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The Impact of Local Law 97

By Matthew Schneid

Local Law Number 97 of 2019 (as amended by Local Law Number 147 of 2019, "Local Law 97") was enacted by the City of New York to amend the New York City Charter and Administrative Code to achieve reductions in greenhouse gas emissions by 2050 (*See*, §28-320 and §28-321 of the Administrative Code). The specific goal of Local 97 is to reduce city-wide carbon emissions by forty percent (40%) by 2030 and a total of eighty percent (80%) by 2050. This is accomplished by requiring buildings to retrofit their systems with more energy efficient systems or purchase certain permitted carbon offsets.

REQUIREMENTS

Local Law 97 includes specific carbon limits depending on a building's size, property type and the compliance year. Starting in the 2024 calendar year, the law assigns emissions limits for sixty (60) different property types that reflect the wide variation in energy use among buildings. Carbon caps become more stringent over a series of compliance periods, so each building will be allowed to emit less carbon over time in the following periods: 2024-2029, 2030-2034, 2035-2039, 2040-2049, and 2050 and thereafter.

As of Jan. 19, 2023, the New York City Department of Buildings added new rule 103-14 to implement Local Law 97 by establishing the procedures for reporting on complying with annual greenhouse gas emissions limits for buildings. The rules establishes the building emission limits, or emission factors, for different property types and provides the formula for calculating a building's annual emissions limit. The law assigns a "carbon coefficient" to specify the carbon content for each fuel type. A building's annual emissions are determined by combining total energy use for each fuel type multiplied by its corresponding carbon coefficient.

To confirm compliance, by May 1st of each year, commencing with May 1, 2025 for the first compliance of calendar year of 2024, the owner of each covered building is required to file an energy report and submit the same to the city setting

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forth their self-reported emissions and information as to whether they met the required emissions targets.

To meet a building's carbon limit, owners can lower carbon directly through retrofitting building systems, increasing energy efficiency and switching to lower-carbon fuels. They can also use credits from eligible renewable energy generation, greenhouse gas reduction projects, or install solar or battery storage onsite to help meet the law's targets. However, there has been substantial debate as to the ability to purchase offsetting credits, the types of credits that can be purchased and further rules are expected on this issue that are expected to limit the ability to purchase offsetting credits.

Penalties for Non-Compliance

It is estimated that approximately 20%-25% of all covered buildings will exceed their emissions limits in 2024 if they take no action to improve their building's performance. In 2030, if owners take no action to make improvements, approximately 75%-80% of buildings will not comply with their emission limits.

Commencing in 2025, an owner of a covered building who has submitted a report pursuant to section 28-320.3.7 of the New York City Administrative Code which indicates that such building has exceeded its annual building emissions limit will be liable for a civil penalty of not more than an amount equal to the difference between the building emissions limit for such year and the reported building emissions for such year, multiplied by $268. In larger buildings, this could be a substantial amount. There are also penalties if a building owner completely fails to submit a report.

In addition to the aforementioned monetary penalties, the Buildings Department may also issue violations for non-compliance with the law, but regulations on potential other penalties have not yet been determined by the relevant governmental agencies.

The law does provide mitigating factors, which may result in a reduced penalty such as good faith efforts to comply, history of compliance, unforeseen events, access to financial resources and whether payment of penalty would impact operations of facilities critical to human life or safety. As noted with other items, the regulations on such mitigation factors has not been finalized and is of substantial interest.

Covered Properties

Local Law 97 was intended to cover most "large" buildings and applies to the following: i) a building that exceeds 25,000 gross square feet; ii) two or more buildings on the same tax lot that together exceed 50,000 gross square feet; or iii) two or more buildings held in the condominium form of ownership that are governed by the same board of managers and that together exceed 50,000 gross square feet.

While this covers most New York City buildings in the listed categories, including residential condominium and cooperative building, the law does specifically exclude the following property types from most requirements: 1) an industrial facility primarily used for the generation of electric power or steam; 2) real property, not more than three stories, for which ownership and the responsibility for maintenance of the HVAC systems and hot water heating systems is held by each individual dwelling unit owner; 3) a building owned by the City of New York or for which the city regularly pays all of the annual energy bills (other than senior colleges in the City University system); 4) a housing development or building on land owned by the New York City Housing Authority; 5) a rent regulated accommodation (i.e., building with at least 35% rent-regulated units); 6) religious corporation owned buildings used exclusively as a place of public worship; or 7) real property

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owned by a housing development fund company.

COMMENT

Although there has been outreach to building owners, many are still unaware of the requirements, which may require substantial costs to buildings owners and through to their tenants. As a preliminary step, it is recommended that covered property owners engage consultants to audit their emissions and determine any methods to reduce the same. While there may be some quick and inexpensive remedies to reduce certain limited emissions that may suffice for the initial emissions period, many buildings will require substantial investment to conform with the requirements going forward or face substantial penalties, the cost of which are being analyzed in comparison to the cost to comply (including analyzing if it is more efficient to simply treat the civil penalty as an additional tax).

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DEVELOPMENT

NEIGHBOR LACKED STANDING TO CHALLENGE NONCONFORMING USE DETERMINATION

Boyajian v. Village of Ardsley, Zoning Board of Appeals
2022 WL 17332536
AppDiv, Second Dept.
(memorandum opinion)

In neighbor's article 78 proceeding challenging the ZBA's determination that landowner's nonconforming use had not been abandoned, neighbor appealed from Supreme Court's dismissal of the proceeding. The Appellate Division affirmed, holding that the challenge was ripe, but that neighbor lacked standing.

Landowner's former tenant had operated a gasoline station on the subject property until February 2016, when the former tenant removed the gasoline tanks and vacated the premises. The following month, landlord relet the property to current tenant for use as a gasolines station and convenience store. Current tenant filed an application for a building permit, and then, in September 2017, filed an application for an interpretation, seeking a determination that the nonconforming use of the property as a gasoline station had not been abandoned. The ZBA determined that the nonconforming use had not been abandoned. In February 2018, neighbor, who owns property abutting the subject property, brought an article 78 proceeding challenging the ZBA's determination. Supreme Court denied the petition and dismissed the proceeding, holding that the proceeding was not ripe because tenant's land use application was still pending before the Village Board of Trustees. Neighbor appealed.

In affirming, the Appellate Division first held that neighbor's claim should not have been dismissed on ripeness grounds because the ZBA's determination that the nonconforming use had not been abandoned was a complete and final action that would not be addressed by any further administrative action. But the court then held that the petition should be dismissed because the neighbor lacked standing because the neighbor, despite his close proximity, failed to allege a direct harm or injury different from that of the public at large.

PARKING CONGESTION ALLEGATIONS INSUFFICIENT TO CONFER STANDING

Matter of 61 Crown Street, LLC v. City of Kingston Zoning Board of Appeals
2022 WL 17347167
AppDiv, Third Dept.
(Opinion by Garry, P.J.)

In neighbors' article 78 proceeding challenging an interpretation of the zoning ordinance by the zoning board of appeals (ZBA), neighbors appealed from Supreme Court's dismissal of the petition for lack of standing. The Appellate Division affirmed, concluding that allegations of parking congestion were insufficient to confer standing on neighbors.

The Kingstonian Project is a plan to redevelop areas in the Kingston Stockade Historical District. During the SEQRA review process, a community group and some individuals contended that the contemplated construction of residential units as part of the project was not permitted by the zoning code. When the city's zoning enforcement officer interpreted the code to permit residential construction, neighbors appealed to the ZBA. The ZBA upheld the interpretation, prompting neighbors to bring this article 78 proceeding. Supreme Court dismissed for lack of standing.

In affirming, the Appellate Division conceded that the neighbors' close proximity to the project gave rise to a presumption of injury in fact resulting from the project, but the court then determined that the injury alleged by the neighbors was not within the zone of interest protected by the city's zoning code. In particular, neighbors had alleged that the net loss of parking spaces as a result of the project would make their properties less desirable to rent and would cause customers to shop elsewhere. The court held that although parking congestion may be considered as an injury protected by the zoning laws, the only injuries neighbors alleged in this case were rooted in economic harm due to increased business competition. That economic harm is not within the zone of interests protected by the code, and therefore is not sufficient to confer standing on neighbors.

COUNCIL'S APPROVAL OF PUD UPHELD

Matter of Bistany v. City of Buffalo
2022 WL 17075486
AppDiv, Fourth Dept.
(memorandum opinion)

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Development

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In neighbors' article 78 proceeding challenging approval of a planned unit development (PUD), neighbors appealed from Supreme Court's denial of the petition. The Appellate Division modified to declare the PUD valid, and otherwise affirmed, holding that the common council had not improperly bypassed the city's planning board.

Developer applied for a PUD to permit construction of a mixed-use development. The city's common council referred the application to the city's planning board, which recommended approval. The common council conducted a public hearing and approved the PUD. Two days later, however, the common council reconsidered the PUD and approved it with amendments that had not previously been considered either by the planning board or the common council itself. Neighbors then brought this article 78 proceeding, contending that the PUD approval was invalid both because it was inconsistent with the city's comprehensive plan and because the amended PUD was not considered by the planning board. Supreme Court denied the petition.

In modifying, the Appellate Division noted that the planning boar had reviewed the PUD and the common council exercised its discretion to "waive, modify, or supplement the standards of the underlying zone." The initial referral to the planning board was sufficient without the need to submit the amendments to the board. The court modified to issue a declaration that the PUD was valid rather than simply denying the petition.

Neighbor Had No Standing To Challenge SEQRA Determination

Matter of 1160 Mamaroneck Avenue Corp. v. City of White Plains

2022 WL 17480752
AppDiv, Second Dept.
(memorandum opinion)

In a hybrid declaratory judgment action/article 78 proceeding challenging a negative declaration under SEQRA and the resulting zoning amendments, landowner appealed from Supreme Court's denial of the petition and grant of summary judgment to the city. The Appellate Division modified to declare that the zoning amendments are not invalid, holding that landowner did not have standing to challenge the SEQRA determinations and did not raise triable issues of fact on its claim that the amendments were unconstitutional.

Landowner operates a nursery as a nonconforming use in a residential district. Landowner's operation includes grinding and composting of raw materials. In 2017, the city's common council adopted amendments to the zoning ordinance prohibiting processing operations (including grinding and composting) by nurseries operating in residential districts. In the process of considering the amendments, the common council adopted a negative declaration under SEQRA. Landowner challenged both the negative declaration and the amendments themselves. Supreme Court granted summary judgment to the city and denied the article 78 petition.

In modifying, the Appellate Division first agreed with Supreme Court that landowner lacked standing to challenge the negative SEQRA declaration. The court noted that the only harm landowner would suffer from the amendment was economic, not environmental, and that harm was insufficient to confer standing. The court turned then to landowner's due process and equal protection challenges to the amendments and noted that the amendments did not involve a suspect class or interfere with the exercise of a fundamental right. Because the challenge was to the ordinance on its face, landowner could only prevail by showing that the ordinance lacked a legitimate purpose or a reasonable relation between the end sought and the legislative means. In this case, the city demonstrated that the ordinance had a legitimate purpose and was within the city's zoning power. Landowner raised no issue of fact in response. The court did modify, however, holding that Supreme Court should have not simply dismissed the proceeding, but should have entered a declaration that the amendments were not invalid as arbitrary and unconstitutional.

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REAL PROPERTY LAW

Open Use of Driveway Provides Constructive Notice of Unrecorded Easement

Conwell Properties v. DAG Route Six, LLC

2022 WL 17332520
AppDiv, Second Dept.
(memorandum opinion)

In an action for declaratory and injunctive relief and for breach of an easement agreement, servient owner appealed from Supreme Court's grant of easement claimant's summary judgment motion, while easement claimant appealed from Supreme Court's denial for its motion for summary judgment declaring the scope of the easement. The Appellate Division affirmed, holding that servient owner had constructive notice of the easement but that issues of fact remained about the easement's scope.

When, in 1974, the common grantor of lots 1 and 2 sold off lot 1, easement claimant built a commercial building on lot 1. Common grantor subsequently granted easement claimant an express easement of access over a driveway located on lot 2. The easement was never recorded. Then, in 2016, more than 40 years later, servient owner acquired lot 2. In 2018, servient owner wrote to inform easement claimant that it would be erecting non-structural barriers because easement

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claimant's tenants and patrons were using the parking lot on lot 2. Easement claimant then brought this action to enforce the easement agreement. Claimant sought money damages, declaratory and injunctive relief, and specific performance of the agreement. Supreme Court rejected servient owners claim of protection as a bona fide purchaser and remanded for trial on the scope of the easement.

In affirming, the Appellate Division acknowledged that a good faith purchaser for value is not bound by an unrecorded easement, but also noted that a purchaser cannot claim good faith purchaser status if it had actual or constructive notice of the unrecorded easement. In this case, the record indicated that the easement claimant's use of the driveway was open and visible. That open and visible use put the servient owner on constructive notice of the easement. As a result, easement claimant was entitled to summary judgment declaring that it was entitled to the easement rights set forth in the easement agreement. At the same time, the court held that easement claimant had failed to establish the scope of the easement, which is to be determined by the language of the grant, aided by circumstances tending to manifest the intention of the parties. The court remitted to Supreme Court to determine the scope of the easement and to determine whether use of the Lot 2 parking lot constitutes a trespass or nuisance.

Comment

The mere existence of a pathway does not put the servient owner on constructive notice of an unrecorded easement, but open, visible, and exclusive use of that pathway by the easement claimant does. In *Corrarino v. Byrnes*, 43 A.D.3d 421, the Second Department denied summary judgment to the holders of unrecorded easements over a pathway to a beach, holding that easement claimants had failed to establish, as a matter of law, that their use of the path put the servient owner on constructive notice. Perhaps because the pathway was also used by the holders of recorded easements, the mere existence of the path was insufficient to provide the owner with notice of the claim by holders of unrecorded easements By contrast, in *Webster v. Ragona*, 7 A.D.3d 850, the Third Department held that the servient landowner's actual knowledge that the dominant owners were using and maintaining a shared driveway was open and visible enough to put the servient owners on constructive notice of an unrecorded easement.

Although the holder of an unrecorded access easement would not generally have a need to place structures on the easement, structure placed on an easement in plain view of the servient owner suffice to establish constructive notice of unrecorded easements for purposes other than access. In *Pallone v. New York Tel. Co.*, 34 A.D,.2d 1091, the Fourth Department held that the placement of poles in "plain view" on the servient property put the purchasers on constructive notice of an unrecorded easement to place poles on the property. Similarly, in *Hudson Valley Cablevision Corp. v. 202 Devs. Inc.*, 185 A.D.2d 917, the Second Department modified a motion to dismiss a cable company's claim to an unrecorded easement, concluding that the cable company's installation of poles and wires across the servient parcel, if proven, would provide constructive notice to purchaser of the servient land. In contrast, the Fourth Department determined in *Covey v. Niagara, Lockport & Ontario Power Co.*, 286 App. Div. 341, that electric lines placed by the easement claimant at the back of the servient owner's eight-acre parcel may not be open and visible enough to satisfy constructive notice because they were not in "plain sight," and therefore the purchasers may not have had knowledge of their existence.

Subsequent Purchaser Qualifies As Bona Fide Purchaser Despite Notice of Prior Purchaser's Appeal

Chester Green Estates, LLC v. Arlington Chester, LLC
2022 WL 17660421
AppDiv, Second Dept.
(memorandum opinion)

In contract vendee's action for a judgment declaring that a subsequent conveyance of real property is void, contract vendee appealed from Supreme Court's grant of summary judgment to seller and subsequent purchaser. The Appellate Division affirmed, holding that subsequent purchaser was a bona fide purchaser even though contract vendee's appeal was pending at the time of the purchase.

Contact vendee contracted to purchase two parcels for a total of about $13,000,000, with the sale to close after the town's approval of a subdivision map. The sale did not close because of a dispute about responsibility for posting of performance bonds required by the town. Contract vendee then brought an action for specific performance. Supreme Court directed dismissal of the specific performance claim unless contract vendee appeared at a closing upon 10 days notice from seller. When contract vendee did not appear at a scheduled closing, seller sought and obtained a declaration dismissing the specific performance claim and cancelling the notice of pendency. While the notice of pendency was cancelled, seller conveyed the property to another purchaser for $12,100,000. Subsequently, however, the Appellate Division vacated Supreme Court's dismissal of contract vendee's specific performance claim, holding that seller had failed to establish that contract vendee was not ready, willing and able to close. Contract vendee then brought the current action for a judgment declaring the subsequent conveyance void, and seeking specific performance of the original sale contract. Supreme Court granted summary judgment to seller and subsequent purchaser.

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In affirming, the Appellate Division agreed with Supreme Court that the subsequent purchaser was protected as a bona fide purchaser. The Appellate Division first rejected the argument that subsequent purchaser failed to pay valuable consideration, noting that the subsequent purchaser was about 94% of the original purchase price. The court then held that even though the subsequent purchaser had actual notice of contract vendee's appeal, subsequent purchaser could take clear title because the notice of pendency had been cancelled and the cancellation had not been stayed pending appeal.

Comment

Where an action affecting title, possession, use, or enjoyment of real property has terminated by a final judgment or order, and the order has not been stayed, a subsequent purchaser who acquires the property for value during the pendency of the appeal generally qualifies as a bona fide purchaser even if the purchaser had actual knowledge of the appeal. In *Da Silva v. Musso*, 76 N.Y.2d 436, the court held that a subsequent purchaser acquired good title to the subject property despite its actual knowledge of a pending (and ultimately successful) appeal by a prior contract vendee. On the prior contract vendee's appeal, the Court of Appeals held that seller's breach entitled contract vendee to specific performance. Contract vendee had not, however, obtained a stay of the Appellate Division's dismissal of his complaint. Failure to obtain the stay resulted in cancellation of the notice of pendency. In holding that subsequent purchaser, who purchased after the Appellate Division's dismissal, was a bona fide purchaser, the court reasoned that if actual knowledge of a pending appeal constituted a lack of good faith, then the statutory requirement that the unsuccessful claimant preserve his notice of pendency on appeal by obtaining a stay of the adverse judgment would ultimately have no purpose. *Id*. at 16. Further, it would allow an unsuccessful complainant to interfere with the marketability of a defendant owner's property, despite having already lost on the merits and not obtaining a judicial stay as procedurally required. *Id*.

Courts have departed from *Da Silva* where the plaintiff in the initial action would be left with no effective remedy if a subsequent purchaser with knowledge of a pending appeal was afforded the same protections as a bona fide purchaser. Thus, in *Marcus Dairy, Inc. v. Jacene Realty Corp.*, 298 A.D.2d 366, the court held that a senior mortgagee retained priority over a junior mortgagee who acquired its interest with knowledge of senior mortgagee's pending (and ultimately successful) appeal of Supreme Court's judgment directing cancellation of its mortgage. The court noted in *Da Silva*, the prior purchaser's only loss would be the interest in buying the property, while the senior mortgagee in *Marcus Dairy* would lose the priority of its mortgage. Unlike the prior contract vendee in *Da Silva*, who could recover any loss in a breach of contract action against the seller who resold the property, the mortgagee in *Marcus Dairy* would have no comparable remedy.

Notice of Pendency Not a Substitute For Recording

Bello v. Ouellette
2022 WL 17660428
AppDiv, Second Dept.
(memorandum opinion)

In an action for a judgment declaring that prior owner holds a one-quarter interest in the subject property, subsequent purchaser appealed from Supreme Court's denied subsequent purchaser's motion for summary judgment declaring it to be the sole owner of the property. The Appellate Division reversed and held that subsequent purchaser was entitled to the protection of the recording act.

In April 2001, Ouellette acquired a deed to the subject property. Subsequently, prior owner brought an action against Ouellette alleging that he had contributed funds towards the purchase on the understanding that he would own a beneficial interest in the property. Prior owner relied on a 2008 written agreement with Ouellette establishing that prior owner had a one-quarter interest in the property. While prior owner's action was pending, Ouellette conveyed the property to subsequent purchaser without disclosing the 2008 agreement. After the closing, the subsequent purchaser visited the property and showed the deed to the prior owner, who was residing at the property. Prior owner then filed a notice of pendency. Several weeks later, subsequent purchaser recorded the deed from Ouellette. Prior owner then amended the complaint to add subsequent purchaser as a defendant. Subsequent purchaser moved for summary judgment, and for a declaration that it was the sole owner. Supreme Court denied the motion. Subsequent purchaser appealed.

In reversing, the Appellate Division noted first that subsequent purchaser had established that it had neither actual nor constructive notice of prior owner's alleged interest. The court then held that prior owner's filing of a notice of pendency before subsequent purchaser's recording of the deed did not deprive subsequent purchaser of the protection of the recording act. The court indicated that filing of a notice of pendency is not a substitute for recording of a conveyance. The court then held that prior owner's occupancy of the property was not inconsistent with Ouellette's title, and therefore did not defeat subsequent purchaser's status as a good faith purchaser. As a result, subsequent purchaser was entitled to a declaration that it was the sole owner of the property.

Comment

Generally, a notice of pendency will not be sufficient to substitute for recording. In *2386 Creston Ave. Realty, LLC v. M-P-M Management Corp.*,

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58 A.D.3d 158, 867 N.Y.S.2d 416, the court dismissed a specific performance action by a prior purchaser who failed to record its sale contract where a seller subsequently sold to a second purchaser who then recorded its deed, holding that a notice of pendency filed by the first contracting party was insufficient to substitute for recording. In *2386 Creston*, the prior purchaser filed the notice of pendency on the same day the second purchaser's deed was delivered for recording, and there was no evidence that the second purchaser was aware of the prior contract.

Where a party does not have the option to record, at least one court has found a notice of pendency to be a sufficient substitute. In *Goldstein v. Gold*, 106 A.D.2d 100, 483 N.Y.S.2d 375, the court set aside a fraudulently obtained mortgage satisfaction against a subsequent purchaser when they the defrauded mortgagee had filed a notice of pendency before the subsequent purchaser recorded his deed. The mortgagee had provided the mortgagor with a satisfaction based on the promise that the mortgagor would not sell the subject property until the mortgage was actually satisfied, but mortgagor broke that promise. Because the mortgagee had recorded his mortgage but had no other interest he could have recorded, and no other remedy was available to him, the court recognized his notice of pendency as sufficient to substitute for recording. The court observed that the decision did not leave the subsequent purchaser without relief, because subsequent purchaser had a claim against his title insurer.

Defect In Original Foreclosure Precludes Reforeclosure

McWhite v. I & I Realty Group, LLC

2022 WL 17332509
AppDiv, Second Dept.
(memorandum opinion)

In two related actions, mortgagor appealed from Supreme Court's denial of her motion to dismiss a reforeclosure action and denial of her summary judgment motion on her quiet title action. The Appellate Division reversed and declared her to be fee owner of the property because a defect in the initial foreclosure action precluded reforeclosure.

Roache, then the fee owner of property, executed a mortgage to secure a loan and then transferred the property to current mortgagor. Citimortgage then commenced a foreclosure action against both Roache and current mortgagor. Although current mortgagor was served, she did not appear. Three years later, assignee of the mortgage moved for summary judgment on the complaint against Roache, and for leave to enter a default judgment against current mortgagor. Supreme Court denied the motion with respect to current mortgagor on the ground that mortgagee had failed to move within one year of the default, as required by CPLR 3215(c). Assignee nevertheless submitted a judgment of foreclosure and sale to the court which named all defendants and purported to extinguish all of their interests. The property was then sold at auction to I & I Realty, and a referee's deed was issued to I & I. Current mortgagor then brought this action to quiet title to the property and I & I brought a reforeclosure action. Supreme Court denied current mortgagor's summary judgment motion in the quiet title action, and her motion to dismiss the reforeclosure action. Current mortgagor appealed.

In reversing, the Appellate Division held that a purchaser who brings a reforeclosure action must allege that the defect in the initial foreclosure action was not occasioned by the fraud or willful neglect of the foreclosure plaintiff. In this case, the foreclosure plaintiff knew that current mortgagor had been effectively dismissed from the action and nevertheless made a conscious decision to proceed to judgment and sale without validly extinguishing her interest. As a result, reforeclosure was not available and current mortgagor was entitled to dismissal of the complaint. (The court observed that I & I could have commenced a strict foreclosure action had it obtained title within the statute of limitations, without regard to the reason for the defect in the original foreclosure action.) Finally, because the initial foreclosure action had accelerated the mortgage debt and no valid foreclosure had occurred within the period of the statute of limitations, current mortgagor was entitled to summary judgment in her quiet title action.

Sellers Who Paid Tax Are Entitled to Refund Of Overrpayment

69 Pinehurst LLC v. Sixty Nine Pinehurst Avenue Associates LLC

2022 WL 17684379
AppDiv, First Dept.
(memorandum opinion)

In purchaser's action against sellers to recover a real estate tax refund, purchaser appealed from Supreme Court's grant of sellers' motion to dismiss. The Appellate Division affirmed, holding that because sellers had paid the tax, sellers were entitled to the refund.

In 2017, sellers transferred the subject property to purchaser by way of a deed which transferred to purchaser "all of Seller's rights … claims … and causes of action … with respect to the premises." Purchaser then applied for a real estate tax refund for the period from 2013 through 2016. The Department of Taxation and Finance then issued a refund to sellers. Purchaser brought this action, asserting that sellers wrongfully retained the refund despite transferring the claim to purchaser in the bill of sale. Supreme Court dismissed the action.

In affirming, the Appellate Division relied on RPTL section 726(1)(b), which provides that excess taxes must be paid to "the petitioner or other person paying such tax" regardless of whether the person owned the property. The court then

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held that the bill of sale conveyed the property and claims relating to the property, not claims personal to the seller as the person who paid the real estate taxes.

Easement Holder Has Right to Erect Dock

Mosley v. Parnell
2022 WL 17883204
AppDiv, Fourth Dept.
(memorandum opinion)

In an action for a declaration that easement holders have the right to erect a dock on their easement, easement holders appealed from Supreme Court's denial of their summary judgment motion. The Appellate Division modified to grant their summary judgment motion, holding that the dock was a reasonable use incidental to the purpose of the easement.

The plaintiff easement holders have use of a 20-foot-wide right of way across the servient owner's lakefront property. The parties dispute whether the easement affords easement holders a right to build a seasonal dock, and easement holders also sought a declaration that servient owner had placed obstacles obstructing their right of way. Supreme Court denied easement holders' summary judgment motion.

In modifying, the Appellate Division found no error in Supreme Court's denial of easement holders' motion with respect to alleged obstructions of their right of way, noting that easement holders had failed to demonstrate any obstructions. But the court held that easement holders were entitled to erect the dock, noting that the relevant deeds contained no restrictions on the easement and that the purpose of the right-of-way was to provide ingress and egress to the lake. Because any reasonable lawful use within the contemplation of the grant was permissible, easement holders were entitled to build and use a dock.

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CO-OPS AND CONDOMINIUMS

Amendment of Bylaws Relieves Condominiums of Obligation to Use Association For Repair Services

Board of Managers of Van Wyck Glen Condominium v. Van Wyck At Merritt Park Homeowners Association, Inc.
2022 WL 17660405
App Div, Second Dept.
(memorandum opinion)

In an action by two condominiums action for declaratory relief against a homeowners association and its board members, homeowners association and the board members appealed from Supreme Court's denials of their motion to dismiss. The Appellate Division affirmed, holding that the condominiums' amendment of their bylaws released them from the obligation to pay the homeowners association for services.

The same sponsor developed two condominium communities and their governing documents appointed the homeowners association to provide repair and maintenance services for the common elements. Those documents also authorized the association to collect assessments from the unit owners, and provided that the condominium "shall be deemed to have irrevocably appointed" the homeowners association to provide those services. After the sponsor relinquished control, disputes arose between the condominiums and the homeowners association, and the condominium sought to take control of those services. The condominiums then brought this action seeking a declaration about the meaning of the irrevocable appointment, and seeking damages from the board members for breach of fiduciary duty. After settlement negotiations and a Supreme Court order directing the condominiums to hold meetings to amend their bylaws, the two condominiums conducted meetings at which the homeowners approved amendments to their bylaws deleting the irrevocable appointment language. Supreme Court then granted summary judgment to the condominiums dismissing the homeowners association's counterclaim for a judgment declaring the meaning of "irrevocable managing agent", and denied the association's motion to dismiss the claim for rental revenue wrongfully retained by the association and its board members.

In affirming, the Appellate Division held that the condominiums had followed proper procedures in amending their bylaws. As a result, the language about the irrevocable appointment was no longer in the bylaws, and the association's request for declaratory relief had become moot. The court also held that the condominium's complaint adequately alleged breach of fiduciary duty by the homeowners association board members, raising triable issues of fact that precluded dismissal of the claim.

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