GANFER SHORE LEEDS & ZAUDERER LLP

REAL ESTATE TITLE CLIENT ADVISORY

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COURT REJECTS LENDER'S STATUTE OF LIMITATION DEFENSE AND GRANTS SUMMARY JUDGMENT TO SUBSEQUENT PURCHASER CANCELING MORTGAGE

A recent case provides clarity concerning what must be done to decelerate a loan as well as who can challenge a subsequent purchaser's right to maintain a cause of action seeking to cancel and discharge a mortgage in a foreclosure action. In ***53rd Street LLC v. U.S. Bank N.A.*** 1:18-CV-4203 (E.D.N.Y. May 8, 2020), a prior lender asserted that the purchaser's statute of limitations defense to foreclosure was barred because such a defense was personal to the original borrower. Therefore, the prior lender asserted that a subsequent purchaser lacked standing to raise the defense. The court disagreed, holding that the subsequent purchaser of property stepped into the shoes of the original borrower for this purpose and thus had the right to assert such defense.

The court then reviewed the merits of the purchaser's statute of limitations argument. The statute of limitations to foreclose on a mortgage loan in New York is six years. This period applies to each payment due under the mortgage, but once the lender accelerates the mortgage, the limitations period for the principal indebtedness is triggered and begins to run from that date. Here, the prior lender commenced a foreclosure action in June 2008, but did not aggressively pursue the action which was thereafter discontinued. Six days before the six-year statute of limitations would have run, the lender sent a purported deceleration letter to the borrower. However, the deceleration letter did not contain an express demand that the borrower resume making monthly payments or include copies of monthly invoices. Instead, the lender then sent a series of notices reflecting an intention to initiate a new foreclosure action.

Where a lender appears to decelerate the loan solely in order to avoid the statute of limitations and without providing proper demands or documents, the purported deceleration will be insufficient to extend the statute of limitations. Especially given the effect of the NY PAUSE Executive Orders on mortgagees, it is especially critical to pay careful attention to the statute of limitations as it pertains to the payment of principal, where the failure to properly decelerate the mortgage may prevent the mortgagee from foreclosing on the secured property or obtaining any payment on its loan.

INSURED'S FAILURE TO APPEAR FOR EXAMINATIONS UNDER OATH RESULTS IN VITIATION OF INSURANCE COVERAGE

The New York Appellate Division, First Department, in ***Nationwide Affinity Ins. Co. of Am. v. Thomas***, 2020 NY Slip Op. 02258 (1st Dep't April 9, 2020), recently affirmed the granting

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of summary judgment in favor of an insurance company that sought a declaration that it owed no coverage to insureds who failed to appear for duly noticed examinations under oath ("EUO"), which were timely and duly noticed pursuant to the terms and conditions of the policy. After reviewing how the EUO notices and insurance denial letters were generated, the precise means by which they were sent and to whom they were sent, the basis for the denials and where a detailed record was made of the insureds' non-appearances, the court held that the insureds' failure to appear vitiated their insurance coverage, and the appeals court agreed. This decision provides a useful template for understanding what needs to be done in order to create a record that will support vitiating coverage for the failure to comply with an EUO. An insurer must carefully document that the insured received timely notices under the policy and inexcusably refused to appear for examination before seeking to vitiate coverage on this ground.

FEDERAL TAX LIEN RESULTS IN SALE OF MARITAL PROPERTY

Under New York law, property that two spouses own as tenants by the entirety ordinarily may not be reached by creditors seeking to enforce the individual debt of one spouse. However, an exception to this rule exists for federal income tax liens, as shown in ***United States v. Bonadido***, 3:14-CV-1391 (N.D.N.Y. May 19, 2020). In this case, a husband and wife were required to sell New York real property owned jointly by them due to the husband's failure to pay several years of federal taxes. After notifying the husband of the outstanding amounts due, the Internal Revenue Service placed a lien against the real property owned by the husband and wife. The IRS then moved for a default judgment and the sale of the property, with the IRS's claim to be paid from the husband's interest in the property. The court explained that "there are three prerequisites to the existence of a tax lien: (1) the assessment of a tax; (2) the notice of assessment and demand for payment; and (3) the taxpayer's neglect or refusal to pay."

The Internal Revenue Code provides that the federal government may force the sale of a debtor's property to satisfy a valid tax lien, and the U.S. Supreme Court has held that contrary state laws that would prevent the IRS from reaching certain property may be preempted. While some equitable factors may be taken into account in deciding whether to order the sale of the property, in this case, the defendants defaulted and did not raise any such arguments. The court directed that the property be sold and that, after the sale, the net proceeds (after costs and expenses) would be divided in half. The wife, who was not liable for her husband's tax debts, would receive her fifty percent share of the proceeds. The IRS then would recover the money it was owed from the husband's fifty percent share. If any of the husband's share remained after the IRS was paid in full, he would receive the balance.

It is important to remember that even though a property is held by a husband and wife as tenants by the entirety, there are certain scenarios under which a lien may arise and force the apportioning of the property.

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