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John G. Hall, a former Chair of the Real Property Law Section, shown here with his family, was the recipient of the Section's Professionalism Award at the Annual Meeting in January. The Award was presented in recognition of John's outstanding legal career, which exemplifies the highest standards of ethical and professional conduct.

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The Equitable Mortgage: Its Creation, Enforceability and Lien Priority

By Joel David Sharrow

Most practitioners are familiar with a duly executed and acknowledged recorded mortgage given by an owner to secure repayment of a loan or other obligation; the priority of such a recorded mortgage (usually first in time and, without notice, first in right); and the enforceability of such a mortgage, as a matter of law, under N.Y. Real Property Actions & Proceedings Law Article 13. A lender may perceive problems concerning validity, seniority and/or enforcement when, despite a validly made loan and recordation of the mortgage instrument, the document contains a substantial defect rendering it legally unenforceable. The same concern could arise when a duly executed and delivered mortgage inadvertently is not recorded; purposely is held in escrow; is not signed and delivered; or, when an instrument, which on its face absolutely is a deed conveying title to realty is, in actuality, given only as security. The Second Department, relying on long established case law, recently discoursed on the topic and held that there still is a foreclosable lien *Citibank, N.A. v. Kenney*.¹

In *Kenney*, the lender, which held a first and second mortgage, inadvertently executed and recorded a discharge of its second mortgage (which had had priority over third and fourth mortgages held by unrelated parties). Importantly, despite discharge of the second mortgage, the lender had not released or received payment of the debt secured by that second mortgage. Therefore, per the Court, the lender's security interest remained extant, albeit as an unrecorded equitable lien. The Court held, too, that when the lender discovered what had happened and thereafter recorded a mortgage to replace its discharged second mortgage, the lender did not waive its then equitable lien of its discharged second mortgage or merge that earlier

equitable lien into the legal lien of the replacing mortgage (which waiver or merger arguably would have adversely impacted upon the lender's lien priority *vis-à-vis* both the third and fourth mortgages, both of which were recorded before the lender's replacing mortgage was recorded). Thus, the lien of the equitable, discharged second mortgage, represented by the legal lien of the replacement mortgage, had priority over the third mortgage, which had been given and recorded prior to the replacement mortgage.²

An Equitable Mortgage

There are various sources for creation of an equitable mortgage.

First, any deed to realty "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; . . ."³

Szerdahelyi v. Harris put historical perspective on the issue:

Concededly, there was no formal mortgage instrument given to secure the loan. But from the earliest days, the English law recognized that an equitable mortgage may be impressed when money is loaned in reliance upon the security of property of the debtor pledged by him in such a way as not to be enforceable as a mortgage at law (*see, e.g.,* YB 9 Edwards IV, 25, 34 [1470], cited in Walsh, *Mortgages* ch II, *Equitable Mortgages*, at 34 [1934]). This was and is the law in New York (*Mooney v. Byrne*, 163 NY 86; *Chase v. Peck*, 21 NY 581; *see*, 38 NY Jur, *Mortgages and Deeds of Trust*, § 28 *et seq.*).⁴

The case of *Basile v. Erhal Holding Corp.*⁵ is illuminating. It arose out of an earlier proceeding where there was evidence that the original mortgage loan was usurious. That proceeding was settled pursuant to an agreement restructuring the debt and providing for the escrowing of an executed and delivered "deed in lieu of foreclosure," not to be recorded until there was a default under the settlement agreement. The Court held that the deed actually was a mortgage because it had been provided as collateral security for payment of the settlement agreement's re-stated debt.

Similarly, in *Gioia v. Gioia*,⁶ an escrowed deed was deemed to be only a mortgage. There, the former husband executed and delivered to his former wife an absolute deed, facially conveying his entire interest in the marital residence, as well as a mortgage thereon; both of them were to be held in escrow pending the former husband's performance or, conversely, his default under a stipulation to purchase his former wife's interest in the marital residence. The matrimonial agreement expressly provided that if he defaulted, then the former wife either could: (a) record the deed in lieu of foreclosure; or (b) foreclose the mortgage. Nevertheless, the former husband argued that the former wife could not acquire title simply by recording the deed; instead, he claimed, she had to foreclose. The Court agreed. It ruled that the former husband's escrowed deed in lieu of foreclosure "was intended to serve as security for his obligations under the stipulation and not as an absolute conveyance of the property."⁷ The Court held that N.Y. Real Property Law § 320 (RPL) trumped the language of the parties' agreement, precluding the former wife's recording of the deed and thereby acquiring sole title to the marital premises.

The reason for this result stems from common law, e.g., *Leonia Bank v. Kouri*,⁸ and rests upon public policy. Thus, long ago, the Supreme Court held, in *Peugh v. Davis*, that:

It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties.

* * *

It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. *This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates.* Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities, will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed (emphasis added).⁹

Courts make a global inquiry. They look not only at the "deed" instrument but also at other documentary or oral evidence to ascertain whether there was intent to deliver the deed and convey title or whether delivery of the deed was done only as security for performance of an obligation. For Example, in *TWA v. NYS Tax Appeals Tribunal*¹⁰ the court examined

all documents executed in conjunction with assignment of a lease and oral testimony as to why the transaction was so structured, to conclude that such particular assignment was not a mortgage under RPL § 320. Also, in *Corcillo v. Martut, Inc.*,¹¹ "to establish that the deed was meant only as a security, [the court found that an] examination may be made not only of the deed and a written agreement executed at the same time, but also to oral testimony bearing on the intent of the parties and to a consideration of the surrounding circumstances and acts of the parties." Finally, in *AL-SAR Realty v. Griffith*¹² the court found that "the applicable law is stated in Powell, Real Property (vol. 3, para. 447, at 37-131): "The deed . . . absolute in form is transformed into a mortgage by a judicial finding that the parties intended it to operate as such. *Such a finding is unavoidable if there is a separate instrument providing that the deed was executed as security for indebtedness.*" (emphasis in original)

Because an absolute deed which nevertheless is given as security is, at law, a mortgage, and the mortgagor has the unwaivable right to redeem the property, the creditor-mortgagee may not, upon mortgagor's default, simply record the deed,¹³ or deem the transaction to have been a conditional sale "by way of an agreement to reconvey (citation omitted). 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 (citation omitted)."¹⁴

Second, courts find and impose an equitable mortgage even in the absence of an enforceable—or, any—deed and accompanying security or other similar instrument, so long as the facts of the transaction clearly demonstrate that the parties expressly, or implicitly, intended that identified realty or personalty was, in some fashion, to be pledged as collateral security for any type of obligation. E.g., *James v. Alderton Dock Yards, Ltd.*:¹⁵

The basis for [the equitable] lien . . . is dependent upon some agreement express or implied that there shall be a lien upon specific property, or else it is the means adopted for enforcing equities which could not be otherwise established

The theory of equitable liens has its ultimate foundation in contracts express or implied which either deal with or in some manner relate to specific property, such as a tract of land, particular chattels or security, a certain fund and the like. The agreement must deal with some particular property either by identifying it or by so describing it that it can be identified and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for the obligation. (3 Pomeroy's Eq. Juris. [4th ed.] pp. 2961-2965.) The implied contract is a term used to define those situations and conditions which make it equitable and just in applying the equity powers of the court to establish and declare a lien where otherwise there might be no relief. (See Pomeroy, *supra*, p. 2976, § 1238, for illustration.)¹⁶

In *Allen v. Union Fed'l Mortg. Corp.*,¹⁷ plaintiffs obtained a loan to be secured by a mortgage on their residence. A note and related documents were signed, the loan closed, and the proceeds were used to retire pre-existing secured and other debts owed by plaintiffs. Although there was a document entitled as being a mortgage, its signature and acknowledgment pages were missing. The Court's opinion, rendered after a hearing, did not disclose whether there was any evidence that plaintiffs actually signed the mortgage document or if the signature and acknowledgment pages were missing at the time of the closing.

Absent the execution and notarization pages, the incomplete mortgage document could not be recorded and it was not legally enforceable. Nevertheless, the lender's assignee sought and was awarded summary judgment imposing an equitable mortgage upon the subject premises:

Under New York law, an equitable mortgage is a transaction that has the intent, but not the form of a mortgage, which a court will enforce in equity to the same extent as a mortgage. *Mailloux v. Spuck*, 87 A.D.2d 736, 737, 449 N.Y.S.2d 69, 70 (3d Dep't 1982).

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. See *Teichman v. Community Hospital of Western Suffolk*, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 475, 663 N.E.2d 628 (1996); *James v. Alderton Dock Yards*, 256 N.Y. 298, 303, 176 N.E. 401 (1931); *Corcillo v. Martut, Inc.*, 58 A.D.2d 617, 618, 395 N.Y.S.2d 696, 698, *aff'd*, 45 N.Y.2d 878, 410 N.Y.S.2d 811, 383 N.E.2d 113 (1978); *Newcourt Realty Holding Corp. v. Gabel*, 28 A.D.2d 704, 280 N.Y.S.2d 1020, 1021 (2d Dep't 1967).

An equitable mortgage can be imposed where a legal mortgage "fails for the want of some solemnity." *Payne v. Wilson*, 74 N.Y. 348, 351 (1878). Thus, for example, an equitable mortgage may be imposed where money is advanced upon a verbal agreement to secure the debt by a mortgage on real property, but the agreement, for one reason or another, never culminates in a signed writing. *E.g., Federal Deposit Ins. Corp. v. Five Star Mgmt., Inc.*, 258 A.D.2d 15, 21, 692 N.Y.S.2d

69, 73 (1st Dep't 1999), citing, *Sprague v. Cochran*, 144 N.Y. 104, 112-13, 38 N.E. 1000 (1894) (emphasis added).¹⁸

Thus, the *Allen* case and its authorities disclose two separate, additional bases, not covered by RPL § 320, which a court may use to impose an equitable lien, to wit: either facts showing an agreement to provide identifiable property (of any kind) as security for performance of an obligation, or a substantial defect in a security instrument rendering it unenforceable at law. In either instance, equity will intervene so as to do what is fair, proper and just (and thereby enforce the parties' legally determined intention).

The Recording Tax

RPAPL Article 13 mandates only that the complaint in a foreclosure action state compliance with New York's version of the "One Action Rule."¹⁹ Despite conventional pleading, one vainly searches RPAPL Art. 13 for any requirement that the foreclosure complaint also must allege recording of the mortgage and payment of the applicable recording tax.

The necessity of recording a mortgage and paying the requisite tax is found, instead, in N.Y. Tax Law Article 11, Tax On Mortgages. It states that for purposes of Article 11, "[t]he term 'mortgage' . . . includes every mortgage or deed of trust which imposes a lien on or affects the title to real property . . ."; and, by definition, the term "mortgage" also includes, under certain circumstances, an assignment of rents which is delivered "as security for an indebtedness."²⁰

The lien of an unrecorded equitable mortgage nevertheless may affect title to realty—even before the tax is paid—and the holder may bring an action to foreclose it. But a judgment of foreclosure and sale statutorily is prohibited by Tax Law § 258(1), unless the tax imposed by Tax Law § 253 is paid. Thus, sooner or later, the holder of an unrecorded equitable mortgage has to provide proof to the

Court of the tax payment, to enable the holder to enter the mortgage into evidence and obtain a foreclosure judgment. *E.g., Commonwealth Land Title Ins. Co. v. Lituchy*.²¹ There, assignee-mortgagee held an unrecorded assignment of an unrecorded mortgage as well as the note secured by that mortgage. No recording tax had been paid. The Court held that the note and mortgage were enforceable; but the assignee-mortgagee had to pay the requisite recording tax—even if the mortgage and its assignment were not recorded—if it wanted to proceed to a judgment in the action. Upon later payment, summary judgment was granted to the assignee-mortgagee.²²

The more serious problem of failure to record a mortgage (and pay the requisite recording tax applicable to a transaction deemed to be a deal including delivery of a mortgage) is priority of liens. For this purpose, New York is a "race/notice" jurisdiction. In other words, a party who has given consideration for its voluntarily created lien or encumbrance and is the first to record its security interest, without actual notice of a pre-existing unrecorded encumbrance, has priority over the earlier created, but unrecorded, lien.²³

In *New York TRW Title Ins. v. Wade's Canadian Inn and Cocktail Lounge, Inc.*,²⁴ the issue surfaced because the first mortgage loan was given to an individual's corporations while the deed to the realty securing that loan was in the name of the individual. Thus, there was a defect since the loan was "secured" by a security interest on land not owned by the borrower and there was no hypothecation agreement by the land's owner. Thereafter, the individual subdivided the land and obtained three additional mortgages, apparently one per newly-subdivided parcel. Two of those mortgages expressly declared that they were subordinate to the first mortgage. Upon default, the first mortgagee foreclosed—but, only on the two parcels where the junior mortgages acknowledged the exist-

tence of and their subordination to the first mortgage.

The Court said that there was a question whether the first mortgagee had an adequate legal remedy.²⁵ Therefore, the Court held that despite the defect of the first mortgage and it not being a legally enforceable lien upon realty not owned by the mortgagor, there were enough facts to indicate the possibility of intent to have created a valid legal mortgage. Due to the factual questions, the Court denied cross-motions for summary judgment, recognizing that a factual determination might lead a court to conclude that the defective first mortgage was an equitable one; and, as to the reason why the first mortgagee sought to foreclose upon only two of the three subdivided parcels, the Court stated: "Apparently realizing that the declaration of an equitable mortgage would not take priority over [a bank's subsequent] legal mortgage, inasmuch as [the bank] apparently had no notice of [the equitable lien], [the first mortgagee] did not pursue foreclosure of that part of the [subdivided] property secured by the [bank's second] mortgage."²⁶

In that regard, where legally enforceable mortgages mistakenly are discharged or inadvertently satisfied, the lien holder may seek reinstatement of the priority of such mortgages to their original status and priority as a lien provided, however, no harm is caused to anyone who, in the interim, innocently relied upon the validity of the discharge or satisfaction, i.e., there are no *bona fide* encumbrancers intervening between the date of the discharge/satisfaction and the reinstatement.²⁷ Further, reinstatement usually is effected simply by an order canceling the discharge/satisfaction document.²⁸

The Kenney Case

The *Kenney* case is notable because it dealt with not only the accidental discharge of a legal mortgage and the resultant equitable lien, but also because it highlighted the

difference in priorities between a legal and an equitable mortgage.

Kenney was an action to foreclose the lien of a mortgage recorded in 1987 which thereafter was consolidated with a second mortgage in 1993 and later amended and restated in 1997 (the "Senior Mortgage"). In addition, the lender had obtained and recorded in 1987 another mortgage, which originally covered only a part of the realty encompassed by the Senior Mortgage, but which thereafter was spread to encumber all of the pledged realty (the "Second Mortgage"). Subsequently, in 1993, defendant Kenney received and recorded a mortgage against all of the realty (the "Third Mortgage"); and, later on that year, the Small Business Administration ("SBA") also obtained a mortgage (the "Fourth Mortgage"), but only on part of the subject premises.

In 1994, the lender erroneously discharged the Second Mortgage. That mistake was uncovered in 1996. In 1997, the lender obtained and recorded a new mortgage (the "Replacement Mortgage"), covering all of the realty for the same, but restructured, debt which had been secured by the lien of the since discharged Second Mortgage. In 2001, the SBA's Fourth Mortgage was assigned.

The Senior Mortgage was foreclosed. The issue for distribution of surplus monies was clearly defined: which lien had priority, the lender's 1997 Replacement Mortgage and equitable lien thereof arising out of the accidental discharge of the 1987 Second Mortgage, or defendant Kenney's 1993 Third Mortgage (see also, fn.2, *supra*, regarding priority of the assigned Fourth Mortgage). The Court held in favor of the lender.

Under the circumstances presented here, the Supreme Court correctly determined that Citibank's lien had priority over Kenney's. To be sure, when Citibank discovered in 1996 that the [Second M]ortgage had been erroneously discharged, it had the right to

seek the reinstatement of the [Second M]ortgage to its former status and priority, as neither Kenney nor the SBA had changed their positions in reliance on the validity of the prior discharge (see *Application of Ditta*, 221 N.Y.S.2d 34, Sup Ct., Kings County, Oct. 11, 1961, Cohn, J.). Contrary to Kenney's contentions, Citibank's decision to enter into the [R]eplacement [M]ortgage in lieu of moving to reinstate the [Second M]ortgage does not compel the conclusion that Citibank waived its seniority under the [Second M]ortgage. The inadvertent discharge of the [Second M]ortgage, without concomitant satisfaction of the underlying debt, did not extinguish Citibank's security interest; rather, it left Citibank with an unrecorded, equitable lien, which Citibank could have enforced by way of foreclosure (see *Federal Deposit Ins. Co. v. Five Star Mgt.*, 258 A.D.2d 15, 21 [1999]; *Sullivan v. Corn Exchange Bank*, 154 App Div 292, 296 [1912]). Moreover, the subsequent creation by Citibank of a duly perfected mortgage (i.e., the [R]eplacement [M]ortgage) encumbering the same premises and securing a restructured version of the same underlying debt did not, **under the circumstances**, operate as a waiver of Citibank's prior equitable lien or as a merger of such lien into the subsequent [R]eplacement [M]ortgage. Accordingly, because Kenney never changed her position in reliance on the inadvertent discharge of the [Second M]ortgage, there was no basis in equity to deny the continued seniority of Citibank's equitable lien over the Kenney [Third M]ortgage (see *Payne v. Wilson*, 74 N.Y.

Conclusion

Recognizing, and exercising the opportunity for declaring, the existence of and foreclosing upon an equitable mortgage is more widespread than generally may be presumed. Utilizing such a remedy frequently will enable an obligee to recover on its intended security—at least, in part, if there are no recorded *bona fide* encumbrancers. It is a useful tool whenever defects in the mortgage process have occurred; and, recourse to declaring and foreclosing equitable liens may give some measure of comfort to lenders or other obligees when there are problems in the underlying documents or transactions in which those documents are, or are supposed to be, executed, delivered and/or recorded.

Indeed, if there are concerns about an expiring statute of limitations which could bar foreclosure of a subsequently reinstated earlier mortgage, a promptly commenced action to declare and foreclose the equitable mortgage might be the only viable remedy for a lender who never had or inadvertently lost a legal mortgage.

Endnotes

1. 17 A.D.3d 305, 793 N.Y.S. 84 (2d Dep't 2005), granting reargument of, recalling and vacating, that Court's earlier decision reported at 10 A.D.3d 377 (2d Dep't 2004).
2. The Court, without stating any basis, asserted that the lender "conceded" that the lien of the replacement mortgage did not have seniority over the fourth mortgage which was assigned in 2001, years after the replacement mortgage was recorded. Appellate counsel for the lender opined to this writer that the Appellate Division's conclusion might have arisen out of an apparent procedural snafu at the I.A.S. Court level. But, it might be that the assignee of the fourth mortgage was a *bona fide* purchaser, since the replacement mortgage did not state that it was replacing the inadvertently discharged second mortgage or otherwise seek to legally revive the lien of that earlier mortgage. See, 1997 replacement mortgage, recorded at Liber 17926 of Mortgages, Pages 0835-0848, in the Nassau County Clerk's Office on May 12, 1997. Thus, although neither the third nor fourth mortgagees changed

their positions between 1994 (when the second mortgage was discharged) and 1997 (when the replacement mortgage was recorded), the fourth mortgagee's 2001 assignee might not have had notice that the lender's 1997 replacement mortgage was not a new one, but, instead, had been given to replace the second mortgage which, prior to its discharge, had had priority over the fourth mortgage.

3. N.Y. Real Property Law § 320.
4. 110 A.D.2d 550, 558, 488 N.Y.S.2d 164, 169 (1st Dep't 1985), *mod. oth. gds.*, 67 N.Y.2d 42, 499 N.Y.S.2d 650 (1986).
5. 148 A.D.2d 484, 538 N.Y.S.2d 831 (1st Dep't), *app. den.* 75 N.Y.2d 701, 551 N.Y.S.2d 905 (1989), cited with approval in *D&L Holdings, LLC v. RCG Goldman Co. LLC*, 287 A.D.2d 65, 70, 734 N.Y.S.2d 25, 29 (1st Dep't 2001), *app. den.* 97 N.Y.2d 611, 742 N.Y.S.2d 604 (2002).
6. 234 A.D.2d 588, 589, 652 N.Y.S.2d 63, 64 (2d Dep't 1996).
7. *Gioia*, at 589.
8. 3 A.D.3d 213, 217, 772 N.Y.S.2d 251, 254 (1st Dep't 2004).
9. 96 U.S. 332, 336-337 (1877), followed, *Hammerstein v. Henry Mtn. Corp.*, 11 A.D.3d 836, 838, 784 N.Y.S.2d 657, 659 (3d Dep't 2004) (acknowledging that under the non-waivable right to redeem, mortgagor could sell the pledged realty and pay off the secured loan without lender's prior consent despite express contrary language in the mortgage requiring such consent) (and cases thereat); see also, *Leonia Bank*, *supra* note 8; and, *Maher v. Alma Realty Co.*, 70 A.D.2d 931, 417 N.Y.S.2d 748 (2d Dep't 1979) (a deed accompanying a mortgage may be given solely for security purposes: "deeds given in security for the payment of a debt are mortgages ([RPL] § 320). The plaintiffs [mortgagors] cannot waive their right of redemption even by a stipulation in open court, since public policy forbids such a waiver [citation omitted]. The equities of the parties may be adjusted in the action [citation omitted].").
10. 209 A.D.2d 906, 908, 619 N.Y.S.2d 190, 192 (3d Dep't 1994).
11. 45 N.Y.2d 878, 879, 410 N.Y.S.2d 811, 811 (1978), *aff'g on op. of App. Div.*, 58 A.D.2d 617, 618, 395 N.Y.S.2d 696 (2d Dep't 1977), *stay den.* 43 N.Y.2d 792, 402 N.Y.S.2d 393, *stay den.* 43 N.Y.2d 835 (1977).
12. 139 Misc.2d 104, 105, 526 N.Y.S.2d 313, 315 (Sup. Ct., Oneida Co. 1987).
13. See *Supra*, note 6.
14. *Thomson v. Daisy's Luncheonette Corp.*, 2005 N.Y. Misc. LEXIS 893, 7 Misc.3d 1019A, at ** 4-5 (Sup. Ct., Kings Co. 2005).
15. 256 N.Y. 298, 303 (1931).
16. See also, *Security Pacific Mortg. and Real Estate Svcs., Inc. v. Canadian Land Co. of America, N.V.*, 962 F.2d 204, 208-209 (2d Cir. 1992) (agreement must identify or

describe the realty, goods, or monies sought to be pledged and clearly show intent to grant a security interest in it).

17. 204 F.Supp. 2d 543, 546, (E.D.N.Y. 2002 - collecting N.Y. cases).
18. *Id.*, at 546.
19. RPAPL § 1301(2).
20. N.Y. Tax Law § 250(2)(a). See also, *TWA, Inc. v. NYS Tax Appeals Tribunal*, *supra* note 10 (there, the facts established that the lease assignment was not a RPL § 320 mortgage, so that no tax had to be paid); *Corcillo v. Martut, Inc.*, *supra* note 11 (affirming so much of the IAS Court's holding that a deed in lieu of foreclosure was a RPL § 320 mortgage "and the mortgage tax must be paid").
21. 161 A.D.2d 517, 517-518, 555 N.Y.S.2d 786, 787 (1st Dep't 1990).
22. 188 A.D.2d 353, 591 N.Y.S.2d 770 (1st Dep't 1992), *app. den.*, 81 N.Y.2d 706, 597 N.Y.S.2d 936 (1993).
23. RPL § 291; see also, 78 NY Jur. 2d § 233. Recently, in *Washington Mutual Bank v. Peak Health Club, Inc.*, ___ Misc.3d ___, N.Y.L.J., June 28, 2005, p. 19, cols. 3-4 (Sup. Ct., Nassau Co. 2003), the Court held that a lender that failed to record its mortgage for about five years lost its priority when, in the interim, another lender recorded its own mortgage where there was no evidence that the later lender/mortgagee knew or should have known about the earlier lender/mortgagee.
24. 199 A.D.2d 661, 605 N.Y.S.2d 139 (3rd Dep't 1993).
25. *Id.*, at 663.
26. *Id.*, at 664 and at 663, n. 1.
27. *Application of Ditta*, 221 N.Y.S.2d 34, 35 (Sup. Ct., Kings Co. 1961).
28. *Krause v. Hullar*, 135 Misc. 837, 841, 240 N.Y.S.2d 61 (Sup. Ct., Onondaga Co. 1930); *Lumber Exchange Bank v. Miller*, 18 Misc. 127, 133, 40 N.Y.S. 1073 (Sup. Ct., Erie Co. 1896).
29. 17 A.D.3d 305, 308, 793 N.Y.S.2d 84, 86. It is not clear why, in 1997, the lender chose to replace its inadvertently discharged First Mortgage rather than move for an order canceling the discharge and reinstating the First Mortgage to its original priority. If the lender then had successfully done so, presumably the restored First Mortgage would have had priority over both Kenney's Third Mortgage as well as the SBA's later assigned Fourth Mortgage.

Mr. Sharrow is a member of Moses & Singer LLP, focusing on real estate oriented and general commercial litigation, creditors' rights and asset recovery.

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