NEW YORK APPELLATE DIGEST, LLC

Year in Review
Real Property Law
2020

An Organized Compilation of the Summaries of Selected Decisions Addressing Real Property Law Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in 2020. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There.

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ADIRONDACK PARK.

UPON LEARNING THE STATE, BY EFFECTIVELY MISLEADING THE COURT, OBTAINED A JUDGMENT DETERMINING IT OWNED LAND IN THE ADIRONDACK PARK, THE COURT PROPERLY EXERCISED ITS DISCRETION TO VACATE THE JUDGMENT PURSUANT TO CPLR 5015 (THIRD DEPT).

The Third Department determined Supreme Court properly vacated a judgment pursuant to CPLR 5015 in the interests of substantial justice because plaintiff (the State of New York) had misled the court in proceedings leading to the judgment that it owned land in the Adirondack Park:

Plaintiff argued at trial that, although it could not identify the specific instrument that gave it a superior claim to the parcel at issue, several instruments granted it title to most of Township 40 and that the parcel "was not included within the bounds of any exception" … Plaintiff was aware that the success of this argument would threaten the claims of hundreds of individuals to land in Township 40, and misrepresented to Supreme Court that it would rely upon a judgment in this action to bring RPAPL article 15 actions against those individuals. Upon succeeding, plaintiff instead enforced the 2001 judgment against defendants alone … . It … became evident that plaintiff sought the 2001 judgment despite the doubts … regarding its ownership claims in Township 40 … . Plaintiff subjected defendants to selectively harsh treatment under a judgment about which it harbored doubts, in other words, and Supreme Court stated that it would not have granted the judgment had plaintiff taken the legal position it later adopted. Supreme Court did not abuse its discretion in finding that these circumstances afforded sufficient reason to vacate the 2001 judgment in the interest of substantial justice … . State of New York v Moore, 2020 NY Slip Op 00008, Third Dept 1-2-10

ADVERSE POSSESSION, TRESPASS.

PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT ON THEIR ADVERSE POSSESSION AND TRESPASS CAUSES OF ACTION SHOULD HAVE BEEN GRANTED; A DEFENDANT'S MISTAKEN BELIEF HE OR SHE HAD A RIGHT TO ENTER DOES NOT DEFEAT LIABILITY FOR TRESPASS (SECOND DEPT).

The Second Department, reversing Supreme Court in this adverse possession and trespass action, determined plaintiffs were entitled to summary judgment on their adverse possession and trespass actions. With regard to

trespass, the court noted that liability is not defeated by a defendant's belief he or she has a right to enter the property:

The Supreme Court also should have granted that branch of the plaintiffs' cross motion which was, in effect, for summary judgment on the issue of liability on the trespass cause of action. To meet their prima facie burden, the plaintiffs were required to demonstrate that the defendant intentionally entered onto the land belonging to the plaintiffs without justification or permission … . "'Liability may attach regardless of defendant's mistaken belief that he or she had a right to enter'" … . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the trespass cause of action by submitting the affidavit of the plaintiff Jamie Montanaro, who averred that, in December 2016, the defendant removed a portion of the retaining wall on the disputed property and built a garage which encroaches upon the disputed property … . The plaintiffs also submitted the affidavit of a land surveyor who averred that the new garage encroached upon the disputed property … . Montanaro v Rudchyk, 2020 NY Slip Op 07560, Second Dept 12-16-20

ADVERSE POSSESSION.

QUESTION OF FACT WHETHER THE ENCROACHMENT OF A FIRE ESCAPE HOVERING OVER A PORTION OF DEFENDANT'S PROPERTY WAS HOSTILE AND CONTINUOUS FOR THE PRESCRIPTIVE PERIOD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this prescriptive easement action should not have been granted. A fire escape on plaintiff's building hovers over a portion of defendant's land, which had been used as parking lot. The defendant argued the encroachment by the fire escape was permissive, not hostile, because the fire escape did not interfere with the use of the parking lot. The Second Department held that was question of fact whether a prescriptive easement had been created before the alleged permissive use:

The defendant, in moving, inter alia, for summary judgment declaring that the plaintiff does not have a prescriptive easement, established, prima facie, that the fire escape on the rear of plaintiff's building that encroaches several feet above the defendant's property was not hostile, but permissive … . Specifically, the defendant submitted evidence that the fire escape did not interfere with the operation of a parking lot on its property from June 1, 1991, to October 15, 2014. In opposition, however, the plaintiff raised triable issues of fact as to whether the use of the subject fire escape, which hovers over a portion of the defendant's property, has been adverse, open and notorious, and continuous for the prescriptive period … . The plaintiff asserted that the

subject fire escape has been in place since at least 1902, and that the period of prescription could have been satisfied and the easement created by the time of the alleged permissive use … . Barrett v A&P Pac. Owner, LLC, 2020 NY Slip Op 00396, Second Dept 1-22-20

APPEAL RENDERED MOOT BY VALID TRANSFER.

THE APPEAL WAS RENDERED MOOT BY DEFENDANT'S TRANSFER OF THE PROPERTY AFTER SUPREME COURT RULED DEFENDANT HAD TITLE TO THE PROPERTY (THIRD DEPT).

The Third Department dismissed the appeal as moot. Property which had been validly foreclosed by defendant was transferred to a third party. Plaintiff had brought an action pursuant to Real Property Actions and Proceedings Law (RPAPL) Article 15 to determine its rights to a portion of the foreclosed property. Supreme Court granted defendant's motion for summary judgment on its counterclaim for strict foreclosure (RPAPL 1352) and plaintiff appealed. The appeal was deemed moot and dismissed because defendant had a right to transfer the property after Supreme Court's ruling:

[T]he jurisdiction of this Court extends only to live controversies and, as such, an appeal will be considered moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" … . "Since the ability to transfer clear title is a natural incident of [property] ownership, it follows that when a complaint involving title to or the right to possess and enjoy real property has been dismissed on the merits and there is no outstanding notice of pendency or stay, the property owner has a right to transfer or otherwise dispose of the property unrestricted by the dismissed claim" … . "'[A] purchaser's actual knowledge of litigation and a pending appeal is not legally significant and[,] absent a validly recorded notice of pendency, an owner has the ability to transfer clear title'" … .

Here, Supreme Court canceled plaintiff's notice of pendency and this Court denied his motion for a stay pending appeal. Therefore, defendants had the right to transfer the property when they did, and the purchaser obtained clear title despite its knowledge of the pending appeals. Govel v Trustco Bank, 2020 NY Slip Op 02306, Third Dept 4-16-20

ARBITRATION, DISTRESSED PROPERTY CONSULTANT.

QUESTION OF FACT WHETHER AGREEMENT TO ARBITRATE WAS VOID PURSUANT TO REAL PROPERTY LAW 265-b; NOT CLEAR WHETHER DEFENDANT LAW FIRM WAS ACTING AS A CONSULTANT IN A MATTER CONCERNING A DISTRESSED HOME LOAN; IF SO, THE DEFENDANT CAN VOID THE AGREEMENT TO ARBITRATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant law firm was acting as a consultant in matters related to distressed home loans such that any related agreement to arbitrate was void pursuant to Real Properly Law 265-b. Supreme Court had granted the law firm's motion to compel arbitration:

Real Property Law § 265-b governs the conduct of distressed property consultants. "Distressed property consultant" or "consultant" is defined as "an individual or a corporation, partnership, limited liability company or other business entity that, directly or indirectly, solicits or undertakes employment to provide consulting services to a homeowner for compensation or promise of compensation with respect to a distressed home loan or a potential loss of the home for nonpayment of taxes" … . A consultant does not include, inter alia, "an attorney admitted to practice in the state of New York when the attorney is directly providing consulting services to a homeowner in the course of his or her regular legal practice" … . Real Property Law § 265-b further provides, in part, that "[a]ny provision in a contract which attempts or purports to require arbitration of any dispute arising under this section shall be void at the option of the homeowner" … .

Here, the plaintiff raised a question of fact as to whether the Donado defendants directly provided consulting services to the plaintiff in the course of the Donado defendants' regular legal practice … . The plaintiff asserted in his affidavit, among other things, that he never met with an attorney from Donado Law Firm, P.C. … . Inasmuch as the plaintiff raised a question of fact as to whether the Donado defendants were consultants within the meaning of former Real Property Law § 265-b[1][e][i], there is a question of fact as to whether the plaintiff would be allowed to void the arbitration provision … , and a hearing is required. Ventura v Donado Law Firm, P.C., 2020 NY Slip Op 00888, Second Dept 2-5-20

CONDOMINIUM, COMMON CHARGES.

A CAUSE OF ACTION MAY BE DISMISSED PURSUANT TO CPLR 3211 (a) (4) BECAUSE IT SEEKS THE SAME RELIEF AS A PENDING ACTION INVOLVING THE SAME PARTIES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a cause of action should have been dismissed pursuant CPLR 3211 (a) (4) because it involved the same parties and sought the same relief as a pending action. The actions involved common charges for condominiums:

Pursuant to CPLR 3211(a)(4), a party may move to dismiss a cause of action on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." "'It is not necessary that the precise legal theories presented in the first action also be presented in the second action as long as the relief . . . is the same or substantially the same'" … . "'The critical element is that both suits arise out of the same subject matter or series of alleged wrongs'" … .

We disagree with the Supreme Court's exercise of its discretion in denying that branch of [the] cross motion which was for relief pursuant to CPLR 3211(a)(4). The … [actions] arise out of the same events, and involve overlapping questions of law, namely, the authority of the Board to charge … the increased common charges and assessments. The business judgment rule does not shield a condominium board's acts of "bad faith and self-dealing" … . … [T]he resolution of [the] causes of action against the Board, which include, among other things, a request for a judgment declaring that the Board's common charge increases were not valid, may moot the instant action to foreclose upon the common charge liens … . Further, absent relief under CPLR 3211(a)(4), [there would be] duplicative litigation and the prospect of inconsistent results. Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer, 2020 NY Slip Op 05026, Second Dept 9-23-20

CONSTRUCTIVE TRUST, REFORMATION OF THE DEED.

PETITION SEEKING TRANSFER OF REAL PROPERTY FROM DECEDENT TO PETITIONER BY REFORMATION OF THE DEED OR A CONSTRUCTIVE TRUST, AS WELL AS THE DISTRIBUTION OF TRUST ASSETS TO DECEDENT'S GRANDCHILDREN, AS OPPOSED TO DECEDENT'S SURVIVING DESCENDANTS, PROPERLY DENIED (THIRD DEPT).

The Third Department determined Surrogate's Court properly denied the petition which sought proceeds from the sale of real property in decedent's name and a distribution from a trust for the educational expenses for decedent's grandchildren:

According to the petition, petitioner had contributed funds to purchase the lots and paid all expenses associated therewith. Petitioner requested either reformation of the deeds or the imposition of a constructive trust. In the second proceeding, petitioner sought a decree authorizing a distribution from decedent's testamentary trust to pay for the educational expenses of the grandchildren. …

[Re: reformation of the deed for the real property,] [g]iven that petitioner did not establish, or even allege, that there was fraud involved, she failed to establish unilateral mistake where the showing of fraud is required … . To claim that there was mutual mistake, it must be established that "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" … . Here, petitioner failed to show that there was an oral agreement that the vacant lots would be owned as tenants by the entirety … . …

[Re: a constructive trust for the real property,] … although there was a confidential relationship between petitioner and decedent due to their marital status, the record does not reveal that there was a promise that the two would jointly own the four vacant lots, that petitioner transferred monies to purchase the properties in reliance of that promise or that decedent's enrichment was unjust as a result … . …

Petitioner asserts that the word "use" supports her claim that decedent intended to provide the trustees with broad discretion that allows the distribution of the trust to be used for the grandchildren's educational expenses. However, when gleaning decedent's intent from the entirety of the will, the word "use" does not give unbridled discretion to the trustees to distribute the income for such purpose. Rather, when considering that the will provides that decedent's descendants who survive petitioner receive the remainder of the trust at the time of her

death, it may be gleaned that it was not decedent's intent that the trust provide for the grandchildren's educational expenses during petitioner's lifetime … . Matter of Husisian, 2020 NY Slip Op 06188, Third Dept 10-29-20

CONSTRUCTIVE TRUST.

PLAINTIFF RAISED QUESTIONS OF FACT ABOUT WHETHER A CONSTRUCTIVE TRUST ON REAL PROPERTY HAD BEEN CREATED, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff had raised questions of fact about whether a constructive trust on real property had been created:

The defendant established his prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting his affidavit denying the existence of any agreement with the plaintiff regarding ownership or an interest by the plaintiff in the premises, and denying that the plaintiff performed repairs to the premises. However, in opposition, the plaintiff submitted the affidavits of two nonparties who each attested, inter alia, to admissions made by the defendant that the plaintiff was an equal owner of the premises with the defendant. Thus, the affidavits submitted by the parties raise triable issues of fact as to whether the parties, who are in-laws by virtue of the defendant's marriage to the plaintiff's daughter and who lived with each other for several years prior to the defendant moving out, orally agreed to a shared ownership of the subject premises, and as to whether the plaintiff relied on that agreement by paying for repairs and expenses on the home for the benefit of the defendant. Accordingly, the defendant's motion for summary judgment should have been denied … . Abehsera v Saldin, 2020 NY Slip Op 04723, Second Dept 8-26-20

CONVEYANCE UPON DEATH.

THE REAL PROPERTY PASSED TO THE BENEFICIARY IN THE WILL UPON DEATH, NOT UPON SUBSEQUENT PROBATE; THEREFORE THE CONVEYANCE WAS VALID AND THE DEED SHOULD NOT HAVE BEEN DEEMED VOID (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined plaintiff's deed inherited the real property upon decedent's death, not after probate. Therefore the conveyance of the property by the beneficiary, McKenzie, to plaintiff was valid:

… [T]he decedent's will, unequivocally and without limitation, devised McKenzie one third of the residuary estate, and this interest vested in McKenzie at the moment of the decedent's death … . Although the vesting of McKenzie's interest was "subject to the executor[ʻs] duty to ensure that all debts and obligations of the estate[ ] were met" … , the defendants failed to establish, prima facie, that McKenzie's conveyance of her interest impeded the executor's duties, and thus, failed to establish, prima facie, that McKenzie's interest had not yet vested when she conveyed it to the plaintiff after the decedent's death … . 72634552 Corp. v Okon, 2020 NY Slip Op 07845, Second Dept 12-23-20

CORRECTION DEED, EASEMENT, STRANGER TO THE DEED RULE.

A SUBSEQUENT DEED INCLUDING THE EASEMENT WAS A VALID CORRECTION DEED; THE STRANGER TO THE DEED RULE DID NOT APPLY BECAUSE THE DEEDS WITH THE EASEMENT CAME FROM THE SAME GRANTOR; THE EASEMENT WAS THEREFORE VALID AND DEFENDANTS SHOULD NOT HAVE BEEN ENJOINED FROM CLEARING IT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a deed was correction deed which included an easement not mentioned in the prior deed. The Second Department also held that the "strange to the deed" rule did not apply because the deeds with the easement came from the same grantor. Therefore the easement was enforceable and defendants should not have been enjoined from clearing trees and other obstructions from the walkway:

… [A]lthough the 1972 deed does not use the phrase "correction deed" or similar phrases, and it does not reference the 1971 deed or the prior conveyance, the 1972 deed is a deed of correction that superseded the 1971 deed … . * * *

We disagree with the Supreme Court's determination that the easement was void ab initio under the stranger to the deed rule … . … Since the dominant Lots … and the servient … shared a common grantor at the time the reservation was made, the stranger to the deed rule does not apply … . Garson v Tarmy, 2020 NY Slip Op 06104, Second Dept 10-28-20

DEED AS SECURITY (MORTGAGE).

THE HOLDER OF A DEED INTENDED AS SECURITY IN THE NATURE OF A MORTGAGE MUST PROCEED BY FORECLOSURE TO EXTINGUISH THE MORTGAGOR'S INTEREST; HERE THE SUBSEQUENT GOOD FAITH PURCHASERS OF THE PROPERTY WERE ENTITLED TO SUMMARY JUDGMENT DISMISSING THE MORTGAGEE'S CAUSES OF ACTION SEEKING RESCISSION OF THEIR DEED AND A DECLARATION THEIR DEED WAS NULL AND VOID (SECOND DEPT).

The Second Department determined a deed which facially appears to evidence an absolute conveyance was actually intended as security in the nature of a mortgage. The holder of such a deed (here American Lending) must proceed by foreclosure to extinguish the mortgagor's interest. The subsequent purchasers of the property (the Romond defendants) were good faith purchasers. Therefore the Romond defendants were entitled to dismissal of American Lending's complaint seeking rescission of the Romond deed and a declaration the deed was null and void:

In 2009, the defendant Dana Grigg sought to purchase certain property … . When financing for the transaction fell through, Grigg entered into an … agreement with the plaintiff, American Lending Corp. … to borrow … $385,000. The terms of the loan, which were memorialized in a note, included a provision that after 90 days, if the loan had not been repaid in full, American Lending would be authorized to file a joint deed in the property records and to "seek a Summary Judgment instead of following a regular foreclosure proceedings [sic]." In June 2009, Grigg purchased the subject property and executed … a deed from himself to himself and American Lending (… the joint deed). Grigg subsequently defaulted under the terms of the loan. * * *

Real Property Law § 320 provides, in pertinent part, that a "deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage" … . … "The holder of a deed given as security must proceed in the same manner as any other mortgagee—by foreclosure and sale—to extinguish the mortgagor's interest" … .

… [T]he Romond defendants established … that the joint deed was given as security for the loan from American Lending to Grigg. Therefore, pursuant to Real Property Law § 320, the joint deed must be considered a mortgage, and American Lending's sole remedy for Grigg's breach of its terms was to commence an action sounding in foreclosure. Moreover, under the circumstances at bar, the Romond defendants established that they were good faith purchasers of the subject property (see Real Property Law § 290 …). American Lending Corp. v Grigg, 2020 NY Slip Op 03211, Second Dept 6-10-20

EASEMENT.

NATURE OF AN INGRESS AND EGRESS EASEMENT EXPLAINED (SECOND DEPT).

The Second Department discussed the elements of an easement for ingress and egress only:

"Express easements are governed by the intent of the parties" … . "As a [result], where the intention in granting an easement is to afford only a right of ingress and egress, it is the right of passage, and not any right in a physical passageway itself, that is granted to the easement holder" … . "Indeed, an owner of land that is burdened by an express easement for ingress and egress 'may narrow it, cover it over, gate it or fence it off, [as] long as the easement holder's right of passage is not impaired'" … . Panday v Allen, 2020 NY Slip Op 05519, Second Dept 10-7-20

EQUITABLE LIEN.

PLAINTIFF ENTITLED TO AN EQUITABLE LIEN ON REAL PROPERTY WHICH WAS IDENTIFIED BUT NOT DESCRIBED IN THE MORTGAGE WHICH HAD BEEN ASSIGNED TO PLAINTIFF (SECOND DEPT).

The Second Department determined plaintiff bank was entitled to an equitable lien on real property. The mortgage secured by the property had been assigned to plaintiff but the mortgage did not include a description of the property:

… [T]he plaintiff commenced the instant action seeking, inter alia, an equitable mortgage on the property. The complaint noted that the mortgage failed to include a description of the property, and thus that the plaintiff's security interest in the property was imperiled. …

"New York law allows the imposition of an equitable lien if there is an express or implied agreement that there shall be a lien on specific property" … . "While [a] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation, it is necessary that an intention to create such a charge clearly appear from the language and the attendant circumstances" … .

Here, the documentary evidence submitted by the plaintiff sufficiently established the existence of the loan, the intent that it be secured by the property, and the debtor's obligation to satisfy the debt by a date certain … . U.S. Bank N.A. v Alleyne, 2020 NY Slip Op 06166, Second Dept 10-28-20

LICENSE TO ENTER, CONDOMINIUM.

PETITION FOR A LICENSE PURSUANT TO RPAPL 881 TO ENTER A CONDOMINIUM TO MAKE REPAIRS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined the petition for a license pursuant to Real Property Actions and Proceedings Law (RPAPL) 881 to temporarily enter a condominium to make repairs was properly granted:

RPAPL 881 allows the owner of "real property" to petition for a license to enter the "premises" of an adjoining owner when such entry is necessary for making improvements or repairs to the petitioner's property and the adjoining owner has refused such access … . RPAPL 881 applies to "real property," defined as "lands, tenements and hereditaments" (Real Property Law § 2). Similarly, Real Property Law § 339-g provides that "[e]ach unit, together with its common interest, shall for all purposes constitute real property." Thus, the petitioners' condominium unit constitutes "real property" within the meaning of RPAPL 881. …

… [W]e agree with the Supreme Court's determination to grant that branch of the petition which was pursuant to RPAPL 881 for a license to temporarily access the appellants' unit. The court directed that access be limited to 10 consecutive days, that the petitioners return the unit to its original condition, that the appellants be financially protected by the naming of the appellants as additional insureds on the relevant construction insurance policy, that the petitioners pay the appellants a license fee of $100 per day, and that the petitioners indemnify the appellants for any loss … . Matter of Voron v Board of Mgrs. of the Newswalk Condominium, 2020 NY Slip Op 04747, Second Dept 8-26-20

LICENSE TO EXCAVATE, NEIGHBORING PROPERTY.

DEFENDANTS DID NOT REQUEST THAT PLAINTIFFS GRANT A LICENSE FOR EXCAVATION WORK NEXT DOOR TO PLAINTIFFS' BUILDING; NYC BUILDING CODE 3309.4 IMPOSES STRICT LIABILITY FOR DAMAGE CAUSED BY SUCH EXCAVATION WORK; OVERRULING PRECEDENT, PLAINTIFFS DID NOT NEED TO SHOW EITHER THAT A LICENSE WAS GRANTED OR THAT PLAINTIFFS TOOK OTHER STEPS TO PROTECT THEIR PROPERTY TO BE ENTITLED TO SUMMARY JUDGMENT FOR DEFENDANTS' VIOLATION OF BUILDING CODE SECTION 3309.4 (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Leventhal, overruling precedent, determined plaintiffs were entitled to summary judgment in this action alleging damage to plaintiffs' building caused by defendants' excavation for a new building next door. The New York City Building Code (BC) section 3309.4 imposes strict liability for damage caused by such excavation work. Here the defendants did not ask plaintiffs for a license in accordance with BC 3309.4 and no license was granted by the plaintiffs. Prior decisions held a plaintiff must show it granted a license for the work, or otherwise took steps to protect the property, before the

plaintiff would be entitled to summary judgment on an action alleging a violation of BC 33309.4. Those decisions should no longer be followed:

We hold that where, as here, a plaintiff presents evidence showing, prima facie, that no request for a license was made to the plaintiff in accordance with section BC 3309 before the excavation work began, a plaintiff moving for summary judgment on the issue of liability on a cause of action alleging a violation of section BC 3309.4 need not demonstrate, prima facie, that the plaintiff granted the requisite license, or, in the absence of a license, what, if any, actions it took to protect its premises. 211-12 N. Blvd. Corp. v LIC Contr., Inc., 2020 NY Slip Op 04134, Second Dept 7-22-20

NONPROFIT TAX EXEMPTION.

CALIFORNIA NONPROFIT WHICH PURCHASED PROPERTY IN THE TOWN OF ISLIP WAS ENTITLED TO AN EXEMPTION FROM PROPERTY TAX; HOWEVER IF A PORTION OF THE PROPERTY IS USED FOR OTHER PURPOSES, THE EXEMPTION WOULD BE PARTIAL (SECOND DEPT).

The Second Department determined the California nonprofit corporation which places international students with families in the United State was entitled to tax exempt status with respect to real estate purchased in the Town of Islip, New York. However, with respect to a building on the property, the exempt status would apply only to those portions of the building used by the corporation and would not apply to portions leased for other purposes:

Under RPTL 420-a, even when the property owner is shown to have an exempt purpose, the owner must still demonstrate that the property is used exclusively for that exempt purpose … . Within the context of § 420-a, whether the property is being used exclusively for statutory exempt purposes depends on whether the primary use of the property is in furtherance of permitted purposes … .

Here, it is undisputed that the petitioner uses the property as its headquarters, in furtherance of its exempt purpose. However, the property is improved with a two-story office building measuring more than 17,700 square feet, and there are no record facts as to what portion of the building is actually used by the petitioner in furtherance of its purpose … . In addition, the petitioner indicated on its application that it plans to lease 2,500 square feet of the property to a tenant. RPTL 420-a(2) provides that "[i]f any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other

purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt," unless the tenant and its use of the property is also exempt from taxation. Therefore issues of fact exist as to whether the petitioner is entitled to a full or partial tax exemption for the property for the tax year 2018/2019. Matter of International Student Exch., Inc. v Assessors Off. of the Town of Islip, 2020 NY Slip Op 03911, Second Dept 7-15-20

NUISANCE.

PUBLIC VERSUS PRIVATE NUISANCE EXPLAINED; BECAUSE DEFENDANTS SOLD THEIR PROPERTY, THE APPEAL RELATED TO THE INJUNCTION CAUSE OF ACTION WAS MOOT (THIRD DEPT).

The Third Department determined plaintiffs' private nuisance cause of action should not have been dismissed, but the public nuisance cause of action was properly dismissed. The Third Department noted that, because defendants' property had been sold, the injunction aspect of the case was moot. The defendants had put in a parking area and a retaining wall which plaintiffs' alleged blocked their view of oncoming traffic making it dangerous for plaintiffs' to pull out from their driveway:

Plaintiffs' complaint alleges that defendants paved a significant area of their front yard and proceeded to park cars and trucks thereon, and, as a result, their view of oncoming traffic was significantly hindered when they used their driveway. As a consequence, they claimed that they suffered great anxiety, as they continually worried about being in a traffic accident. What plaintiffs can ultimately prove, or whether damages of this sort are recoverable, is not our concern when determining a motion to dismiss for failure to state a cause of action … . Rather, "the dispositive inquiry is whether plaintiffs have a cause of action and not whether one has been stated, i.e., whether the facts as alleged fit within any cognizable legal theory" … . Here, after applying the strict standards of a pre-answer motion to dismiss, we conclude that Supreme Court erred in dismissing plaintiffs' cause of action for private nuisance.

… "A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large" … . Plaintiffs have not alleged that defendants interfered with the use of a public place or public rights. The complaint alleges that plaintiffs and the public (pedestrian, cyclist or motorist) are at risk of suffering a collision. "[W]here the claimed injury is common to the entire community, a private right of action is barred" … . Moreover, we find without merit plaintiffs' claim that they suffer a special damage in that they will suffer liability as a result of any collision that might occur. Even were we to conclude

that this claim is not completely speculative, the injury proposed by plaintiffs is not different in kind, but merely in degree, to that which may be suffered by the public as a whole. As such, it does not qualify as a "special injury" so as to allow plaintiffs to bring a public nuisance cause of action … . Duffy v Baldwin, 2020 NY Slip Op 02836, Third Dept 5-14-20

PIPELINE, FERC VS EDPL.

THE CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) EXEMPTED THE GAS PIPELINE COMPANY FROM ANY REVIEW REQUIREMENTS OF THE EMINENT DOMAIN PROCEDURE LAW (EDPL); THE COMPANY WAS FREE TO EXERCISE EMINENT DOMAIN OF THE LAND IN DISPUTE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Stein, over a two-judge dissent, determined that the certificate of public convenience and necessity issued to petitioner, National Fuel Gas Supply, for construction of a gas pipeline, exempted National Fuel from any requirements of the Eminent Domain Procedure Law (EDPL). Therefore National Fuel did not need to comply with the notice and hearing requirements of the EDPL before exercising eminent domain of the land in dispute:

In 2017, the Federal Energy Regulatory Commission issued a certificate of public convenience and necessity to petitioner National Fuel Gas Supply for its proposed construction of a 99-mile natural gas pipeline spanning from Pennsylvania to Western New York. … [t]his certificate …—which did not condition National Fuel's eminent domain power on receipt of a water quality certification and which remained valid and operative at all relevant times despite the New York State Department of Environmental Conservation's intervening denial of National Fuel's application for such a certification—exempted National Fuel from the public notice and hearing provisions of article 2 of the Eminent Domain Procedure Law (EDPL) in accordance with EDPL 206 (A). …

The question before us distills to whether the certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission (FERC) to National Fuel satisfies EDPL 206 (A) so as to entitle National Fuel to exercise eminent domain over the land in dispute without undertaking additional review of the pipeline's public benefit. If satisfied, EDPL 206 (A) excuses compliance with various provisions of EDPL article 2 where a proposed condemnor has successfully completed a review of the project's public benefit and use before a state, federal, or local agency. * * *

… [W]here, as here, a gas company holds a valid certificate of public convenience or necessity from FERC for the proposed construction of a pipeline and that certificate places no relevant conditions on the eminent domain power and has not been stayed or revoked by FERC or a federal court properly reviewing its issuance, compliance with article 2 is excused under EDPL 206 (A). Matter of National Fuel Gas Supply Corp. v Schueckler, 2020 NY Slip Op 03563, CtApp 6-25-20

SUMMARY OF THE FOURTH DEPARTMENT DECISION REVERSED BY THE COURT OF APPEALS ON JUNE 25, 2020

ALTHOUGH THE FEDERAL ENERGY REGULATORY COMMISSION (FERC) APPROVED THE GAS PIPELINE, THE STATE DID NOT ISSUE A WATER QUALITY CERTIFICATION (WQC) FOR THE PROJECT, THEREFORE THE PIPELINE COMPANY CAN NOT SEEK EASEMENTS OVER PRIVATE LAND PURSUANT TO THE EMINENT DOMAIN PROCEDURE LAW (EDPL) TO INSTALL THE PIPELINE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, over a two-justice dissent, considering a matter of first impression, reversing Supreme Court, determined that a gas supply company could not acquire easements over private property by eminent domain for the installation of a pipeline for which the state denied a permit:

In February 2017, the FERC [Federal Energy Regulatory Commission] granted petitioner's application for a certificate of public convenience and necessity to construct and operate a 97-mile natural gas pipeline from Pennsylvania into western New York. The pipeline's proposed route travels directly across respondents' land … . Within the voluminous certificate, the FERC found that petitioner's "proposed [pipeline] project is consistent with the Certificate Policy Statement," i.e., the public interest. "Based on this finding and the environmental review for the proposed project," the FERC further found "that the public convenience and necessity require approval and certification of the project." …

… [T]he New York State Department of Environmental Conservation (DEC) denied petitioner's application for a WQC [water quality certification]. The WQC application, held the DEC, "fails to demonstrate compliance with New York State water quality standards." Petitioner has taken various steps to challenge the WQC denial, including the filing of a petition for judicial review in the Second Circuit pursuant to 15 USC § 717r (d). It appears that those challenges have not yet been finally resolved. It is undisputed, however, that if the WQC denial is ultimately upheld, the pipeline cannot be built … . * * *

… [P]etitioner is trying to expropriate respondents' land in furtherance of a pipeline project that, as things currently stand, cannot legally be built. Such an effort turns the entire concept of eminent domain on its head. If the State's WQC denial is finally annulled or withdrawn, then petitioner can file a new vesting petition. But until

that time, petitioner cannot commence a vesting proceeding to force a sale without going through the entire EDPL [Eminent Domain Procedure Law] article 2 process. Matter of National Fuel Gas Supply Corp. v Schueckler, 2018 NY Slip Op 07550, Fourth Dept 11-9-18

POSSIBILITY OF REVERTER.

THE 1896 DEED FROM THE PLAINTIFF WHICH TRANSFERRED THE PROPERTY TO DEFENDANT DIOCESE WITH THE LIMITATION THAT IT BE USED AS A CHURCH CREATED A POSSIBILITY OF REVERTER WHICH TRANSFERRED THE PROPERTY BACK TO THE PLAINTIFF WHEN THE PROPERTY STOPPED BEING USED AS A CHURCH IN 2015 (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the 1896 deed to defendant Catholic diocese, which limited the use of the property to serving as a church, conveyed a fee on limitation with a possibility of reverter, which transferred the property to back to plaintiff when the diocese stopped using the property as a church in 2015:

As plaintiff still held a possibility of reverter, resolution of the RPAPL article 15 action hinges upon whether defendant violated the limitation restricting the use of the property to church purposes. The parties' joint stipulation of facts includes the 2015 decree from the Bishop of Ogdensburg that relegated the church "to profane but not sordid use," and indicated that parishioners would be served by a nearby parish. … The stained-glass windows and the altar were later removed, leaving only the pews. Under the canon law of the Roman Catholic Church, "if a church cannot be used in any way for divine worship and there is no possibility of repairing it," it can be relegated to profane but not sordid use … . "Profane use means use for purposes other than a Roman Catholic worship service," and "sordid" limits that use, prohibiting any use that is disrespectful to the Catholic Church … . Contrary to defendant's contentions, we find that defendant's use of the property for church purposes ceased pursuant to the 2015 decree, thus violating the limitation in the 1896 deed. Accordingly, it reverted to plaintiff, which now owns the property in fee simple. Paul Smith's Coll. of Arts & Sciences v Roman Catholic Diocese of Ogdensburg, 2020 NY Slip Op 05012, Third Dept 9-17-20

PUBLIC TRUST DOCTRINE.

UNRESOLVED QUESTIONS OF FACT CONCERNING WHETHER THE CONSTRUCTION OF A WHOLE FOODS STORE IN THE VICINITY OF A RECREATIONAL TRAIL AND A PUBLIC USE EASEMENT VIOLATES THE PUBLIC TRUST DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined petitioner's violation of the public trust doctrine causes of action should not have been dismissed. The action relates to the construction of a Whole Foods store in the vicinity of a recreational trail and a public use easement:

… [T]he court erred by granting a declaration in favor of respondents on petitioner's … causes of action … which allege violations of the public trust doctrine, because there are unresolved factual issues concerning the impact of the Whole Foods development on a recreational trail known as the Auburn Trail, including whether the development would require the constructive abandonment of the existing public use easements for that trail ,,, , Matter of Brighton Grassroots, LLC v Town of Brighton, 2020 NY Slip Op 00754, Fourth Dept 1-31-20

SATISFACTION OF MORTGAGE, FORGED.

THE SATISFACTION OF MORTGAGE ON RECORD WHEN DEFENDANT BANK ISSUED A LOAN SECURED BY THE PROPERTY WAS FORGED AND THEREFORE VOID; DEFENDANT BANK, THEREFORE, WAS NOT PROTECTED AS A BONA FIDE ENCUMBRANCER FOR VALUE PURSUANT TO REAL PROPERTY LAW 266 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined Flagstar Bank was not protected as a bona fide encumbrancer for value under Real Property Law 266. The satisfaction of mortgage that was on record when Flagstar issue a loan secured by the property was forged and therefore void, not voidable:

We disagree with the Supreme Court's determination that Flagstar's interest in the subject property was protected by its status as a bona fide encumbrancer for value under Real Property Law § 266, since the satisfaction of mortgage executed and recorded before Flagstar's issuance of a loan with respect to the subject property was determined to have been forged and was void, not merely voidable. A discharge or satisfaction of a mortgage is

void at its inception when it is executed and recorded by one who has no interest in the mortgage … . Accordingly, the forged satisfaction of mortgage in this case was not entitled to any legal effect, and Flagstar's encumbrance based on it is not protected … . JPMorgan Chase Bank, N.A. v Aspilaire, 2020 NY Slip Op 06510, Second Dept 11-12-20

SIDE SETBACK COVENANT.

DEFENDANT'S HOME WAS CONSTRUCTED ABOUT EIGHT FEET FROM THE PROPERTY LINE VIOLATING THE COVENANT OR RESTRICTION REQUIRING TEN FEET; PLAINTIFF, AFTER A BALANCING OF THE EQUITIES, WAS NOT, HOWEVER, ENTITLED TO EQUITABLE RELIEF (FOURTH DEPT).

The Fourth Department determined the defendant had violated a covenant or restriction imposed on property owners in a subdivision, but that plaintiff was not entitled to equitable relief. Defendant had constructed the home about eight feet from the property line and the covenant or restriction required ten feet:

… [D]efendant knew, or should have known, of the side setback violation on the right side, yet he chose to construct his house in disregard of the fourth paragraph of the covenants and restrictions, defendant did not act in good faith with respect to that violation, and the hardship was self imposed … . … [E]nforcement of the restriction would have little benefit to plaintiff inasmuch as the violation had no impact on the value of plaintiff's home, the violation did not detract from any neighbor's view of the lake, and the violation occurred on the side of defendant's property that was not adjacent to another residential lot. A balancing of the equities under all the circumstances of the case established that plaintiff was not entitled to injunctive relief for the right side lot line violation … . Kleist v Stern, 2020 NY Slip Op 05652, Fourth Dept 10-9-20

STATUTE OF FRAUDS EXCEPTION.

GENERAL OBLIGATIONS LAW 5-703 GIVES AN EQUITY COURT THE POWER TO ENFORCE AN ORAL CONTRACT FOR THE PURCHASE OF REAL PROPERTY; THE CAUSES OF ACTION SEEKING TO ENFORCE AN ALLEGED ORAL AGREEMENT GIVING PLAINTIFFS THE OPTION TO PURCHASE THE PROPERTY UPON THE OWNER'S DEATH SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, held that the general statute of frauds statute, General Obligations Law (GOL) 5-701, did not apply to the alleged oral agreement to give plaintiffs the option to buy the decedent's property upon her death. Rather GOL 5-703, which carves out an exception for specific performance of a real estate contract, applied. Decedent owned a two-unit property and plaintiffs rented the second unit. Plaintiffs alleged decedent asked them to care for her in exchange for the option to purchase. Plaintiffs did in fact care for decedent until her death. The executor refused to honor the alleged oral agreement and plaintiffs sued:

General Obligations Law § 5-701, the general statute of frauds provision outlining which agreements must be in writing, contains no explicit statutory authority for a court, exercising its equitable powers, to grant specific performance of an oral agreement insufficiently memorialized in writing so as to satisfy the statute of frauds. Notably, in Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group (93 NY2d 229, 234 n 1), the Court of Appeals clarified that New York has not adopted a judicially created common-law exception to General Obligations Law § 5-701, which would permit a court to direct specific performance of an oral agreement in cases of part performance.

By contrast, General Obligations Law § 5-703, the more specific statute of frauds provision relating to contracts concerning real property, contains an explicit carve-out, which provides that "[n]othing contained in [General Obligations Law § 5-703] abridges the powers of courts of equity to compel specific performance of agreements in cases of part performance"… .

Here, the plaintiffs' allegations that they entered into an oral option agreement … to purchase the subject property from her estate describe, in sum and substance, "[a] contract to devise real property . . . or any interest therein or right with reference thereto" … , and therefore, this action is governed by General Obligations Law § 5-703 … . Accordingly, since the action is governed by General Obligations Law § 5-703, the plaintiffs are not foreclosed, as a matter of law, from obtaining the remedy of specific performance … . Korman v Corbett, 2020 NY Slip Op 02637, Second Dept 5-6-20

STATUTE OF FRAUDS.

ALLEGED CONTRACTS FOR THE SALE OF REAL PROPERTY DID NOT SATISFY THE STATUTE OF FRAUDS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the alleged agreements to sell real property did not satisfy the statute of frauds:

"Pursuant to General Obligations Law § 5-703(2), a contract for the sale of real property 'is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing'" … . "A writing satisfies the statute of frauds if it identifies the parties to the transaction, describes the properties to be sold with sufficient particularity, states the purchase price and the down payment required, and is subscribed by the party to be charged" … . Moreover, "'a memorandum evidencing a contract and subscribed by the party to be charged must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement'" … . "In a real estate transaction, the essential terms of a contract typically include the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities"… .

… [T]he alleged contract did not satisfy the statute of frauds, as it did not contain the essential terms typically included in a contract for the sale of real property, including the purchase price, the time and terms of payment, the required financing, the closing date, the risk of loss during the sale period, and adjustments for taxes and utilities … . Additionally, the alleged contract was not signed by the defendant Michael Israel, and it indicated that several of the properties were co-owned by other individuals who also were not signatories to the document … .

Further, the emails relied upon by the plaintiff to demonstrate that the parties reached a complete agreement were between the parties' attorneys, and there was neither an allegation in the complaint nor any evidence in the record that the attorneys were authorized in writing to bind the parties to a contract of sale … . Ehrenreich v Israel, 2020 NY Slip Op 06499, Second Dept 11-12-20

TITLE INSURANCE.

THE TITLE INSURANCE POLICY GAVE THE INSURER THE RIGHT TO PROSECUTE A TITLE CLAIM BUT NOT THE OBLIGATION TO PROSECUTE A TITLE CLAIM; THEREFORE PLAINTIFF'S COMPLAINT ALLEGING DEFENDANT BREACHED THE POLICY BY NOT PROSECUTING THE CLAIM SHOULD HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's action against a title insurance company should have been dismissed based upon the language of the policy. Plaintiff had requested that defendant take action against a party plaintiff believed was using plaintiff's land. Defendant refused. The title insurance policy gave defendant the right but not the obligation to bring such an action:

A dismissal of a complaint pursuant to CPLR 3211 (a) (1) is warranted if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" … . Plaintiffs alleged that defendant breached section 5 (b) of the policy, which provides, in relevant part, that defendant "shall have the right . . . to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title, as insured, or to prevent or reduce loss or damage to the Insured." Defendant's "right" to prosecute an action is not equivalent to an "obligation" … . Inasmuch as the policy submitted by defendant on the motion did not require defendant to prosecute the action against the property owner, defendant is entitled to dismissal of the complaint insofar as it sought attorneys' fees and costs that plaintiffs had already incurred for the prosecution of that action … . We further conclude that defendant is entitled to a declaration that it is not obligated to pay for the attorneys' fees and costs necessary to prosecute that action in the future … . Irma Straus Realty Corp. v Old Republic Natl. Tit. Ins. Co., 2020 NY Slip Op 03307, Fourth Dept 6-12-20

TRESPASS, NUISANCE, CIVIL RIGHTS LAW.

PLAINTIFF PRESENTED CLEAR AND CONVINCING EVIDENCE SUPPORTING THE CAUSES OF ACTION AGAINST A NEIGHBOR FOR TRESPASS, PRIVATE NUISANCE, AND VIOLATION OF THE CIVIL RIGHTS LAW; THE MOTION FOR A PRELIMINARY INJUNCTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for a preliminary injunction in this dispute between neighbors should have been granted. Plaintiff alleged the neighbor repeatedly damaged and defaced plaintiff's property and installed a surveillance camera aimed at plaintiff's property. The Fourth Department went through the elements required for issuance of a preliminary injunction and described the proof offered in support of the trespass, private nuisance and Civil Rights Law causes of action:

Plaintiff's supplemental affidavit and photographs submitted in support of the motion demonstrate that Nichols repeatedly drove across her lawn and blew snow with his snowblower onto the side of plaintiff's house, allegedly causing damage to her awning and fence. Both events were intentional invasions of plaintiff's interest in the exclusive possession of her land. Furthermore, although "an action for trespass over the lands of one property owner may not be maintained where the purported trespasser has acquired an easement of way over the land in question" … , plaintiff established that the acts allegedly committed by Nichols on the easement exceeded the scope of the easement and did not constitute a reasonable use of his interest in the easement … . Thus, plaintiff demonstrated a likelihood of success on the merits of her trespass claim. …

The evidence submitted by plaintiff established that Nichols drove across plaintiff's lawn, used a snowblower to blow snow onto her house, tampered with and removed her property markers, parked his vehicle so as to obstruct plaintiff's driveway, drove on the freshly paved driveway and left tire tracks in the asphalt, and repeatedly painted a white line across the driveway. That conduct exceeds the scope of the easement and may fairly be characterized as a substantial interference with plaintiff's use and enjoyment of her property. Thus, plaintiff demonstrated a likelihood of success on the merits of her private nuisance claim.

Plaintiff's affidavit and video evidence also submitted on the motion demonstrate that Nichols threatened to install a "150-foot night vision camera" in his backyard and to point it directly into plaintiff's backyard and at her living room. As Nichols installed the surveillance camera, he stated to plaintiff, "It's gonna look right in your fucking living room! . . . You're on camera bitch! . . . Smile for the camera bitch!" Thus, plaintiff also

demonstrated a likelihood of success on the merits of her claim under Civil Rights Law § 52-a. Cangemi v Yeager, 2020 NY Slip Op 04023, Fourth Dept 7-17-20

UNINCORPORATED CONDOMINIUM, ATTORNEY'S FEES.

IN THE CONTEXT OF A LAWSUIT BY THE BOARD MEMBERS OF AN UNINCORPORATED CONDOMINIUM ASSOCIATION AGAINST THE FORMER PRESIDENT OF THE BOARD, NEITHER THE REAL PROPERTY LAW (RPL) NOR THE BUSINESS CORPORATION LAW (BCL) APPLIES TO THE FORMER PRESIDENT'S DEMAND FOR ATTORNEY'S FEES ASSOCIATED WITH DEFENDING THE ACTION; THE BY-LAWS AND THE COMMON LAW RULE THAT THE PARTIES ARE RESPONSIBLE FOR THEIR OWN ATTORNEY'S FEES CONTROL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court, in a matter of first impression, determined the defendant, the former president of the condominium board, is not entitled to indemnification (attorney's fees) for her costs in defending a lawsuit brought by the board of managers of the unincorporated condominium association. The lawsuit alleged defendant misappropriated the insurance proceeds paid after a fire in the condominium building. The First Department held the by-laws and the common law rule that the parties are responsible for their own attorney's fees control. The court rejected the application of provisions of the Real Property Law (RPL) and the Business Corporation Law (BCL) with respect to indemnification in the context of an unincorporated condominium association:

Neither the common law, nor BCL § 624(e) by analogy, provide the right to recoup attorney's fees to a board member successfully defending against a derivative action. BCL § 626(e) is not an indemnification provision. Rather, it permits legal fees to be paid to an owner who successfully asserts the interest of an entity "when the management of the entity fails to act to protect that interest" … . Consequently, "an award of attorneys' fees in a shareholders' derivative suit is to reimburse the plaintiff for expenses incurred on the corporation's behalf" … . The corporation is responsible for paying the legal fees, but only where the corporation benefits from the litigation … . Neither the BCL nor the common law provide a board member with a reciprocal right to recover legal fees for defending against an unsuccessful derivative action, at least not in the absence of such authorization in the bylaws or some other statutory authority. In this respect, …

In the absence of any authority permitting [defendant] to recoup her legal fees, the general common law rule applies, that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" … . [Defendant], alone, is responsible for her legal fees. Board of Mgrs. of the 28 Cliff St. Condominium v Maguire, 2020 NY Slip Op 06844, First Dept 11-19-20