993
Editorial e-mail: ssalkin@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

New York Real Estate Law Reporter 021873
Periodicals Postage Paid at Philadelphia, PA
POSTMASTER: Send address changes to :
ALM Global
150 East 42 Street, Mezzanine Level
New York, NY 10017

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

Co-Op Owners' Rights

continued from page 2

Third, lenders should take extremely strong precautions in making sure that their accounting records are in order, and that they serve notices on an alleged defaulting debtor perfectly, and that all t's are crossed and i's are dotted. Otherwise, the former debtor may be unable to vacate the sale, and will have no choice but to seek full relief against the lender.

Fourth, the courts may eventually need to further clarify how far the law goes. In an extreme case, one could have borrowed funds, but fully paid them back to the lender. In such a case, if the lender makes an incredible error, and "sells" these same shares to a high bidder, which were formerly a security for the debt, how would the court handle it? A bidder would point to the *Walsh* case and argue that there is no way to seek to vacate a sale of shares under article 9 of the UCC. But presumably, even an extremely cold-hearted court would not go that far.

—❖—

CO-OPS & CONDOMINIUMS

Co-Op Purchaser Not Entitled To Cancel Contract

Agosta v. Abraham
2023 WL 3742963
AppDiv, First Dept.
(memorandum opinion)

In co-op sellers' action for a declaration that they are entitled to retain purchaser's deposit, purchaser appealed from Supreme Court's grant of summary judgment to sellers. The Appellate Division affirmed, holding that purchaser was not entitled to cancel the contract with impunity.

Purchaser contracted to buy the subject co-op apartment for $2.75 million, and paid a deposit of $275,000 into escrow. The contract called for a closing on or about July 1, 2022. The contract also included a provision entitled "Seller's inability" which gave the seller' the right to adjourn the closing if seller were unable to transfer the shares and provided that if seller did not elect to adjourn or if on the adjourned ate seller was still unable to perform, either party had the right to cancel the contract, and seller's liability would be limited to refunding the deposit. After the contract was signed, purchaser failed to submit her application for board approval until after the due date, and, after submitting the application, cancelled her board interview. At that point, purchaser purported to cancel the contract and withdrew her application to the co-op board. Seller then brought this declaratory judgment action, and Supreme Court granted summary judgment to seller, holding that purchaser was not entitled to return of her deposit. Purchaser appealed.

In affirming, the Appellate Division held that purchaser was not entitled to take advantage of the cancellation provision. The court held that once purchaser breached her obligation, the contract gave seller the right to terminate the contract and retain the deposit.

Stipulation of Settlement Did Not Foreclose Warranty Of Habitability Claim

Fiondella v. 345 West 70th Tenants Corp.
2023 WL 3957455
AppDiv, First Dept.
(memorandum opinion)

In proprietary lessee's action for retaliatory eviction and breach of the implied warranty of habitability, proprietary lessee appealed from Supreme Court's dismissal of the complaint. The Appellate Division modified to reinstate the warranty of habitability claim, holding that the parties' settlement stipulation did not conclusively show that the parties had prospectively settled the claim.

When proprietary lessee reported sloping floors in his apartment, the Department of Housing Preservation and Development issued two violations, but the co-op corporation did not make repairs, even after a Civil Court order directing the co-op to remedy the defect. Proprietary lessee then brought an action to enjoin the co-op from evicting him for objectionable conduct. That action was settled by a Jan. 21, 2020 stipulation which provided that each party would hire an engineer to assess repairs and agree on a mutually acceptable plan that the co-op would implement. Those repairs never happened. Proprietary lessee was also concerned about alleged electrical hazards. Although city agencies found the electrical setup safe, shareholder proposed to undertake his own repairs. He ignored requests by the co-op that he submit plans and obtain approval for the plans. The co-op then served proprietary less with a notice to cure, which prompted the current action for an injunction against terminating the proprietary lease, for an injunction requiring the coop to clear the violations, and seeking damages for retaliatory eviction and breach of the implied warranty of habitability. Supreme Court dismissed the claims.

The Appellate Division first affirmed dismissal of the retaliatory eviction claim, noting that the co-op's notice to cure was served in response to proprietary lessee's own complaints seeking authorization to perform repairs that he had requested. The co-op corporation took no affirmative steps to remove the governor, but the court reinstated the habitability claim, acknowledging that parties may settle habitability claims prospectively, but holding that in this case, the January 2020 stipulation did not conclusively show that the parties had prospectively settled the claim.

Comment

Waivers or modification of the implied warranty of habitability are generally unenforceable as contrary to public policy (*see*, NY CLS Real P

continued on page 4

Co-ops & Condos

continued from page 3

§235-b). For instance, in *Vanderhoff v. Casler*, 91 A.D.2d 49, the court reversed the dismissal of the tenants' counterclaim for breach of the warranty and held unenforceable a lease provision that required written notice of any defect be sent to the landlord by certified mail. The court emphasized that the provision impaired the tenants' ability to bring suit for breach of the warranty.

Nevertheless, when parties represented by counsel enter into a stipulation of settlement of a breach of warranty dispute, courts have upheld the stipulation. In *1050 Tenants Corp. v. Lapidus*, 16 Misc. 3d 70, the court held that the landlord was entitled to arrears when the tenants failed to abide by the stipulation of settlement that required them to give written notice of any defects before withholding rent from the landlord. The court noted that the parties were both represented by counsel and freely entered into the stipulation. The court reasoned that although requiring written notice modified the warranty of habitability, it did not substantially impair the tenants' capacity to rely upon the warranty because the tenants retained the right to withhold rent as long as they provided written notice to the landlord.

If a landlord and tenant agree to a prospective rent abatement as part of a stipulation of settlement to remedy a breach of the implied warranty of habitability, courts have held that the stipulation covers the tenant's subsequent claims of breach. In *Leventritt v. 520 East 86th St., Inc.*, 266 A.D.2d 45, the court dismissed the tenant's claim for damages arising from the breach of warranty of habitability because the claim was already covered by the stipulation of settlement, which provided that the tenant would receive a 50% maintenance abatement until all repairs were completed, together with a $56,000 property damage award.

Questions of Fact About Mitchell-Lama Succession Rights

Trump Village Section 4, Inc. v. Young
2023 WL 3856294
AppDiv, Second Dept.
(memorandum opinion)

In co-op corporation's action for a declaratory judgment respecting the rights of an occupant to the subject apartment, both parties appealed from Supreme Court's denial of their respective summary judgment motions. The Appellate Division affirmed, holding that questions of fact about occupant's succession rights precluded summary judgment.

The subject apartment complex was originally organized as a limited profit housing corporation pursuant to the Mitchell-Lama law. In June 2007, the co-op corporation completed the process of dissolution and reconstitution as a market-rate housing corporation. At that time, Julius Young was the shareholder of record, although Julius had died two years earlier. Julius' son, Stephen, allegedly applied through the co-op corporation for succession rights, but there is no record that DHCR ever approved such an application. In 2016, Stephen submitted a transfer application to the co-op corporation. The co-op corporation responded by commencing an action for a declaration that Stephen had no rights with respect to the apartment. Supreme Court denied both summary judgment motions.

In affirming, the Appellate Division noted that the parties had failed to eliminate triable issues of fact about whether the co-op corporation filed an application with DHCR on behalf of Stephen prior to its reconstitution as a market-rate housing corporation, and about whether DHCR approved that application.

—❖—

EMINENT DOMAIN LAW

Taking Was for a Public Purpose and Failure to Comply With Public Hearing Requirement Did Not Invalidate Taking

Matter of Huntley Power, LLC. v. Town of Tonawanda
2023 WL 3912499
AppDiv, Fourth Dept.
(4-1 decision; majority memorandum; dissenting memorandum by Lindley, J.)

Landowner challenged the Town's decision to condemn land along the Niagara River. The Appellate Division upheld the taking, holding that it was for a public purpose and that the Town's failure to publish a synopsis of its determination within 90 days of the public hearing did not prejudice landowner.

Landowner owned 65 acres of land on which it previously operated a coal-fired power point, together with a raw water intake structure. Seven years ago, landowner stopped operating the plant, but continued to operate the water intake system, which it had used to withdraw millions of gallons of untreated water to provide cooling for the power plant units. Since the closing of the plant, landowner has sold the right to obtain water through its facilities to local businesses. The town proposed to condemn landowner's parcel to allow redevelopment of the waterfront, and to ensure that local businesses could continue to obtain water from the intake system. Landowner objected, contending that the taking was not for a public purpose, that the Town proposed to take more land than necessary to achieve any public purpose, and that the Town had failed to comply with Eminent Domain Procedure Law §204(A), which requires the condemnor to make its determination and findings, and publish a brief synopsis of the determination and findings, within 90 days after the public hearing. Landowner also contended that the Town failed to comply with SEQRA.

continued on page 5

Eminent Domain

continued from page 4

In upholding the condemnation, the court first held that landowner had demonstrated no prejudice from the Town's failure to provide the statutorily required synopsis. The court then held that the Town's condemnation served the public purpose of revitalizing blighted property and ensuring a raw water supply for significant industrial employers. The court then noted that a condemnor has broad discretion to decide how much land is necessary to accomplish the public purpose. Finally, the court rejected landowner's argument that the Town had improperly segmented environmental review, holding that the Town was not required to consider the environmental impact of anything beyond its acquisition.

Justice Lindley, dissenting, would have upheld the taking of the former power plant, but not the water intake structure. He noted that landowner was already serving the very purpose the Town advanced for condemning that structure: supplying water to local businesses. He contended that the condemnation therefore did not serve the purpose the Town advanced. He also argued that supplying water to local businesses was not a public purpose, but a private purpose, and that the condemnation was essentially designed to transfer property from one private entity to another in violation of the takings clause.

COMMENT

Generally, courts defer to legislative judgment that its exercise of the eminent domain power is for a public purpose. *Matter of Goldstein v New York State Urban Dev. Corp.*, 13 N.Y.3d 511, illustrates the deference given to the legislature, where the court upheld a 22-acre mixed-use redevelopment project undertaken by a private developer, even though parts of the project suffered only from mild blight. The court stated that "[w]hether a matter should be the subject of a public undertaking—whether its pursuit will serve a public purpose or use—is ordinarily the province of the Legislature, not the Judiciary."

On rare occasions, courts have invalidated a municipality's exercise of eminent domain because, at the time of the taking, the municipality failed to adequately describe the public use of the property. In *Matter of HBC Victor LLC v. Town of Victor*, 212 A.D.3d 121, the court annulled the town's condemnation where the town had not yet decided what to do with the property after obtaining title. The court held the taking invalid because there was no way to know if the taking would serve a public purpose. Likewise, in *Matter of Gabe Realty Corp. v. City of White Plains Urban Renewal Agency*, 195 A.D.3d 1020, the court invalidated the city's condemnation as it was based upon a 25-year-old urban renewal plan which itself lacked detail or documentation.

Courts also defer to legislative determinations on how much land is necessary to serve the intended public purpose, but on rare occasions, courts have limited a municipality's taking where it failed to provide adequate evidence that all the land it sought to take is necessary to achieve its goal. *Matter of PSC, LLC v. City of Albany Indus. Dev. Agency*, 200 A.D.3d 1282, illustrates the general rule of deference, where the court upheld the city's determination that, in order to address blight and economic underdevelopment, it needed to condemn the owner's .88 acres to develop the seven acres already in its possession. By contrast, in *Feeney v. Town/Vill. of Harrison*, 4 A.D.3d 428, the court limited the town's taking to the piece needed for its water infrastructure project, where the town failed to show that condemning the owner's entire parcel was necessary for the project.

Even when the government condemns property for a public purpose, courts have struck down condemnations where the property to be condemned is already used by the public. In *Matter of City of New York v Yonkers Indus. Dev. Agency*, 170 A.D.3d 1003, the court held that the city could not proceed with its urban renewal plan, although it served a public purpose, because the condemnation would materially interfere with the property's existing public use as a bus depot for the MTA.

—❖—

DEVELOPMENT

FACT QUESTIONS ABOUT EXPANSION OF NONCONFORMING USE

Andes v. Zoning Board Of Appeals

2023 WL 3856230

AppDiv, Second Dept.

(memorandum opinion)

In neighbors' article 78 proceeding challenging a determination that owner's marina and commercial shellfishing operation are lawful pre-existing nonconforming uses, neighbors appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division reversed and granted the petition, remitting to the Zoning Board of Appeals for a new determination.

Landowners bought the subject property in 1994. The property is located in a single-family district in which marinas and commercial shellfishing are prohibited. In 2003, landowners obtained building permits for the construction of docks and bulkheading, and obtained a certificate of occupancy in 2008. The following year, they applied for a special permit for reconfiguration of docks with a site plan that depicted a substantial expansion of the docks. In response to concerns about the expansion, the town building department issued a determination that landowner had a preexisting nonconforming marina in 2004, when marinas were first prohibited, and a legal nonconforming commercial shellfishing operation since 1959, when that use was

continued on page 6

Development

continued from page 5

first prohibited. The Zoning Board of Appeals (ZBA) affirmed that determination. Neighbors then brought this article 78 proceeding challenging those determinations. Supreme Court denied the petition and dismissed the proceeding.

In reversing, the Appellate Division first held that the ZBA's nonconforming use determination was entitled to deference and there was sufficient evidence in the record to support that determination. But the court then noted that the construction of new docks, catwalks and bulkhead was not completed until 2008 without site plan approval from the Planning Board. Because the town code requires site plan approval for nonconforming commercial changes that require a building permit, landowner was required to obtain site plan approval. Their failure to obtain site plan approval called into question the determination that the dock and bulkhead reconstruction did not constitute an expansion of a pre-existing nonconforming use. As a result, the court remitted to the ZBA for a new determination.

Subdivision Improperly Classified As Type II Action Under SEQRA

Andes v. Planning Board
2023 WL 3856139
AppDiv, Second Dept.
(memorandum opinion)

In neighbors' article 78 proceeding challenging the Planning Board's grant of a minor subdivision, the Planning Board appealed from Supreme Court's grant of the petition. The Appellate Division affirmed, holding that the Planning Board improperly classified the subdivision as a Type II action under SEQRA

Landowner purchased property in 1994 and in 2013, they built a dock, ramps, and floats on a portion of the property pursuant to a building permit. Neighbors appealed issuance of the building permit and certificate of occupancy, and the ZBA concluded that the dock, float, and ramp had been illegally constructed on the lot. Landowner then submitted a minor subdivision application to the Planning Board, seeking to divide the lot into two. The Planning Board approved the application after concluded that it constituted a Type II action under SEQRA, requiring no further environmental review. Neighbors brought an article 78 proceeding challenging the approval and Supreme Court granted the petition. The Planning Board appealed.

In affirming, the Appellate Division held that the Planning Board had no basis in the record to support is conclusion that the subdivision was a Type II action. At the time of the determination, neither the town code nor SEQRA regulations listed a minor subdivision as a Type II action. And the board's staff report identified several environmental concerns with the application. As a result, the planning board's action was arbitrary, and it was not saved by amendments to the town code made after the planning board's determination.

ZBA Entitled to Approve Permit for Building Larger Than One Depicted In Approved Site Plan

Save Monroe Ave, Inc. v. Town of Brighton
2023 WL 3912415
AppDiv, Fourth Dept.
(memorandum opinion)

In neighbors' article 78 proceeding challenging the ZBA's determination upholding grant of a building permit, neighbors appealed from Supreme Court's denial of the petition. The Appellate Division affirmed, holding that the ZBA was entitled to approve a permit for a building larger than the one depicted in the approved site plan.

The Brighton Town Code provides that no building permit shall be issued when it is subject to site plan approval "except in conformity with the plan approved" The building inspector approved a building permit authorizing construction at least 130 square feet larger than the site plan approval. Neighbors brought this article 78 proceeding, contending that the permit (and the ZBA's upholding of the permit) was in violation of the town code. Neighbors also contended that the permit was invalid because easements granted by landowners — easements required by the incentive zoning approval — were defective because of the possibility of third party challenges to those easements. Supreme Court denied the petition and neighbors appealed.

In affirming, the Appellate Division upheld the ZBA's determination that the permit was in conformity with the site plan. The ZBA had explained that the code permits minor deviations from an approved site plan, and the court concluded that the zoning board's interpretation of its governing code was entitled to deference. Here, that interpretation was not irrational. The court then held that the town was not required to determine whether third parties might assert conflicting rights to the easements at some time in the future.

—❖—

LANDLORD & TENANT LAW

Tenant's Early Termination Entitled Landlord to Rent

Bay Plaza Community Center, LLC v. Cablevision Systems New York City Corporation
2023 WL 3828078
AppDiv, First Dept.
(memorandum opinion)

In landlord's action against commercial tenant, tenant appealed from Supreme Court's grant of landlord's summary judgment motion determining that tenant had not effected an early termination of the lease. The Appellate Division reversed, holding that any breach by tenant after the stated termination date did not make tenant's early termination ineffective.

continued on page 7

Landlord & Tenant Law

continued from page 6

The lease gave tenant the right to terminate early upon 60 days' notice of the termination date and payment of a termination fee equal to six months' rent and additional rent. The right to terminate early was conditions on the absence of an existing uncured default by tenant. Tenant provided 60 days' notice of an intent to terminate on March 31, 2021, and paid a $1.1 million early termination fee. At that time, landlord had not served tenant with any notice of default or notice to cure. Landlord, however, contended that tenant failed to comply with its leasehold obligation to remove all personal property and leave the premises broom clean upon termination of the lease. The lease provided that those obligations would survive termination of the lease. Moreover, landlord contended that tenant owed a balance of $33,128 as of the termination date. Supreme Court awarded summary judgment to landlord on its claim that tenant had not effected an early termination, concluding that tenant had not terminated the lease as of June 30, 2021 because it had not paid rent due after March 31, 2021 on a current basis. Tenant appealed.

In reversing, the Appellate Division first concluded that failure to remove all personal property was not a default existing at the time of the notice of termination and therefore would not prevent early termination of the lease. The court then noted that landlord's contention that tenant owed rent on March 31 was disputed, and landlord failed to provide adequate proof of the balance due, precluding an award of summary judgment. Finally, the court noted that tenant's failure to pay rent after March 31 was not relevant because tenant's notice had indicated that March 31, not any later date, was the termination date.

Questions of Fact About Landlord's Intention To Convey Leasehold To Individual

Walber 82 Street Associates, L.P. v. Fisher
2023 WL 3828299
AppDiv, First Dept.
(memorandum opinion)

In landlord's action for rent and use and occupancy, tenant appealed from Supreme Court's award of summary judgment to landlord. The Appellate Division reversed, holding that questions of fact remained about whether landlord intended to convey a leasehold interest to the individual defendant tenant.

In 2004, landlord leased the subject store premises to a corporation in which defendant occupant was the principal. In 2012, the parties executed an amendment to the lease signed by landlord and by current occupant on behalf of the corporation, extending the terms of the original lease. In 2016, landlord and occupant signed a second amendment. This time, current occupant signed as tenant, and the amendment provided that the parties agreed that individual occupant had been the tenant since the corporation was dissolved in 2009. Current occupant contends that after the first amendment expired, the corporation remained on the premises as a month-to-month tenant. He contended that although the second amendment was notarized, he never appeared before the notary and he never received a copy of the second amendment until 2022. He denied knowing the key terms of the first amendment and contended that he only owed use and occupancy at fair market value. On the basis of these facts, Supreme Court awarded summary judgment to landlord on its claim for rent under the 2016 second amendment.

In reversing, the Appellate Division first held that occupant's failure to read the amendment before executing it was not a defense to breach. But the court then held that a leasehold estate cannot be conveyed without a delivery of the fully executed lease to the lessee. In this case, landlord did not offer sufficient proof that landlord delivered the amendment to tenant during the lease period. Tenant's occupancy during the lease period was equally consistent with a month to month tenancy which would only give rise to an obligation to pay use and occupancy. As a result, landlord was not entitled to summary judgment because of the fact question about whether landlord had taken actions sufficient to demonstrate an intent to convey a leasehold interest to the occupant.

—❖—

REAL PROPERTY LAW

Quiet Title Action Subject To Statute of Limitations

Mahabir v. Snyder Realty Group, Inc.
2023 WL 4095867
AppDiv, Second Dept.
(memorandum opinion)

In former owner's action to quiet title to property, transferee appealed from Supreme Court's denial of its motion to dismiss the complaint as time-barred. The Appellate Division reversed and dismissed the complaint, holding that former owner's claims were fraud and unjust enrichment claims subject to a six-year statute of limitations.

Former owner contends that in 2009, transferee fraudulently induced him to convey title to property in foreclosure by promising that transferee would pursue a short sale of the property on former owner's behalf. In 2015, former owner commenced an action against transferee alleging breach

continued on page 8

Real Property

continued from page 7

of contract, fraud, intentional misrepresentation and home equity theft. The court dismissed that action because former owner had failed to comply with court orders. In 2020, former owner commenced the instant action for a judgment declaring the deed invalid and rescinding the deed on the ground of fraud, Former owner also sought to quiet title to the property and sought damages for unjust enrichment. Both parties moved for summary judgment; transferee's motion was based on the statute of limitations. Transferee appealed from Supreme Court's denial of its motion.

In reversing, the Appellate Division acknowledged that quiet title actions are generally subject to a ten-year statute of limitations, but held that former owner's claim was not really to quiet title, but instead to void transferee's title based on alleged fraud. As a result, the court held that the claim was governed by the six-year fraud statute of limitations and was therefore untimely. The court also held that former owner's unjust enrichment claim began to accrue when the wrongful action occurred, not from the time the fraud was discovered. As a result, that claim, too was barred by the six-year statute of limitations.

Foreclsoure Sale Purchasers Not Subject to Claim By Former Owners

Iovino v. Deutsche Bank National Trust Co.
2023 WL 4095852
AppDiv, Second Dept.
(memorandum opinion)

In an action for restitution, former owners appealed from Supreme Court's grant of foreclosure sale purchasers' motion to dismiss. The Appellate Division affirmed, holding that in the absence of a stay of the sale or an outstanding notice of pendency, the foreclosure sale purchasers were bona fide purchasers not subject to a claim by former owners.

In 2011, mortgagee brought an action to foreclose a mortgage on residential property owned by former owners. Mortgagee obtained a judgment of foreclosure and sale in 2017. Former owners appealed and moved to stay the foreclosure sale, but the court denied their motion. The property was then sold at the foreclosure sale. After the sale, the judgment of foreclosure and sale was reversed and the complaint against former owners was dismissed. Former owners then brought this action against mortgagee and the foreclosure sale purchasers, seeking restitution of the property or its value, which, the complaint asserted was $600,000, while the property brought only $400,000 at the foreclosure sale. Supreme Court granted foreclosure sale purchasers' motion to dismiss.

In affirming, the court held that the purchasers were entitled to rely on the judgment of foreclosure and sale because there was no judicially issued stay pending disposition of the appeal. The court rejected former owners' contention that the inadequacy of the price paid was sufficient to establish that the foreclosure sale purchasers were not good faith purchasers for value.

Specific Performance Denied Because Buyer Did Not Establish That It Was Ready To Close

Treasure Island of Asbury Park Self Storage, Inc. v. MBAR Realty, LLC
2023 WL3729764
AppDiv, Second Dept.
(memorandum opinion)

In buyer's action for specific performance of a contract to sell real property, seller appealed from Supreme Court's judgment, after a nonjury trial, of specific performance to buyer. The Appellate Division reversed and dismissed the complaint because buyer had not established that it was ready, willing, and able to close.

The sale contract required seller to clear various title issues before closing, and was contingent on buyer's ability to obtain an approval from the Board of Standards and Appeals (BSA). If the buyer did not obtain that approval, buyer had the option to terminate the contract. In March 2016, buyer sent a notice of default to seller because title defects had not been cleared. Seller responded by indicating that it was prepared to clear title by closing and set a closing date. The parties continued to correspond with buyer rejecting seller's closing dates because of the failure to clear title. Seller then set a closing date of June 3, and made time of the essence, but then agreed to extend the date by two weeks. On June 28, buyer brought an action for specific performance. Supreme Court awarded specific performance and enjoined seller from selling to any third party. Seller appealed.

In reversing, the Appellate Division emphasized that buyer had not established that it was ready and willing to close without the BSA approval, and therefore was not entitled to specific performance. In addition, because seller's obligation was to clear title by closing, sellers were not in default because they never repudiated that obligation.

—❖—