



**First American Title™**

NATIONAL COMMERCIAL SERVICES

# Current Developments

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## Easements

The Plaintiff granted the Defendants, the owners of land adjoining Plaintiff's property, an "exclusive, perpetual easement to use for any legal purposes" a portion of the Plaintiff's property. After the Defendants put up a gate in the easement area blocking the entrance to the driveway on the Plaintiff's property, the Plaintiff sought an Order directing the Defendants to remove the gate and a judgment that the easement had been extinguished due to misuse. The Defendants asserted that since they held an "exclusive" easement they could exclude even the Plaintiff from the easement area.

According to the Supreme Court, Queens County, an exclusive easement, which gives the holder of an easement the right to exclude even the property owner, is "disfavored" under New York law. "An easement will be deemed non-exclusive unless the subject easement agreement demonstrates the clear intent of the parties to allow the easement holder to exclude both third-parties and the landowner." Since the easement did not clearly prohibit the landowner from using the easement area it was not "exclusive", and the Defendants were directed to remove the gate and not limit or encroach on the Plaintiff's use of the subject area.

The Court denied the Plaintiff's motion for summary judgment on the cause of action to have the easement declared extinguished. There was no proof that the Defendants had used the easement in an unlawful manner. *Amlak Realty Corp. v. A.H.S.A. Corp.*, decided June 29, 2012, is reported at 2012 WL 3289004.

## Electronic Recording

The electronic recording ("e-recording") in New York State of documents affecting real property will be possible on and after September 24, 2012 in counties electing to record electronically. Reference should be made to Chapter 549 of the Laws of 2011 ("An Act to amend the state technology law and the real property law, in relation to permitting electronic recording of instruments affecting real property") and pending Part 540 ("Electronic Records and Procedures Act") of 9 NYCRR Subtitle N, which Part will be effective on or about September 19.

On September 24, e-recordings will be accomplished by a Registered Submitted electronically

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transmitting a scanned image of the document to be recorded, together with all required transfer tax returns and ancillary instruments. Recording charges and taxes will be paid by the recorder debiting an account through an ACH payment. Submitting a document executed and acknowledged electronically is authorized under Chapter 549 but is not expected to be done in New York at this time.

When a county elects to permit e-recording, original paper documents will still be recordable through the traditional, paper based process. It is understood that the Counties of Rockland and Westchester, and possibly Nassau County, will permit e-recording on September 24.

### Equitable Subrogation

In December 2007, the Bank of Smithtown (the "Bank") made a mortgage loan to fund the purchase of property in Orange County. Proceeds of the loan were applied to satisfy three existing mortgages. The title report did not, however, report a mortgage recorded in March of 2006 made to Arbor Commercial Mortgage, LLC ("Arbor") on a part of the property. In an Action to foreclose its mortgage, Arbor claimed that its mortgage was senior to the Bank's mortgage.

The Supreme Court, Rockland County held that Arbor's mortgage had priority over the Bank's mortgage. The Court also denied the Bank's motion for leave to serve an amended answer to assert a counterclaim seeking priority based on the doctrine of equitable subrogation or, alternatively, directing the marshaling of assets, since the Bank's mortgage also encumbered property in Rockland County. The Court determined that the Bank could not rely on the doctrine of equitable subrogation because it had constructive knowledge from the real estate records of Arbor's prior recorded mortgage. The Appellate Division, Second Department, reversed the ruling of the lower court. Citing the 1967 decision of the Court of Appeals in *King v. Pelkofski*, reported at 20 N.Y.2d 326, the Appellate Division held that "the Bank's constructive knowledge of the plaintiff's mortgage is not an absolute bar to application of the doctrine of equitable subrogation." *Arbor Commercial Mortgage, LLC v. Associates at the Palm, LLC*, decided May 23, 2012, is reported at 945 N.Y.S. 2d 694.

### Marketability of Title

WP Plaza was the successful bidder at auction in the foreclosure of three consolidated mortgages. Since a mortgage held by People's Bank was recorded prior to the recording of the second and third of the three consolidated mortgages being foreclosed, and People's Bank was only named in the foreclosure as the holder of a junior lien as to the first of the consolidated mortgages, WP Plaza sought to be excused from completing its purchase due to a possible title defect. The Supreme Court, Queens County, held that WP Plaza had not defaulted in its obligation to complete the purchase of the property; a purchaser at a foreclosure sale is entitled to a good, marketable title and is not obligated to accept a doubtful title until the title defect is remedied.

However, since the Plaintiff produced a satisfaction of the People's Bank mortgage after the extension of the scheduled closing date, WP Plaza was obligated to complete the purchase. Under the terms of sale, time was of the essence as to the purchaser only, and as "[t]he satisfaction from People's Bank...was obtained within a reasonable time after the extended closing date...the delay does not provide an equitable basis to void the sale." The Court also held that the presence of tenants or squatters at the property was not a basis for relieving WP Plaza of its obligation to complete the purchase. *IRM Realty Group LLC v. 124-15 Jamaica Ave. Realty Corp.*, decided August 20, 2012, is reported as 2012 NY Slip Op 51611 and posted at [https://www.nycourts.gov/reporter/pdfs/2012/2012\\_32229.pdf](https://www.nycourts.gov/reporter/pdfs/2012/2012_32229.pdf).

### Mortgage Foreclosures/MERS

The Plaintiff brought an Action for a judgment declaring that a mortgage executed to MERS, as nominee for HSBC Mortgage Corporation (USA) ("HSBC"), was unenforceable. The Plaintiff asserted that HSBC did not have

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standing to foreclose the mortgage; the mortgage was made to MERS, the note secured by the mortgage was made to HSBC, and MERS neither advanced any funds nor had physical possession of the Note. The Supreme Court, Suffolk County, dismissed the Action. According to the Court, the Second Department's 2011 decision in *Bank of New York v. Silverberg*, reported at 926 N.Y.S. 2d 532, does not require that the holder of the note be the same as the mortgagee of record. The issue in *Silverberg* was the authority of MERS, the holder of a mortgage as nominee for the lender, to assign the related note. Further, the Plaintiff's claim, which in effect challenges HSBC's standing in a foreclosure action that has not been commenced, is premature. *Shui Fong Loo v. HSBC Mortgage Corporation (USA)*, decided July 30, 2012, is reported at 36 Misc.3d 1223 and 2012 WL 3139879.

## **Mortgages/"Foreclosure Rescue"**

Plaintiffs, the owners of a four-family dwelling in Brooklyn, brought an Action to undo their conveyance of the property to Defendant Jeanette Bowles, which transfer was purportedly made to facilitate the refinancing of a mortgage on the property. The property was to be re-conveyed to the Plaintiffs at the end of one year. The Plaintiffs also sought an Order canceling two mortgages executed by Bowles to MERS, as nominee of M&T Mortgage Corporation ("M&T"). The Plaintiffs asserted that M&T's representative at the closing knew or should have known that the making of the mortgages was part of a fraudulent transaction.

The Supreme Court, Kings County, held that M&T was a bona fide encumbrancer under Real Property Law Section 266 ("Rights of purchaser or incumbrancer for valuable consideration protected") and granted M&T's motion for summary judgment dismissing the complaint as to it. Section 266 provides that the title of a purchaser or incumbrancer for a valuable consideration is not impaired "unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." M&T conducted a fraud investigation before the loans were made and found no evidence of fraud. In addition, M&T had no record of any communication prior to or at the time the loans were made suggesting that there was any irregularity, impropriety, or indicia of fraud. *Foster v. Bowles*, decided August 7, 2012, is reported at 36 Misc. 3d 1229 and 2012 WL 3516872.

## **Mortgage Recording Tax/New York State Transfer Tax**

New York State's Department of Taxation and Finance has announced that the interest rates to be charged for the period October 1, 2012 – December 31, 2012 for late payments and assessments of Mortgage Recording Tax and the State's Real Estate Transfer Tax will be 7.5% per annum, compounded daily. The interest rate to be paid on refunds of those taxes will be 2% per annum, compounded daily. The interest rates are published at [http://www.tax.ny.gov/pay/all/int\\_curr.htm](http://www.tax.ny.gov/pay/all/int_curr.htm).

## **Mortgage Recording Tax/New York State Transfer Tax**

The Office of Tax Policy Analysis in New York State's Department of Taxation and Finance has posted its Annual Statistical Report of New York State Tax Collections for the State's fiscal year 2011-2012 (April 1, 2011-March 31, 2012). According to the Report, the Real Estate Transfer Tax collected in FY 2011-2012 was \$610,047,675, up from \$580,100,733 in FY 2010-2011. Mortgage recording tax collected statewide in FY 2011-2012 was \$1,124,159,703, with the mortgage recording tax collected in New York City being \$677,550,993. In FY 2010-2011, the mortgage recording tax collected statewide was \$1,036,827,652 and the mortgage tax collected in New York City was \$544,589,565. The Report can be obtained at the following link: [http://www.tax.ny.gov/research/stats/statistics/new\\_reports.htm](http://www.tax.ny.gov/research/stats/statistics/new_reports.htm).

## **Mortgages/Reformation**

A deed vested title in a husband and his wife, as tenants by the entirety. The note and mortgage, however, only named the husband as the borrower. In an Action to foreclose the mortgage, the Plaintiff sought to have the mortgage reformed to have the wife added as a mortgagor. The Supreme Court, New York County, granted

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the wife's motion for summary judgment dismissing the complaint as to her, and the Appellate Division, First Department, affirmed. Although an instrument may be reformed on the ground of mutual mistake or because of a scrivener's error, there was no evidence that the wife had any intent to be bound by the mortgage. She and her husband were in the midst of a divorce, she was represented at the closing by an attorney-in-fact, she had not applied for the mortgage, and she had no contract with the Plaintiff. *US Bank National Association v. Lieberman*, decided August 7, 2012, is reported at 2012 WL 3166732.

## Receivers

In a matrimonial action, a judgment was rendered awarding the former husband a distributive share of the marital assets. To ensure satisfaction of the judgment, he moved to be appointed as receiver with authority to sell his former wife's cooperative unit. The Supreme Court, Kings County, found that relief could be granted pursuant to CPLR Section 5228 ("Receivers") which states, in part, "...[u]pon motion of a judgment creditor...the court may appoint a receiver who may be authorized to...sell any real or personal property in which the judgment debtor has an interest..." The appointment of a receiver is, however, within the Court's discretion and a receiver should be appointed only when this remedy is necessary and appropriate.

The Plaintiff had not attached a bank account of the Defendant and, according to the Court, "[w]ithout evidence in support of the assertion that there is no adequate remedy other than receivership that would result in satisfaction of the judgment, the court cannot employ such drastic measures." Further, it not being known whether the sale of the cooperative unit would result in proceeds in excess of the homestead exemption, the Plaintiff had not shown that a receivership would increase the likelihood that the judgment would be satisfied. The Court denied the Plaintiff's motion with leave to renew within ninety days from the date of its ruling. To determine whether the appointment of a receiver to sell the unit was appropriate, an appraisal of the cooperative unit and a lien search were needed. *Booth v. Ling-Shan Li*, decided July 9, 2012, is reported at 36 Misc. 3d 1212 and 2012 WL 2866286.

## Recording Act

An Action was commenced to determine which of two mortgages executed by the same borrower had priority. The Plaintiff's mortgage was executed on July 3, 2008 and recorded November 25, 2008. A portion of the proceeds of that mortgage were applied to satisfy a prior mortgage, the Satisfaction of which was recorded before the Defendant-mortgagee's mortgage was executed. The mortgage made to the Defendants (the "Colin Mortgage") was executed on September 15, 2008 and recorded on September 19, 2008.

New York's Recording Act, Real Property Law Section 291, protects the priority of the lien of a mortgagee which obtains its lien in good faith and for a valuable consideration, provided that its mortgage is first recorded. A mortgage securing an antecedent debt has been held not to be an instrument given for a valuable consideration. Since the Colin Mortgage secured approximately \$228,764 of antecedent debt, and only \$22,664.77 in additional loan proceeds, the Plaintiff asserted that the Colin Mortgage did not secure valuable consideration. The Supreme Court, Rockland County, held that the new money secured by the Colin Mortgage constituted valuable, and not nominal, consideration, and that the Colin Mortgage was entitled to the protection of the Recording Act.

The Plaintiff also asserted that the holders of the Colin Mortgage should be charged with constructive notice of the Plaintiff's mortgage because the Satisfaction of the prior mortgage, with funds from the Plaintiff's mortgage, was recorded before the Colin Mortgage was executed. The Court noted that the title report for the Colin Mortgage did not report the discharged mortgage. *Capital Stack Fund, LLC v. Badio*, decided July 15, 2012, is reported at 2012 WL3234283.

## Recording Act

In 2005, a mortgage (the "Fremont Mortgage") was executed to MERS, as Nominee for Fremont Investment & Loan. The Fremont Mortgage was not recorded. In 2007, the property was conveyed to the mortgagors'

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daughters, who executed a mortgage (the "Delta Mortgage") to MERS, as Nominee for Delta Funding Corporation ("Delta"). An Action pursuant to Real Property Actions and Proceedings Law Article 15 ("Action to compel the determination of a claim to real property") was commenced by MERS to set aside the 2007 mortgage as fraudulent and for a ruling that the 2005 mortgage had priority over the 2007 mortgage. The Supreme Court, Kings County, denied the motion for summary judgment dismissing the complaint made by HSBC Bank USA, NA, as Indenture Trustee, the holder by assignment of the Delta Mortgage. The Appellate Division, Second Department, affirmed the ruling of the lower court.

According to the Appellate Division, "...HSBC failed to show that Delta 'had no knowledge of the alleged fraud or of facts that would have led a reasonable mortgagee to make inquiry of the possible fraud at the time the [Delta] mortgage was entered into...' [citations omitted]. Checks issued at the closing of the Delta Mortgage did not correspond with disbursements listed on the settlement statement, and, while the settlement statement indicated that there was a payment being made to the daughter's mother, other documents at the closing indicated that the daughters obtained title to the property for no consideration. Therefore, HSBC did not therefore establish, prima facie, that Delta was a bona fide encumbrancer without constructive notice of the Fremont Mortgage. HSBC, as assignee of the Delta Mortgage, had no greater rights than its assignor. Mortgage Electronic Registration Systems, Inc. v. Rambaran, decided July 25, 2012, is reported at 97 A.D. 3d 802 and 2012 WL 3023980.

## Religious Corporations

Under Religious Corporations Law Section 12 ("Sale, mortgage and lease of real property of religious corporations", "[a] religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court...") The Plaintiff church, the owner of property in Bellport, Suffolk County, in order to obtain municipal approval and financing for the construction of senior citizen housing at its property, executed a deed to a corporation which, in turn, deeded the property to Allen Kwan, the corporation's majority shareholder. Both conveyances were made without Court approval. Further, Kwan executed two mortgages on the property, none of the proceeds of which went to the Church. The senior citizen housing was not approved by the Town of Brookhaven, the property was never deeded back to the Church, and the mortgages went into default. The Supreme Court, Suffolk County, held that the deeds were null and void, ab initio. According to the Court, "until and unless leave of the court has been obtained, on notice to the Attorney General, a religious corporation cannot make a valid conveyance of its real property." The Court also annulled the two mortgages and directed the Suffolk County Clerk to cancel and discharge the mortgages of record. Lord-N-Fields of Freedom Bible Church Community Workers International, Inc. v. Kwan, decided August 2, 2012, is reported as 2012 NY Slip Op 32151 and posted at: [https://www.nycourts.gov/reporter/pdfs/2012/2012\\_32151.pdf](https://www.nycourts.gov/reporter/pdfs/2012/2012_32151.pdf).

## Village of Dobbs Ferry, Westchester County

Pursuant to Section 204-21 ("Adoption of plans for inspection and reinspection") of the Village of Dobbs Ferry's Village Code, as amended by Local Law No. 1 of 2012, "[a]ll residential properties [within the Village] shall be inspected/re-inspected by the building department before transfer of ownership... at a fee of one hundred and fifty dollars(\$150.00)..." According to a Regulation of the Village:

"All properties must be re-inspected and receive a CCO before transfer of ownership.

It is the responsibility of the current owner to call the building department to arrange for an inspection date.

Inspections will deal with fire & life safety and that the property confirms to

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building department records.

The cost of the CCO is \$150.

If the property is found to not be in compliance, the second re-inspection after work is performed is at no additional charge.

A CCO is valid for 90 days.

If a CCO is more than 90 days old but not more than 120 days, a re-inspection must be conducted and a current CCO issued at half the original fee.

A CCO more than 120 days must have a re-inspection and the original fee.

A CCO inspection can be paid for, done and requested not to be issued for up to 180 days, then a re-inspection can be performed and CCO issued at no added fee.”

The Regulation is posted at the following link:

<http://www.dobbsferry.com/Building-Department/regulations-for-transfer-of-property-within-the-village.html>

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