GANFER SHORE LEEDS & ZAUDERER LLP

REAL ESTATE TITLE CLIENT ADVISORY

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COURT GRANTS SUMMARY JUDGMENT DISMISSING CLAIM OF FORGERY WITHOUT NEED FOR DISCOVERY

A lender, which had relied upon a notarized and duly recorded deed, was sued by an individual who claimed that she was the owner and that deed conveying the property, bearing her signature, was a forgery. The lender argued that to raise a genuine issue contesting the authenticity of a signature, something beyond an allegation of forgery is required. The lender cited a New York rule of evidence providing that the "certification of the acknowledgment or proof of a writing, except a will, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property within the state is *prima facie* evidence that it was executed by the person who purported to do so." The court without requiring discovery held that to overcome this presumption of due execution, plaintiff was required to respond with "evidence adduced to show that the subject instrument was not duly executed." Moreover, the presumption of due execution cannot be "overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of the evidence, but only upon proof so clear and convincing as to amount to a moral certainty." The lender argued that plaintiff's affidavit on its own was insufficient to rebut the validity of her signature. In addition, plaintiff's signature on another document was sworn to before the same notary and on the exact same day as the deed. Accordingly, the court granted the lender's motion to dismiss the action, as a matter of law, because the plaintiff had failed to rebut the presumption of due execution. **Alleyne v. Rutland Development Group Inc., Index No. 505513/2019 (Sup. Ct. Kings Co. Oct. 16, 2019)**. Ganfer Shore Leeds & Zauderer LLP represented the successful defendant lender in this case.

Because many fraud cases now include allegations of forgery, it is critical to review not only the information available regarding the property, but also what other information may be available concerning the alleged signatories because the transaction may not actually involve any forgery or lack of authorization, but may be a business deal that has not gone the way all had hoped, and defensible from a title perspective.

MEMBER CONSENTS DEFEAT A CLAIM OF LACK OF AUTHORIZATION

In **Atlantic Washington Funding, LLC v. Atlantic Upreal et al., Index No. 500538/2019 (Sup. Ct. Kings Co. Oct. 23, 2019**), the mortgagee commenced a foreclosure, arising from a business transaction that apparently went bad. Defendant, a limited liability company, asserted an affirmative defense in its answer alleging that defendant was never authorized to execute the

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mortgage held by plaintiff, which was in the process of being foreclosed upon. Defendant relied upon a term sheet containing a lower loan amount, which had been executed in connection with the formation of the LLC years before the member consents relied upon in issuing the mortgage. Based on this term sheet, defendant argued that the originating lender (and any subsequent assignee) should have been on notice of a potential authority issue because the term sheet provided for such lower financing amount. However, after being presented with precedent that a lender does not have a duty of care to ascertain the validity of the documentation presented by an individual who claims to have the authority to act on behalf of a borrower corporation or entity, the court dismissed the affirmative defense of lack of authority, as a matter of law based on the consents proffered at the time of the loan, which authorized the higher financing amount. Ganfer Shore Leeds and Zauderer LLP represented the successful lender in this action.

FOCUS ON DEED THEFT (FINALLY!)

A recent *New York Times* article by Kimiko De Freytas-Tamura, entitled "Why Black Homeowners in Brooklyn are being Victimized by Fraud," shined a bright light on the increasing problem of deed theft. https://www.nytimes.com/2019/10/21/nyregion/deed-theft-brooklyn.html. Governor Cuomo has asked the NYS Department of Financial Services to investigate the circumstances giving rise to the deceptive tactics targeting Brooklyn homeowners. https://www.dfs.ny.gov/reports_and_publications/press_releases/pr1910221. This follows the signing into law of A5615/S1688 on August 14, 2019. This new law seeks to enhance the New York Home Equity Theft Prevention Act (RPL 265), which attempts to protect distressed home owners from those seeking to skim the equity from property via a contract containing a buyback clause whose terms are nearly impossible to achieve. The law expands, in pertinent part, the scope of the covered transactions to include not only those involving borrowers in foreclosure, but also transactions where the borrowers are presently in default although a foreclosure has not been commenced. The law also amends Criminal Procedure Law § 420.45 by authorizing a district attorney, after obtaining a conviction (whether by guilty plead or at trial) against a party for deed fraud, to file a motion in the county in which the property lies to void the fraudster's deed *ab initio*.

Further, also seeking to combat deed fraud, New York now requires the names and social security or taxpayer identification number of all LLC members when submitting or recording a deed or transfer documents. However, without an index kept by the appropriate agency to cross check such numbers with the proper county clerk's office, such disclosure will only be of limited value in preventing deed fraud.

Lastly, it is worth noting that to help combat "zombie" homes, e.g. homes that that are deteriorating and vacant whose owner's defaulted on their mortgage, RPAPL 1308 (4) has been amended to require lenders and their servicers, when the property is vacant, to keep homeowner association dues or cooperative maintenance payments current during the foreclosure process.