
CLIENT ADVISORY

AUGUST 2017

Ganfer and Shore, LLP is pleased to introduce a new advisory newsletter to its clients which will, from time to time, address recent decisions issued by New York Courts as well as legislation that may affect the real estate title industry. Our goal is to provide recent precedent to title companies, lenders, property owners and lienors that should be of assistance in addressing matters where title to property has been called into question.

As part of the firm's practice, Ganfer & Shore's attorneys represent title insurance companies and their insured owners and lenders in a wide range of complex title disputes. Our strength in title matters draws upon the multi-disciplinary composition of our practice group: transactional real estate attorneys with in-depth real estate and title insurance background working with litigation attorneys experienced in handling the full array of complex title-related issues. The firm's title insurance litigation team is led by a senior litigation partner and a real estate transactional attorney who served as an assistant major claims counsel at one of the largest title insurance companies in the United States. This unique combination enables us to tackle the most complex title disputes, whether through litigation or successful settlement. In addition to our litigation experience, we counsel underwriters on coverage determinations and claim resolutions.

Our real estate title practice group is led by Mark A. Berman, Matthew J. Leeds and Jason A. Ganfer.

AN "EQUITABLE MORTGAGE LIEN" IS A POWERFUL WEAPON IN A FORECLOSURE WHEN THERE ARE DEFECTS IN THE RECORDED DOCUMENTS

Plaintiff bank commenced an action to foreclose a consolidated mortgage in the total amount of 1.5 million dollars (the "Consolidated Mortgage"), which was recorded against a property. The obligations secured by the Consolidated Mortgage were comprised of two previous consolidated mortgages. The latter of the two consolidated mortgages lacked a complete mortgage chain. As a result, Plaintiff sought to reform the second consolidated mortgage to include a recitation of the complete chain of mortgages for the underlying indebtedness. In *Capital One, N.A. v. Karp*, Index No. 67229/2014, NYLJ 1202792210583 (Sup Co. West. Co. June 22, 2017), Plaintiff moved for summary judgment and the borrower asserted that the relief of reformation should be denied, as more than six years – the applicable statute of limitations -- had elapsed since the granting of the second consolidated mortgage, and that summary judgment could thus not be granted by reforming the Consolidated Mortgage. The court agreed with the borrower and denied summary judgment.

However, the Court held on a second motion for summary judgment that, even though the relief of reformation was unavailable and where the entire mortgage chain had not been included, the Consolidated Mortgage was enforceable as an "equitable mortgage lien." The court relied upon the First Department decision in Federal Deposit Ins. Corp. v. Five Star Mgmt., Inc., 258

A.D.2d 15, 21 (1st Dep't 1999), for the proposition that "New York has long recognized that 'an equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity.'" While noting that the application of the concept of an "equitable mortgage" is fact-based, the Court found that there was no doubt as to the intent of the parties that the property was to be encumbered and to act as security for the \$1.5 million mortgage.

BE CAREFUL WHEN COUPLES PURCHASE PROPERTY TO ENSURE THAT THE DEED INDICATES THAT THEY ARE IN FACT "MARRIED"

Plaintiff, Marie Hughes-Reddick, commenced an action in 2013 to quiet title to properties in Brooklyn, alleging that she was the daughter and heir to the original owner, Ira Hughes, who passed away ten years earlier. However, another person, Georgia Hughes, a purported "wife," obtained letters of administration following Ira Hughes' death and sold the premises to codefendant Fatimat Talabi in 2005. Georgia Hughes passed away in 2015. At issue, in *Hughes-Reddick v. Hughes*, Index No. 15299/2013, NYLJ 1202791673153 (Sup. Ct. Kings Co. June 19, 2017), was whether the alleged "wife" of the decedent was the holder of title at the time she conveyed the properties to a third party purchaser. Plaintiff asserted that, although the deed to one of the properties dating back to 1966 stated that it was taken as husband and wife, in an application by the deceased owner for veterans' benefits, the purported "wife" had certified that she had not married the owner until 1994, which was after the subject property had been purchased. The Court held that where a "property is deeded to a man and woman who are not married, but the deed indicates they are, a joint tenancy with a right of survivorship is created." As a result, the alleged "wife" was held to be entitled to sell one of the properties as the surviving joint tenant. However, the Court held that, as to the other property, which had been deeded only to the deceased owner, there were issues of fact as to the heirs who owned the second property as "tenants in common."

PROPOSED NEW YORK CITY LAW WOULD SEEK TO MINIMIZE DEED FRAUD

In an attempt to minimize deed fraud in New York City, a new law (Administrative Code §7-628) has been proposed by City Councilwomen Helen K. Rosenthal and Julissa Ferreras-Copeland that would require the New York City Department of Finance to maintain a database of interested stakeholders in property, *e.g.* lenders and owners, who would receive notification when an instrument affecting their property is recorded. This law would codify the Department of Finance (DOF)'s Automated City Register Information System (ACRIS) Notice of Recorded Document Program, by requiring the DOF to establish and maintain a system that would allow individuals to register, without charge, to receive notifications by email or text message whenever any document (as determined by the Finance Commissioner) affecting an ownership interest in real property is recorded with the City Register or the Office of the Richmond County Clerk. DOF would be required to report quarterly on utilization of the system, including the number of registrants, the number of individuals contacting DOF regarding an incorrect or suspected fraudulent document recording, and information about referrals made to the City Sheriff related to suspected fraudulent recording, including any outcomes of such referrals.

If adopted, the law would take effect 30 days thereafter. While the law would not prevent deed fraud from occurring, it would likely increase the number of stakeholders signing up for the current notice system offered on ACRIS. Thus, the real benefit of this safeguard would be that a person, who has signed up to be notified, would become aware of the alleged fraud immediately upon recordation and thus would be able to more swiftly address the issue.