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COURT OF APPEALS

STATE OF NEW YORK

M&T REAL ESTATE TRUST,

Appellant,

-against-

No. 55

DOYLE, ET AL.,

Respondents.

20 Eagle Street
Albany, New York 12207
February 14, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

HOWARD S. ROSENHOCH, ESQ.
JAECKLE FLEISCHMANN & MUGEL, LLP
Attorneys for Appellant
Avant Building
Suite 900
200 Delaware Avenue
Buffalo, NY 14202

JOHN K. ROTTARIS, ESQ.
GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C.
Attorneys for Respondents
465 Main Street
Suite 600
Buffalo, NY 14203

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: M&T Real Estate,
2 number 55.

3 MR. ROSENHOCH: Howard Rosenhoch for the
4 appellant, Your Honors. If I - - -

5 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

6 MR. ROSENHOCH: If I may - - -

7 CHIEF JUDGE LIPPMAN: Rebuttal?

8 MR. ROSENHOCH: - - - may I reserve two
9 minutes for a rebuttal?

10 CHIEF JUDGE LIPPMAN: Two minutes, sure.

11 MR. ROSENHOCH: Thank you, Your Honor.

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MR. ROSENHOCH: The Fourth Department in
14 this case decided that when the referee signed the
15 deed prepared by plaintiff's counsel, he was left
16 with no title to convey and thus the sale was con - -
17 -

18 CHIEF JUDGE LIPPMAN: Counsel, the date of
19 the sale remained the same during this whole - - -
20 with all this back and forth, and it going - - - the
21 referee sending it, and it getting sent back, and it
22 going back. At no point did the date change - - -

23 MR. ROSENHOCH: The date of - - -

24 CHIEF JUDGE LIPPMAN: - - - that is listed
25 on the deed, yeah?

1 MR. ROSENHOCH: Well, it - - - I'm not sure
2 if you were referring to the date of the foreclosure
3 bid - - - that is, the foreclosure sale when bids
4 were taken.

5 CHIEF JUDGE LIPPMAN: What's the operative
6 date?

7 MR. ROSENHOCH: The operative date is the
8 date that - - -

9 CHIEF JUDGE LIPPMAN: We're talking about
10 the date of the sale.

11 JUDGE GRAFFEO: Wasn't that in September,
12 2009?

13 MR. ROSENHOCH: That was the date of the
14 foreclosure sale.

15 CHIEF JUDGE LIPPMAN: So what - - - is that
16 the operative date?

17 MR. ROSENHOCH: It is not the operative
18 date. Under - - -

19 CHIEF JUDGE LIPPMAN: So you don't have to
20 change the date of the sale to accommodate your
21 position?

22 MR. ROSENHOCH: Abso - - - the date of the
23 auction? No. No. On the auction, what is taken are
24 bids. It is sometime, either at the auction or
25 thereafter that the property is conveyed by the

1 delivery of a proper deed of conveyance and the sale
2 is consummated.

3 CHIEF JUDGE LIPPMAN: Where does it say
4 that delivery is the test?

5 MR. ROSENHOCH: In 1371, if I may, Your
6 Honor, and I'll - - - I will - - - I don't have it
7 with me - - -

8 JUDGE SMITH: Subsection 2.

9 MR. ROSENHOCH: Yes.

10 JUDGE SMITH: "Simultaneously with a making
11 of a motion for an order confirming the sale provided
12 such motion is made within ninety days after the date
13 of a consummation of the sale by the delivery of the
14 proper deed of conveyance to the purchaser." Are
15 those the words you had in mind?

16 MR. ROSENHOCH: Those are exactly, Your
17 Honor - - - thank you - - - the words I had in mind -
18 - -

19 JUDGE PIGOTT: This gets us, Mr. Rosenhoch
20 - - - it seems to me, I think of MERS, because when
21 you - - - when you - - -

22 MR. ROSENHOCH: I'm sorry, what's the word
23 you used?

24 JUDGE PIGOTT: MERS, the Mortgage - - -

25 JUDGE READ: Mortgage recording system.

1 JUDGE PIGOTT: - - - Electronic Recording
2 Service - - -

3 MR. ROSENHOCH: Oh.

4 JUDGE PIGOTT: - - - where all of sudden -
5 - -

6 MR. ROSENHOCH: Oh.

7 JUDGE PIGOTT: - - - everybody gets into
8 the same library, because they're all moving - - -
9 here you got a situation where somebody is assigned
10 by the court - - - he's an officer of the court - - -
11 to sell the darn place. They do.

12 And all of a sudden, M&T takes over the
13 whole transaction, and says, don't - - - don't give
14 us a deed; don't give us a deed now. We're going to
15 transfer, not the property, our bid.

16 Well, maybe there was somebody standing
17 there at the courthouse on the day that this thing -
18 - - that would have gotten you more money, or would
19 have had a different plan, but M&T goes and takes it
20 and then says, we have this inchoate right to bid
21 that we've exercised that we're now giving to
22 somebody else so they can get the property.

23 And all the referee's trying to do is get
24 the property sold, because the court told him to, so
25 that there can be a judgment. I couldn't find an end

1 date. You could have held on to this and told the
2 referee to put this in his drawer and wait until Aunt
3 Lily dies, and then we'll give it to their estate.

4 MR. ROSENHOCH: Your Honor, I suggest to
5 you that's an issue for the legislature. That is not
6 what happened here - - -

7 CHIEF JUDGE LIPPMAN: When is the sale
8 consummated?

9 MR. ROSENHOCH: The sale is consummated
10 when - - -

11 CHIEF JUDGE LIPPMAN: It's - - - is it May
12 or September?

13 MR. ROSENHOCH: May - - - excuse me. It is
14 not in September. It is in August when the - - - the
15 redated deed was delivered.

16 CHIEF JUDGE LIPPMAN: But the - - -

17 JUDGE GRAFFEO: Did you have to make a
18 deposit on the day of the auction?

19 MR. ROSENHOCH: The - - - when the
20 plaintiff for - - - the foreclosing plaintiff - - -
21 is the successful bidder, that generally, as I recall
22 it - - -

23 JUDGE GRAFFEO: Because you're the lender,
24 you didn't have to do a deposit?

25 MR. ROSENHOCH: - - - I press the term to

1 fit. No, we didn't have to make a deposit. A third
2 party would have to make a deposit, would not be
3 required at that time to take a deed. The third
4 party would have the opportunity to do due diligence,
5 and could. And sometimes this happens, when a third
6 party bids, refuses to consummate the sale because of
7 a title defect, because of environment - - -

8 JUDGE GRAFFEO: And there's no end date for
9 that due diligence?

10 MR. ROSENHOCH: Not that I'm aware.

11 JUDGE PIGOTT: Well, there's - - -

12 MR. ROSENHOCH: There is none in the
13 statute.

14 JUDGE PIGOTT: When they do that, though,
15 they lose their deposit.

16 MR. ROSENHOCH: Yes, they do, Your Honor.

17 JUDGE PIGOTT: You don't. You - - -

18 MR. ROSENHOCH: That is correct.

19 JUDGE PIGOTT: You - - - which strikes me
20 is that M&T here kind of took over the court. I
21 mean, all the judge wanted to do was say, sell this
22 property, you know, get a judgment, and then M&T gets
23 a deficiency after the exchange.

24 You, in the meantime, though, held on to
25 it, and then decided that you weren't even going to

1 take title when the referee - - - he told the court,
2 I'm done; you know, give me my 500 bucks; I've sold
3 the property. And you think he hasn't sold the
4 property.

5 MR. ROSENHOCH: Your Honor, for what it's
6 worth, that is not uncommon. In this day and age,
7 lending institutions, which are in the business of -
8 - - of banking, not property ownership - - -

9 JUDGE PIGOTT: And mortgage foreclosure.

10 MR. ROSENHOCH: Mortgage for - - - but by
11 the way, you mentioned the - - - I think the program
12 that arose out of the financial crisis. Keep in
13 mind, that's a program that is specific and exclusive
14 to residential mortgages.

15 JUDGE PIGOTT: No, that wasn't out of the
16 crisis.

17 MR. ROSENHOCH: Oh.

18 JUDGE PIGOTT: It was just an easier way of
19 registering then was - - -

20 JUDGE GRAFFEO: There is - - -

21 MR. ROSENHOCH: Oh, oh, then I - - -

22 JUDGE GRAFFEO: There is - - -

23 MR. ROSENHOCH: - - - you mentioned
24 something that I'm not familiar with.

25 JUDGE GRAFFEO: There is an ancillary

1 concern here, though, which is who's paying the taxes
2 on this property? They're just accruing unpaid?

3 MR. ROSENHOCH: The - - -

4 JUDGE GRAFFEO: I mean, you could take
5 eighteen months, two years, three years, to decide -
6 - -

7 MR. ROSENHOCH: Oh, well - - -

8 JUDGE GRAFFEO: - - - if you want to accept
9 - - -

10 MR. ROSENHOCH: The - - - the - - -

11 JUDGE GRAFFEO: - - - delivery of the deed.

12 MR. ROSENHOCH: Whoever the owner is that
13 is going to be taking title in a case like this, if
14 you looked at the terms of sale, it's subject to
15 taxes. And - - - and - - -

16 JUDGE GRAFFEO: Right, but you're letting -
17 - - you're letting - - -

18 MR. ROSENHOCH: Of course.

19 JUDGE GRAFFEO: - - - these taxes - - -
20 unpaid taxes accrue - - -

21 MR. ROSENHOCH: Abso - - -

22 JUDGE GRAFFEO: - - - and then three years
23 later you can say I don't want to accept the deed.

24 MR. ROSENHOCH: Well - - -

25 JUDGE GRAFFEO: And then the municipality

1 has lost those taxes for three years. The referee
2 couldn't create - - - the referee couldn't conduct
3 another auction.

4 MR. ROSENHOCH: Well, yes, Your Honor, I
5 suppose in theory the bank could do that, but if the
6 property is, in fact, worth - - - I forget what the
7 figure was here - - - a million dollars, the
8 appraiser found - - - and there's 400,000 dollars in
9 taxes, even if it accrues to 500,000 dollars, the
10 bank is not going to do that, because they're going
11 to be throwing away 500,000 dollars.

12 JUDGE PIGOTT: Mr. Rosenhoch, why when you
13 - - - when the property was struck down to M&T,
14 didn't they take the deed? Then - - -

15 MR. ROSENHOCH: Why didn't they?

16 JUDGE PIGOTT: I'm almost done, yes.

17 MR. ROSENHOCH: I'm sorry.

18 JUDGE PIGOTT: And then - - - then assign
19 it to MAT, and MAT's got it. Referee's made a
20 representation to the court that we did everything we
21 were supposed to do speedily. And now M&T can get
22 their judgment.

23 MR. ROSENHOCH: As a practical matter,
24 there are two reasons why they don't take the deed
25 and then give it to MAT. In order for the title to

1 be properly made of record, you'd have to record it
2 twice. You'd have - - -

3 JUDGE PIGOTT: And what's wrong with
4 recording it twice?

5 MR. ROSENHOCH: You pay taxes.

6 JUDGE PIGOTT: Exactly.

7 MR. ROSENHOCH: No question, Your Honor, no
8 question about that. But the second reason, there -
9 - - hypothetically, there could be environmental
10 issues that - - - where the bank doesn't - - - would
11 prefer not to become the title owner because of - - -

12 JUDGE PIGOTT: But you're - - - you're
13 asking - - - you're asking the court system which
14 does these things to collude with you - - - it's a
15 bad word - - - but say, look, just in case, that
16 property up there, because it was a car dealership,
17 may have some oil on it or something; we've got it
18 off the market. It's not sold - - - well, it is
19 sold, but it isn't sold. Everybody thinks we own it,
20 but we don't.

21 And let's go make sure that we don't have
22 any environmental considerations. If we do, Mr.
23 Officer of the Court, you're really an officer for
24 us, let's pretend that we never bid on it, and we'll
25 go home and you go sell it again.

1 MR. ROSENHOCH: Typically, what they're
2 going to try and do is find somebody else to accept
3 assignment of the bid, so they don't go into title at
4 all as an owner.

5 JUDGE PIGOTT: But that's just their
6 preference.

7 JUDGE GRAFFEO: That's - - - I assume
8 that's what generally happens here.

9 MR. ROSENHOCH: Sure. Ab - - -

10 JUDGE GRAFFEO: I'm not saying it was - - -
11 I don't want to say - - -

12 MR. ROSENHOCH: I don't think it generally
13 happens - - -

14 JUDGE GRAFFEO: - - - this was your
15 clients' - - -

16 MR. ROSENHOCH: - - - but that is certainly
17 an option.

18 JUDGE GRAFFEO: I presume they were waiting
19 here to see if they could find somebody else who was
20 going to bid higher?

21 MR. ROSENHOCH: No, they were looking for
22 somebody who would take title. I assume at - - -

23 JUDGE GRAFFEO: Well, who would - - -

24 MR. ROSENHOCH: - - - certainly not at - - -

25 -

1 JUDGE GRAFFEO: Who would pay more so it
2 would reduce - - -

3 MR. ROSENHOCH: Perhaps pay more, perhaps -
4 - - -

5 JUDGE GRAFFEO: - - - their deficiency,
6 right? The whole game is to reduce the deficiency.
7 I'm not saying that's a bad goal - - -

8 MR. ROSENHOCH: No, no.

9 JUDGE GRAFFEO: - - - I'm just saying,
10 isn't that the intent?

11 MR. ROSENHOCH: I think the game might be
12 either to reduce the deficiency or to not take title.
13 Maybe they would have even sold it to a bidder for a
14 little bit less, just to not take title. I don't
15 know what was going on in the banker's mind.

16 JUDGE GRAFFEO: And I think our concern is
17 does the court system just keep these cases open
18 forever? Are these referees out there - - -

19 MR. ROSENHOCH: Your Honor, I'm not aware
20 of cases where they stay open forever. I did
21 foreclosure practice way back when in the 1980s,
22 since I've been just arguing, you know, contested
23 foreclosures. But I did - - - we didn't have that
24 situation. They closed eventually, sometimes a
25 little longer than others, but I submit, Your Honors,

1 that the issues you're raising are for the
2 legislature.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 JUDGE PIGOTT: One more before you go,
5 could I just ask - - -

6 CHIEF JUDGE LIPPMAN: Judge Pigott.

7 JUDGE PIGOTT: Just, kind of, a math
8 question. Let's assume for a minute that you bid it
9 in at 500,000 dollars and you have 500,000-dollar
10 deficiency, all right? And you get your judgment - -
11 - you get your deficiency judgment - - - and you own
12 the property. Now you sell it for 700,000 dollars.
13 Do you go back and say to - - - in this case, Mr.
14 Doyle - - - we actually made 200,000 dollars more on
15 this, so we're going to take it off of your - - -
16 that's right.

17 So what you've done here is, you've taken
18 title for a specific price. Now, odds if you're
19 going to - - - my scenario's going to happen, I don't
20 know, but it then inures to your benefit to kind of
21 play the market and actually make more money that
22 does not go toward the deficiency, if it goes up, or
23 clear the deal, if it goes down.

24 MR. ROSENHOCH: Two points with respect to
25 that, Your Honor. Number one, the amount of the

1 deficiency judgment is not controlled by the amount
2 of the bid. It is the higher of the amount of the
3 bid or the fair market - - - or the fair-market value
4 as found by the court based on competent evidence.
5 That's what's in the statute. So it may or may not
6 be the amount of the bid.

7 If the court finds on competent evidence
8 that it's 500,000 dollars, and that - - - on that
9 basis, a judgment is entered for a deficiency of
10 500,000 dollars, and then after some passage of time
11 - - - whether it's a day, a month, a year - - - the
12 bank sells it for 700,000 dollars, maybe the bank has
13 made a killing, or maybe the market has changed.

14 JUDGE PIGOTT: Right.

15 MR. ROSENHOCH: I don't know. It's purely
16 hypothetical.

17 CHIEF JUDGE LIPPMAN: Okay, counsel, let's
18 hear from your adversary.

19 Counsel?

20 MR. ROTTARIS: May it please the court.

21 CHIEF JUDGE LIPPMAN: Counsel.

22 MR. ROTTARIS: John Rottaris on behalf of
23 the Doyle defendants.

24 I think the court has raised very
25 significant and interesting questions about control

1 over the system on the part of a private institution.
2 But while I acknowledge that in general foreclosures
3 there is sometimes a delay and this goes on with
4 banks, this even goes beyond that. This - - -

5 JUDGE SMITH: Well, but how do you get
6 around the statute? I mean - - -

7 MR. ROTTARIS: Well, that's my point. The
8 statute - - -

9 CHIEF JUDGE LIPPMAN: What's - - - what's
10 the test under the statute?

11 MR. ROTTARIS: The statute clearly reads,
12 "delivery of a deed of conveyance". In May of 2010 -
13 - -

14 JUDGE GRAFFEO: Unfortunately it doesn't
15 have a time period running from the date of the - - -

16 MR. ROTTARIS: No, but, Your Honor, the
17 purpose is that within - - -

18 JUDGE GRAFFEO: - - - of the auction.

19 MR. ROTTARIS: The date of the auction,
20 while it was eight months, that's not my gripe here.
21 While I think that that's a long time, the operative
22 dates are the date of the conveyance and then the
23 ninety days to start the actual - - -

24 JUDGE SMITH: You say the time started
25 running when he put it in the mail the first time?

1 MR. ROTTARIS: I say the time started
2 running when he signed the deed that they prepared
3 and said, send it to us. He did.

4 CHIEF JUDGE LIPPMAN: What's - - - what - -
5 - and what's the operative date in that case?

6 MR. ROTTARIS: That was - - - that was May
7 2010, Judge.

8 JUDGE SMITH: Suppose they - - - suppose
9 they called him before he licked the stamp and put it
10 in the mail, and said hold on to it, does the time
11 start running?

12 MR. ROTTARIS: No, because I - - - I don't
13 - - - I don't believe he would have delivered. He
14 still had possession.

15 JUDGE SMITH: Okay, okay, but you said,
16 because - - - because he put it in the mail and while
17 it was in the mail they called up and said, we don't
18 want it yet; we're going to give it back to you, and
19 he says, okay. That starts the time running?

20 MR. ROTTARIS: Well, because the case law
21 says that when a person delivers a deed - - - tenders
22 delivery, he intends to part with title. The time he
23 puts it in the mail he intended to part with title.

24 JUDGE PIGOTT: Well, I get - - - I get
25 that, you know, they prepared the deed and stuff.

1 MR. ROTTARIS: Right.

2 JUDGE PIGOTT: But I - - - you know, if you
3 look at the statute itself, it just seems to me that
4 the referee does not work for HSBC or, you know, the
5 people that are out there bidding. You know, he's
6 got a job to do; he's ordered to do it by a court,
7 and if he - - - if he puts it in the mail and they
8 say we're going to mail it back, I would think he'd
9 say, you can mail it anywhere you want; I'm done, I'm
10 settled, and if you've got a problem, don't file it,
11 and then you're going to suffer the problem of, you
12 know, if you don't file it, anything that gets - - -
13 more liens get on.

14 MR. ROTTARIS: I agree with that, Judge,
15 and I guess, in theory, the referee after two months
16 could have said, M&T, what are you doing here? I'm
17 giving you the deed, because you were the purchaser.
18 Contrary to what counsel argues, we're not trying to
19 upset a hundred years of case law on real property
20 transactions with delivery and acceptance. Those are
21 arm's-length transactions.

22 You - - - I'm not going to say that a
23 receiver of a deed in an arm's-length transaction
24 doesn't have to accept it to consummate the deal.
25 This is a foreclosure. This is a limited procedural

1 - - -

2 JUDGE SMITH: So you would - - - you would
3 have - - - you would say this case would come out
4 differently if there were a third-party bidder?

5 MR. ROTTARIS: No, no, not a third-party
6 bidder, because they would have known that they were
7 the successful bidder. What I'm saying is this case
8 would come out differently is as Mr. Rosenhoch's
9 brief says, you mail a deed to someone who doesn't
10 know it's coming. You can't transfer property to
11 someone who doesn't know they're going to get it.

12 JUDGE GRAFFEO: You want us - - - you want
13 us to define delivery of a deed specifically for
14 mortgage foreclosure actions - - -

15 MR. ROTTARIS: Well, I - - -

16 JUDGE GRAFFEO: - - - versus other real
17 property transactions?

18 MR. ROTTARIS: I want the court to define -
19 - - yeah, in this statute, in RPAPL 1371(2) for the
20 purposes of starting the ninety-day period to seek a
21 deficiency, is when the referee parts with his title
22 to the property. Either he walks it over or he hands
23 it over or in - - - as in the cases, he transfers it
24 to - - -

25 JUDGE PIGOTT: Well, then you don't have

1 any problem with Mr. Rosenhoch's argument either,
2 then. I mean, if - - - all you'll saying is if he'd
3 been a little more diligent, and at - - - not Mr.
4 Rosenhoch, of course - - - but if the person at the
5 bidding, said now, got it; it's ours. Don't do
6 anything; we'll call you; we'll send you the deed.

7 And then they take eight months to send
8 them the deed, you don't see any requirement on the
9 part of the referee to do what I'm arguing, which is
10 that he got to be drawing the deed. Now, it's nice -
11 - - and I know this what happens in all of them, that
12 the bank will prepare the deed, but he or she, in
13 theory, ought to be preparing the deed and mailing it
14 out. And that would conclude it in your view.

15 But you don't want to say that. You want
16 to say they can do - - -

17 MR. ROTTARIS: Well, no, no, Your Honor, I
18 don't want to say that, because I think the purpose
19 of the statute, Judge - - - this was a Depression-era
20 statute. The purpose was to not have these
21 deficiencies hanging over individual guarantors'
22 head, either in commercial transactions or
23 residential transactions. The deficiency statute - -
24 - ninety days is a very short period of time, and the
25 purpose is to get this thing done for the individuals

1 that were defendants in the foreclosure.

2 JUDGE SMITH: But how - - - but I guess my
3 - - - I'm still troubled how you can say - - - the
4 full words of the statute are "consummation of the
5 sale by the delivery of the proper deed of conveyance
6 to the purchaser".

7 MR. ROTTARIS: Correct.

8 JUDGE SMITH: You say that happened when it
9 was mailed.

10 MR. ROTTARIS: That happened when the
11 referee signed the deed in May, signed the other
12 documents, and sent it back to the purchaser, thereby
13 parting with his title to the property.

14 JUDGE SMITH: Okay, I - - - but - - - but -
15 - - and you say it makes no - - - yeah. Wouldn't you
16 - - - your argument would surely be stronger if the
17 referee had done what Judge Pigott suggested, that if
18 the - - - M&T calls up and says I'm going to send
19 that deed back to you. And the referee says, no,
20 you're not. You're - - - it's your deed.

21 MR. ROTTARIS: Absolutely.

22 JUDGE SMITH: But here, the referee takes
23 it back. How is the - - - how can we say on that
24 record that the consummation of the sale by the
25 delivery of the proper deed has occurred?

1 MR. ROTTARIS: Because he delivered it.
2 Now, the fact that they rejected it - - -

3 JUDGE SMITH: Did - - - well, but did - - -
4 did the delivery consummate the sale?

5 MR. ROTTARIS: Under the terms of that
6 statute, yes, Your Honor, because all that is
7 required of the referee was delivery.

8 JUDGE GRAFFEO: Well, did the - - -

9 MR. ROTTARIS: It doesn't say delivery of
10 the deed and acceptance by the - - -

11 JUDGE GRAFFEO: Did the referee acquiesce
12 to the rejection of the deed - - -

13 MR. ROTTARIS: He took it back.

14 JUDGE GRAFFEO: - - - by having it sent
15 back?

16 MR. ROTTARIS: Well - - -

17 JUDGE PIGOTT: He did. He signed another
18 deed.

19 MR. ROTTARIS: He did. He - - - well, not
20 only that, Judge, he delivered this deed three times.
21 He signed it and then he - - - then - - - then in
22 July, they said, you know what? We're ready now;
23 send it to me. He sent the original one back, and
24 then they said - - - the bank said - - - well, you
25 know what? It would be better if it was dated

1 concurrently with the recording, so we're going to
2 send you another one. And then he dated another one
3 in August and sent it back. So this sale that took
4 place in September of '09 had its deed delivered
5 three times.

6 JUDGE PIGOTT: Was the fault, then, with
7 the referee? If the referee is, as I'm positing, an
8 officer of the court, and if he should have said, you
9 know, I'm not taking the deed back, and then he did
10 take the deed back, shouldn't he then re-auction it?
11 I mean, you can go back to the court and say, you
12 remember that auction I had back in September, Judge,
13 well, guess what? The bidder backed out, and so now
14 I've got to post again.

15 MR. ROTTARIS: Well, I don't know how we'd
16 do that now, Judge.

17 JUDGE PIGOTT: We can't, but I'm just - - -

18 JUDGE SMITH: Well, suppose - - - suppose
19 the bidder did back out. Suppose you had a third-
20 party bidder and the referee sent them the deed - - -
21 well, he wouldn't send him the deed, I suppose, until
22 he got it checked - - - but the referee shows up at
23 some kind of closing, hands him the deed, and says,
24 where's your check, sir? And he says, sorry, I'm out
25 of checks today. Has - - - obviously, the sale

1 hasn't been consummated, has it?

2 MR. ROTTARIS: I'm sorry. If he's paid his
3 deposit?

4 JUDGE SMITH: Yeah, but if the buyer
5 doesn't pay. He delivers the deed and the buyer
6 doesn't pay. He says, no, I'm not paying; here's
7 your deed back. Has the sale been consummated?

8 MR. ROTTARIS: I don't think so, Judge.

9 JUDGE SMITH: Why - - - yeah. So if the
10 referee takes it back, the sale's not consummated.

11 MR. ROTTARIS: But that's because - - -
12 because of the other terms of the terms of sale
13 weren't met. In this case, the terms of sale have
14 been met. They were the successful bidder.

15 JUDGE SMITH: Yeah, this is a statute of
16 limitations. Aren't we supposed to be able to look
17 at the statute and isn't a - - - a mortgagee supposed
18 to be able to look at the statute and figure out when
19 the ninety days are running. I mean, do we have to -
20 - - I mean, you sound like you want a reasonableness
21 analysis of whether they had a good reason for taking
22 the deed back.

23 MR. ROTTARIS: No, I don't want a
24 reasonable - - - I want the opposite here, Judge.

25 JUDGE PIGOTT: An unreasonable analysis.

1 MR. ROTTARIS: It's - - - no. It is a
2 statute of limitations. They knew that they - - - in
3 May that the deed was coming. They asked for it. He
4 delivered it. They changed their minds.

5 JUDGE SMITH: But did they have reason to
6 know that the sale had been consummated by delivery
7 of the proper deed of conveyance to the purchaser
8 when they said, as a matter of fact, we don't want
9 this deed; take it back, and the referee said sure.

10 MR. ROTTARIS: Obviously, they - - - no,
11 they believed that they were in good - - - in good -
12 - - by being able to do that, but I think it was
13 wrong. And I think the Appellate Division was
14 correct. In the Lennar case, the deeds were held by
15 the attorney for a year. Then the attorney claimed
16 to say, well, we were holding them in escrow. And
17 the Fourth Department said, well, there wasn't really
18 an escrow, because there wasn't - - -

19 JUDGE SMITH: But what if there had - - -
20 what if there had really been in escrow?

21 MR. ROTTARIS: If this deed would of - - -
22 had been put in escrow?

23 JUDGE SMITH: Yes, in a case with a real
24 escrow, then obviously the design - - - the sale
25 isn't consummated yet, right?

1 MR. ROTTARIS: If there had - - - if it had
2 been put in a real - - -

3 JUDGE SMITH: Yeah, if it's been delivered
4 to the purchaser's attorney in escrow with an escrow
5 agreement - - - it said escrow agreement at the top.
6 It says, I hereby hold this in escrow. Then the sale
7 is not yet consummated, right?

8 MR. ROTTARIS: Yeah, but if that's
9 happening, Judge, the defendant in a foreclosure is
10 jumping up and down and saying, you can't do that.
11 You can't have this go on forever.

12 JUDGE SMITH: You could have - - - you
13 could have jumped up and down all you wanted. I
14 mean, you - - -

15 MR. ROTTARIS: We had no idea about this,
16 Judge. This did not come to light except for the
17 fact that the referee's report of sale says, I
18 delivered a deed on May 11, 2010. We had no idea.
19 We had no idea when this deed transferred. It was
20 only because of the referee's - - - which raises
21 another issue for the court.

22 The statute says you have to move at the
23 time you consummate - - - at the time you make an
24 order approving the report of sale. The only report
25 of sale in the record on this case says, I delivered

1 a deed on May - - - in May of 2010.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 Thanks, counsel.

4 MR. ROTTARIS: Thank you, Your Honor.

5 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

6 MR. ROSENHOCH: Yes, Your Honor. Just a
7 couple more points, and one we've all been dancing
8 around. I just want to be very clear about it. The
9 law in this state is that a conveyance takes effect
10 upon delivery, and the case law for well over a
11 hundred years has been that delivery occurs when the
12 grantor delivers and the grantee accepts.

13 JUDGE PIGOTT: That's the real property
14 law, and I - - -

15 MR. ROSENHOCH: It is.

16 JUDGE PIGOTT: And I think that's ironclad.

17 MR. ROSENHOCH: That's right.

18 JUDGE PIGOTT: This is the actions and
19 proceedings law and having to do with, you know, as
20 we all know, what happens when there's a default on a
21 mortgage or a lien, and then there's a - - - and it
22 just seems to me that - - - that once - - - I mean,
23 once the courts are in this thing, they call the
24 tune. It's not the plaintiff.

25 And what Mr. Weinmann - - - if I got his

1 name right - - - should have done is what he did, and
2 then all of a sudden, he's not reporting to the court
3 anymore, he's reporting to the plaintiff. And he's
4 doing what the plaintiff wants. Maybe that's okay; I
5 don't know.

6 But it seems to me at some point that as
7 the Doyle interests are saying, you know, we got to
8 move on with our lives, too. And if it's not sold,
9 it ought to be, and it wasn't, and therefore, there
10 ought to be a new bid, wouldn't you think?

11 MR. ROSENHOCH: Your Honor, I disagree. I
12 disagree because the legislature spoke, and they
13 spoke in 1371 and used the term "consummation of the
14 sale by the delivery of a proper deed of conveyance."

15 JUDGE PIGOTT: Right.

16 MR. ROSENHOCH: We presume that the
17 legislature knew what they were talking about. There
18 - - - this is in the real property, yes, actions and
19 proceedings law. It is part and parcel of the law of
20 New York concerning real estate, just like - - -

21 JUDGE PIGOTT: I'm not sure they
22 contemplated that people - - -

23 MR. ROSENHOCH: Just - - -

24 JUDGE PIGOTT: - - - would be doing stuff
25 after - - - after sale. In other words - - -

1 MR. ROSENHOCH: They - - -

2 JUDGE PIGOTT: - - - they figured that the
3 referee would walk out of County Hall with a deed
4 having been conveyed to the bidder and that would - -
5 - and that would be that.

6 MR. ROSENHOCH: With all due respect, I
7 disagree.

8 JUDGE PIGOTT: Well, within reasonable
9 time. I know he's got to prepare.

10 MR. ROSENHOCH: Well, and therein lies - -
11 - lies the rub.

12 JUDGE PIGOTT: Yeah.

13 MR. ROSENHOCH: Because things happen. And
14 yes, maybe under this regime, maybe the foreclosing
15 plaintiff who is the successful bidder has in your
16 mind, and obviously they do, too much control and/or
17 discretion.

18 JUDGE PIGOTT: It's not so much that, I'm
19 just wondering - - - I mean, put it as innocently as
20 it looks, you're doing this to avoid paying what are
21 supposed to be transfer taxes on the sale of
22 property. And you say, well, we don't want to pay
23 'em. So what we're going to do is this and there's
24 nothing in the statute that says we can't.

25 MR. ROSENHOCH: That's right. I mean,

1 look, in a private deal, if you have a contract for
2 the sale of property and that contract says it inures
3 to the benefit of the promisee, his successors and
4 assigns, you could do the same thing. Oh, man, I
5 didn't want to get this property. Let's just assign
6 it to somebody who's - - - who wants it. Let's
7 assign it - - - you know, that happens.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.
9 Thanks, counsel.

10 MR. ROSENHOCH: Thank you.

11 CHIEF JUDGE LIPPMAN: Thank you, both.
12 Appreciate it.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of M&T Real Estate Trust v. Doyle, No. 55 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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