

# Did You Know?

by Theodore P. Sherris

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## DEED - MERGER OF CONTRACT PROVISIONS INTO DEED

Pursuant to the provisions of a separation agreement, certain premises were to be conveyed to plaintiffs by their parents, subject to a reservation by the Husband of a life estate in all oil, gas, mineral and gravel rights in the properties. Additionally, this Agreement provided that the Husband was not to remove, transfer, or sell or encumber any such rights without obtaining plaintiffs' consent. The deeds as actually conveyed, contained the specified reservation; but was silent as to the consent provisions. Prior to the conveyance, the Husband entered into a lease with the Whitman Co. for gravel mining, without plaintiffs' consent. This suit followed.

This Court reversed the trial court, holding that it was the title transfer that triggered the consent provision; and that the Husband had acted prior to the transfer. Citing *Goldsmith v. Knapp* (637 NYS2d 434), the Court concluded, that the contract terms concerning the nature and extent of the conveyance merged into the deed; with the contract terms being extinguished upon delivery and acceptance of the deed.

### ***Boser v. Boser***

654 NYS2d 509 (A.D.4.D.)

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## MORTGAGE FORECLOSURE - CONSOLIDATION WITH ANOTHER ACTION

Plaintiff sued to foreclose on its mortgage; and in another action, asserted other claims against a guarantor. The Trial Court denied defendant-guarantor's motion for summary judgment; and granted plaintiff's motion to consolidate the foreclosure action with the action against the guarantor. Guarantor argues on appeal that this consolidation is barred by RPAPL 1301.

Citing *FDIC v. Forte* (463 NYS2d 844), this Court found this reliance to be misplaced, since plaintiff's

two actions did not both seek to recover on a mortgage debt. Rather, the second action sought to recover from the principal debtor's breach in connection with its line of credit with plaintiff, and on the guarantee of the same. Clearly, Section 1301 does not apply where, as here, the second action is on a debt, separate and distinct from the mortgage debt. *Git Indust. v. Rose* (438 NYS2d 372, on remand, 462 NYS2d 245, aff. 62 NY2d 659).

The Court concluded, that the consolidation was proper, inasmuch as the two actions arose out of the same contract, and involved interrelated questions of law and fact.

***P.T. Bank Central Asia v. Wide Motion Corp.***

649 NYS2d 151 (A.D.1.D.-1996)

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## **MORTGAGE FORECLOSURE - IMPROPER DESCRIPTION**

Plaintiff commenced an action to foreclose a certain mortgage on premises located in the Town of Poughkeepsie, County of Dutchess. Following default by defendant, a final judgment of foreclosure and sale was entered. However, inadvertently, the property description was omitted from the judgment. In the notice of sale, the proper description was included, except that the location of the premises was given as the City, rather than the Town of Poughkeepsie. After the sale and conveyance pursuant to the judgment of foreclosure, plaintiff moved for an order of removal. Defendant sets forth by way of defense, the foregoing errors, claiming that they were prejudiced by them.

Citing *Marine Midland Bank v. Landsdowne Mortgage Assocs.*, 598 NYS2d 630, lv.den. 82 NY2d 656, this Court these errors to constitute, at most, "nonprejudicial irregularities". The Court also rejected as speculation, defendant's claim that if the Notice of Sale had accurately stated the location of the premises, more prospective bidders would have attended the sale; and that the bid price would have been substantially higher.

***Chemical Bank v. Gardner***

649 NYS2d 243, (A.D.3.D.-1996)

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## **MORTGAGE FORECLOSURE - FOREIGN BANK**

Defendant's contention is that plaintiff, a foreign lending institution, not licensed in the State of New York to do business herein, is not authorized to commence a mortgage foreclosure action. Citing Banking Law, sec. 200, and *Banque Arabe Et. International D' Investment v. One Times Square Assocs., Ltd.*, (597 NYS2d 48), this Court interpreted same as authorizing foreign banks to lend money on the security of New York real property, and to commence actions to enforce obligations under these mortgages.

***First Wisconsin Trust Co. v. Hakimian***

654 NYS2d 808 (A.D.2.D.-1997)

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**REAL ESTATE TRANSFER TAX - PROPERTY ACQUIRED AT FORECLOSURE**

Petitioner commenced a foreclosure of its second mortgage upon which the sum of \$4,635,193 was owed. At the sale, petitioner was the successful bidder for the sum of \$1,000,000, which was subject to a first mortgage, then in the reduced principal sum of \$480,000. Petitioner did not seek a deficiency judgment.

Schedule E of the TP-584 form, requires the taxpayer to calculate the consideration subject to tax by adding “ the amount of the foreclosure judgment or price bid by grantee, which ever is higher.” Petitioner filed its transfer tax return showing the judgment in the sum of \$4,635,193, and paid a transfer tax calculated on that amount. Petitioner seeks a refund based upon its contention that it should pay a tax calculated upon its bid, plus the unpaid balance of the first mortgage.

The Tax Appeals Tribunal rejected petitioner’s contention that it should adopt for this purpose, the definition of “consideration” as spelled out in the real property gain tax law, to wit: that consideration should be defined as “fair market value of the property at the time of the transfer.”

In affirming the determination of the Hearing Officer, this Tribunal reasoned as follows. It rejected this contention of Petitioner; and cited the Tax Law Sec. 1401(e) definition of a “conveyance” for the purpose of real estate transfer tax, as any transfer of an interest in real property, including a mortgage foreclosure. The Sec. 1401(d) defines “consideration” in relevant part as including “the cancellation or discharge of an indebtedness or obligation; and nowhere is the “fair market value” concept set forth.” Since Petitioner did not seek a deficiency judgment, it cannot be heard to argue that the amount of the discharged indebtedness should not be included in the calculation.

***In the Matter of the Petition of Indian Head Associates, DTA.***

No. 813069, 12-26-1996

**Note:** Since the rendering of this decision, The Tax Department has promulgated regulations covering these and other circumstances applicable to foreclosure sales. 20 NYCRR 575.11[a][3])

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**WATERWAYS - DAM CONSTRUCTION EASEMENT**

In 1930, plaintiff’s predecessor in title (“The Club), entered into an agreement with defendant’s

predecessor in title (Redding), whereby Redding paid The Club \$300.00 for the right to flood parts of The Club's lands. This Agreement which was recorded, specifically prohibited The Club from boating, fishing, bathing or having any other rights upon the waters of Tusten Lake, over Redding's lands. Plaintiff purchased the parcels of land near the lake, subject to this agreement. In early 1992, the Dept. of Environmental Conservation inspected the dam and found it to be in a dangerous and unsafe condition; and required that it be removed, repaired or reconstructed. Defendants were given a permit to breach the dam by DEC, and did so on November 9, 1992, thus abating the nuisance, and causing a substantial lowering of the water level of Tusten Lake. Plaintiff commenced this action seeking damages to his parcels bordering the lake, due to the lowered water lake level.

Trial court dismissed plaintiff's complaint, finding that "[s]ince the dam ... was created by Defendant's predecessors by virtue of an easement acquired over the property occupied by such dam, such Defendant also had the right to abandon the dam at any time thereafter". This court also ruled that this singular use of the easement, did not create a right in the subservient land owner or adjacent landowners to have the dam continue indefinitely. On appeal this finding was sustained. (cf. *Lake Claire Homeowners Assn. v. Rosenberg*, (626 NYS2d 540 [AD]; lv. dismiss. 86 NY2d 838), the Court held that the complaint failed to alleged any basis upon which to find a duty on behalf of defendant to maintain the dam, even though plaintiffs had established their littoral rights with respect to the lake. Not only did plaintiff not claim before the trial court that it has a reciprocal prescriptive easement to maintain the dam; but defendants correctly argued, that such rule is not applicable here.

***Bird v. Trust Co. of New Jersey***  
651 NYS2d 246 (A.D.3.D.-1996)