



Grant of Interest in Real Property by Non-Surviving Entity in Merger Held Void

(Mergers, Acquisitions, Secured Transactions and Real Estate)

February 23, 2017

In a motion brought in a mortgage foreclosure action by Plaintiff JPMorgan Chase Bank, N.A for an order dismissing an affirmative defense and the counterclaim of Defendant Bank of New York, the Supreme Court of Rockland County, New York in a recent unreported opinion noted that the foreclosure action appeared to be a "run-of-the-mill" mortgage foreclosure action; however, a review of the motion papers and exhibits indicated that the foreclosure action was much more complex.

In analyzing the basis for its ruling, the Court cited two legal precedents that were applicable to determining the validity and priority of the two competing mortgages held by JPMorgan Chase and Bank of New York on the same parcel of real property. First, "as far as mortgages are concerned, [New York] law is clear that mortgagees do *not* have a duty of care to ascertain the validity of the documentation presented by an individual who claims to have the authority to act on behalf of a borrower corporation or entity." *LZG Realty, LLC v. H.D.W. 2005 Forest, LLC*, 87 AD3d 727, 729 (2d Dept. 2011). Second, "pursuant to New York Business Corporation Law Section 906(b)(2), when a merger or consolidation has been effected: ... (2) All property, real and personal, including subscriptions to shares, causes of action and every other asset of each of the constituent entities, shall vest in such surviving or consolidated corporation without further act or deed. In other words, "a corporation merged out of existence typically 'ceases to exist as a separate entity'...." *Preson v. APCH, Inc.*, 89 AD3d 65, 72 (4th Dept. 2011), *quoting, Westside Fed. Sav. & Loan v. Fitzgerald*, 136 AD2d 699 (2d Dept. 1988).

Based upon this legal precedent, the Court held that the transfer of an interest in real property by deed by the non-surviving entity in a merger and all subsequent grants of interests in the real property flowing from the non-surviving entity were void. As a result, the Court granted the motion to dismiss of JPMorgan Chase holding that the mortgage granted to JPMorgan Chase by the surviving entity in the merger was superior to the void mortgage

recitation of facts, the Court noted that the certificate of merger was filed with the New York State Department of State and recorded in the Rockland County Clerk's Office prior to the transfer of the real property by the non-surviving merged entity.

Unreported Disposition, Slip Copy, 54 Misc.3d 1213(A), 2017 WL 482081 (Table), 2017 N.Y. Slip Op. 50130(U), JPMorgan Chase Bank, National Association, Plaintiff, v. Joseph Klein; BILTMORE REAL PROPERTY HOLDINGS, INC.; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; BASEWOOD GROUP, LLC; THE BANK OF NEW YORK MELLON FKA BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS, INC. CHL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-HYB 8; et. al, Defendants. Supreme Court, Rockland County, 032751/2014 E, Decided on January 31, 2017.

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