

**GANFER SHORE LEEDS & ZAUDERER LLP** 

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**REAL ESTATE TITLE CLIENT ADVISORY**

**Summer 2021**

New York State, and in particular New York City, is opening up and the landscape is reverting to in-person closings and document signings. We remain ready to assist you with any title issues.

**NEW YORK EXTENDS THE COVID-19 EMERGENCY EVICTION AND FORECLOSURE PREVENTION ACT OF 2020 (S.9114/A.11181)**

The state of emergency proclaimed by Governor Cuomo as a result of the COVID-19 pandemic and the accompanying Executive Orders were terminated in June 2021. However, certain temporary legislation arising from the pandemic remains in effect. For example, New York State has once again extended the emergency COVID protections afforded to certain residential tenants, owners, and borrowers until August 31, 2021. With respect to tax lien sales, local governments are prevented from engaging in a tax lien sale or a tax foreclosure until August 31, 2021. The statute does not provide for debt forgiveness or extension. Payments are still due and late payments are subject to interest, fees, and penalties as they would be in the ordinary course.

**COURT FINDS STATUTE OF LIMITATIONS EXPIRED ON AN ALLEGEDLY FRAUDULENT TRANSFER**

Legal claims should be pursued promptly. This is especially true where the claim involves a conveyance of real property that has been publicly recorded. Delay may lead to loss of rights if evidence or witnesses become unavailable in the interim, or if the property is re-conveyed. Delay may also be disastrous if the statute of limitations expires, as occurred in *Alexander v. Simpson*, Index No. 71884/2020, 2021 NYLJ LEXIS 420 (Sup. Ct. Queens Co. May 7, 2021).

The plaintiff alleged that defendant fraudulently transferred ownership of a parcel and sued for breach of contract, breach of fiduciary duty, constructive trust, and unjust enrichment. Defendants moved to dismiss arguing that all the claims were time-barred. New York's statute of limitations for constructive trust, breach of contract and unjust enrichment is six years and for breach of fiduciary duty typically three years. Here, the parties did not dispute the applicable time periods, but from when they started to run. The allegedly wrongful transfer took place in 2009, and if the time periods began to run from 2009, the action would be time-barred. Plaintiff contended he did not learn of the transfer until 2016 and argued that the statute should not start running until then.

The court granted defendants' motion to dismiss. The deed had been publicly recorded and defendants had not done anything that would have prevented plaintiff from learning of the transfer and challenging it on a timely basis. Significantly, the plaintiff did not allege that the deed was a forgery, a claim on which there is generally no statute of limitations under New York law.

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Many jurisdictions offer free services that inform a property owner or lender if a property transfer has been recorded. While these services will not prevent fraud in advance, they can help by providing prompt notice of an improper transfer, allowing a defrauded party to quickly dispute the transfer and seek to trace the funds. Your real estate attorney or title professional should be able to help you locate this resource if it is available in your area.

### **COURT SETS ASIDE FRAUDULENT TRANSFER OF REAL PROPERTY**

A recent federal decision is instructive on the elements of fraudulent transfer claims and the type of evidence needed to prove such claims. *Rosario v. 251 East 123rd Street Realty, LLC*, No. 1:20-CV-07387, 2021 U.S. Dist. LEXIS 100664 (S.D.N.Y. May 27, 2021). The plaintiff in this case had obtained two judgments against an LLC and the sole member of the LLC. One month after the second judgment was docketed, the LLC member had a deed recorded, reflecting that he had transferred the LLC's real property to a trust for the benefit of family members, for no consideration. Although the deed was recorded shortly after the judgments were docketed, it bore a date nine months earlier. The transfer rendered the LLC insolvent.

Plaintiff asserted that the deed reflected a fraudulent transfer and should be set aside. Defendants contended that the transfer was not fraudulent because it had occurred before the judgments were docketed. The court disagreed, observing that the transfer undisputedly took place after the underlying litigation was commenced, thereby creating a potential debtor-creditor relationship, even if the judgment had not yet been entered. Defendants also argued that the transfer had not rendered *all* the parties insolvent, but the court held there is no such requirement.

Defendants further argued that the transfer did not reflect an intent to commit fraud, but that it was an estate-planning transaction undertaken in order to manage family property given the LLC member's failing health. The court rejected this contention as well, observing that this individual had been in failing health for three years, and where the transfer took place just eight days before the trial was to begin in the underlying litigation.

Defendants had sought to address the fraudulent transfer claim by re-conveying the property back to the LLC. The court held that the re-transfer did not render the issues moot, because there was no evidence that the beneficiaries of the trust to which the property had purportedly been transferred consented to the re-transfer or whether their consent would be required, moreover, even if such re-transfer had been effectuated it would not obviate the fraudulent act. The court held that the deed transferring the property was void, thereby putting the property undisputedly back in the LLC's name and making it available to satisfy plaintiff's judgments. Having granted rescission, the court declined to award plaintiff money damages for the fraudulent transfer, but did allow plaintiff to recover his reasonable attorneys' fees.