

GANFER SHORE LEEDS & ZAUDERER LLP

REAL ESTATE TITLE CLIENT ADVISORY
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**BANK UNABLE TO RECORD CORRECTIVE VESTING
DEED DUE TO FAILURE TO SECURE TRANSFER TAX FORMS**

If the end game is to get a corrective deed filed by court order, make sure you ask for the proper relief in your pleading, as otherwise all may be for naught. This became painfully clear in the case of *US Bank National Association v. Pettersen*, Index No. 707584/2021 (Queens Co. Sup. Ct. Dec. 17, 2021). In this case, the plaintiff bank commenced an action that sought, among other things, to obtain a declaratory judgment that its mortgage, granted by a husband and wife, is a valid first mortgage lien encumbering the subject property. The bank also sought an order directing the Office of the New York City Register to accept a copy of the vesting deed for recording, as the original deed was misplaced or lost.

The court granted the requested relief, but the bank then learned that it was still unable to record the corrective deed because it lacked fully executed transfer tax forms. One of the parties had passed away, and the court-appointed administrator with limited letters of administration lacked the authority to execute such forms. As a result, the bank moved to amend the court's order to add a provision allowing it to record the deed without filing the otherwise-required transfer tax forms (e.g., the NYC Real Property Transfer Tax Return and a NYS Real Property Tax Return).

The City Registrar opposed this request, arguing that the "failure to file a proper tax return affects the substantial rights of all New York City residents, who have a vested interest in having all taxpayers file required returns and pay taxes." The court denied the bank's motion, holding that the Administrative Code's requirements to record the transfer tax forms must be complied with and the court could not waive them. The court noted that the bank could return to the Surrogate's Court for the administrator to obtain the requisite additional authority.

This additional motion practice would not have been necessary if counsel had focused from the outset on all of the required prerequisites to recording the corrective deed, which in this case included ensuring that the lender could obtain all the signatures needed to record the ancillary tax documents.

LIABILITY FOR LACK OF STANDING: NEW YORK CIVIL RIGHTS LAW

Standing is an issue that is front and center in many foreclosure litigation cases, including ordinary nonpayment foreclosure cases and ones involving title defects. A foreclosure plaintiff whose standing is questionable should be wary not just of a potential dismissal of the action due to lack

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of standing, but of potential liability under §70 of the New York State Civil Rights Law. This section can potentially be used as a sword against a lender that has not performed its adequate diligence to ensure standing.

Civil Rights Law §70 provides in pertinent part that:

If a person vexatiously or maliciously, in the name of another but without the latter's consent ... commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court ... either before or after judgment or other final determination; an action to recover damages therefor may be maintained against him by the adverse party ...; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment not exceeding six months.

The effect of this statute is that if a lender or its servicer commences an action without being the holder of the note, a defendant could seek to recover damages based on such lack of standing. Additionally, a determination of lack of standing could result under Civil Rights Law §71 in an award of treble damages. For this additional reason, lenders need to ensure that they are comfortable with their standing position before commencing an action.

NEW YORK STATE ASSEMBLY CONSIDERS AMENDING NOTARY LAW TO COMBAT DEED FRAUD

The New York State Assembly (A10156) and Senate (S9404) have introduced bills to amend Executive Law §137, by adding a section concerning notaries' obligations for documents conveying residential real property <https://www.nysenate.gov/legislation/bills/2021/A10516>).

The provision, as presently drafted, would require that the notary engage in a "colloquy" or series of questions with the transferor before notarizing the document. The questions and answers must be taken down and signed by both the notary and the principal whose signature is being acknowledged, and failure to do so would render the document *void*. Among other thing, the eight-question colloquy asks the conveying party to confirm that the party understands it is transferring ownership of the property in question for consideration and without duress.

The purpose of the bill is to try to combat deed fraud by legislating that a notary must confirm that the party conveying title understands the ramifications of executing the document. While it is doubtful a party at the closing would openly state under such circumstances that they are under duress, the law may, if approved in its current form, or one substantially similar, help avert instances where people execute documents they do not understand.

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While the extent to which these requirements would help combat fraud cannot be known, it is clear that such a law would create a heavy burden on the notary to ask these questions, and potentially cause notaries to be more thorough and maintain notes on the transaction should a question arise in the future concerning the validity of the colloquy and the document transferring title. It is also possible that some notaries will decline to notarize real estate documents rather than incur this additional burden. We will continue to monitor the status of this bill and provide an update should it be enacted.

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