First American Title™
NATIONAL COMMERCIAL SERVICES

# Current Developments

*By Michael J. Berey*
Senior Vice President, Chief Underwriting Counsel – New York
First American Title National Commercial Services

## Contracts of Sale

A contract of sale provided that on a default by the purchaser the seller would be entitled to retain, as its "sole remedy", the contract deposit as liquidated damages." The contract further stated that the seller would have "no further rights...against Purchaser…" The seller declared the purchaser in default and retained the down payment as liquidated damages. In an Action by the purchaser to recover its down payment, the Supreme Court, Suffolk County, awarded the seller the down payment and, under Civil Practice Law and Rules Section 5001(a) ("Interest to verdict, report or decision") 9% statutory interest. The Appellate Division, Second Department, modified the judgment to vacate the award of statutory interest and the Supreme Court amended its judgment to direct the escrow agent to turn over the contract deposit and bank account interest on the deposit to the seller. The Court of Appeals affirmed.

According to the Court of Appeals, an award of statutory interest under Section 5001(a) applies when the parties to a contract do not specify an exclusive remedy. In this case, "[t]he use of the terms 'sole remedy', 'sole obligation', and 'no further rights' by the parties, together with the provision for interest on the escrowed sum, was sufficiently clear to establish for purposes of this transaction that interest paid at the statutory rate was not contemplated by the parties…The contract language will always control, as it should in this case." J. D'Addario & Company, Inc. v. Embassy Industries, Inc., decided November 19, 2012, is reported at 20 N.Y. 3d 113.

## Contracts of Sale/Statute of Frauds

General Obligations Law Section 5-703 ("Conveyances and contracts concerning real property required to be in writing") provides that "[a] contract…for the sale, of any real property…is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing." In Guerin v. Smith, decided by the Supreme Court, Suffolk County, on December 14, 2012, an Action was commenced by the "purchaser" under a writing executed by Dorothy Borden, as co-Trustee under the Dubois T. Smith Trust. The property was owned by Dubois T. Smith ("Smith") individually, and by Dubois T. Smith and Dorothy Borden as co-Trustees.

**No. 147. January 16, 2013**

The Court held that the writing was unenforceable under the Statute of Frauds because Smith did not execute individually and as co-Trustees. As to execution on behalf of the Trust, under New York law, when there is more than one Trustee [absent a provision stating otherwise in the Trust] the Trustees must exercise their powers collectively. Although it was claimed that Mr. Smith was in a nursing home, suffering from Alzheimer's disease and advanced dementia, "there has been no representation that he resigned as trustee or that he has ceased to act, or that a conservator or other fiduciary has been appointed to manage his estate." Decided December 14, 2012, the case is reported as 2012 NY Slip Op 33082 and posted at http://www.courts.state.ny.us/reporter/pdfs/2012/2012_33082.pdf.

## Deeds

A 1988 deed to approximately 10 acres of real property executed by the Plaintiffs erroneously failed to except from the conveyance a 987 square foot parcel of land (the "Disputed Parcel"). The Disputed Parcel was re-conveyed twice in 2010. In 2011, the Plaintiffs, the grantors under the 1988 deed, commenced an Action seeking reformation of that deed. The Appellate Division, Third Department, affirmed the ruling of the Supreme Court, Schenectady County, dismissing the complaint.

An Action to reform a deed by reason of a "mistake" must be commenced within six years under CPLR Section 213 ("Actions to be commenced within six years"). The Plaintiffs in this case commenced the Action 23 years after the conveyance. Further, nothing in the record suggested that the Plaintiffs were in possession of the Disputed Parcel, and their payment of what the Supreme Court characterized as a "minuscule amount of taxes" on the Disputed Parcel did not toll the statute of limitations. Mastropietro v. Lecci, decided November 1, 2012, is reported at 953 N.Y.S. 2d 349.

## Deeds/Land Under Water

A 1968 deed conveyed land "along the edge of Perch Pond" to Anthony Furlano. The deed also stated that "(t)he Grantor further conveys any rights which he may have in and to the lands under the waters of Perch Pond which bound and abut unto the lands hereinabove conveyed." However, conveyances executed by Anthony and Marilyn Furlano in 1973 to the Defendants' predecessors in title recited only that the deeds conveyed land "along the waters (sic) edge of Perch Pond" and "along the edge of Perch Pond." The Plaintiffs claimed title to the land under water as the grantees under a 1993 deed which conveyed the Furlanos' remaining waterfront property and "all remaining lands of Grantors". The Plaintiffs asserted that the 1973 deeds did not convey the land under water and therefore the submerged land passed under the 1993 deed to the Plaintiffs' predecessors in title.

The Court of Appeals, reversing an Order of the Appellate Division, Third Department, held that the Defendants had title to the underwater land. According to the Court, "(i)t has long been established New York law that a conveyance of land on a pond or stream includes the land under the pond or stream, to the center of the water, unless a contrary intention is made clear. We reaffirm that principle in this case, and hold that its application does not depend on minor variations in the language of the conveyance."

Further, according to the Court, "(t)o make a plain and express reservation of rights to underwater land, a grantor must do more than use the word 'edge' or 'shore' in a deed. He or she must say that land under water is not conveyed, in those words or in words equally clear in meaning. In the absence of an explicit reservation, a grant of land on the shore of a pond or stream will be held to include the adjoining underwater land, except in unusual cases where the nature of the grant itself shows a contrary intention." Knapp v. Hughes, decided October 18, 2012, is reported at 2012 WL 4933274.

## Joint Tenancy

The Appellate Division, Second Department, affirming a ruling of the Supreme Court, Nassau County, held that the execution of a mortgage by a joint tenant to a third party without the knowledge of the other joint tenant does not sever the joint tenancy. On the death of the joint tenant who executed the mortgage, the mortgage

ceased to exist and the surviving joint tenant held the property free and clear of the mortgage.

The mortgagee asserted that under Real Property Law Section 240-b ("Certain conveyances authorized"), the joint tenancy was severed by execution of the mortgage, which was "a written instrument that evidences the intent to sever the joint tenancy" under Section 240-b. The mortgagee also asserted that the mortgagee and the surviving joint tenant were therefore tenants in common. However, according to the Appellate Division, absent language in the mortgage or in another writing evidencing the mortgagor's intent to sever the joint tenancy, the Court could not "conclude that the mere act of delivering a mortgage…evinced [the mortgagor's] intent to sever the joint tenancy." Smith v. Bank of America, decided December 19, 2012, is reported at 2012 WL 6604683.

## Mechanic's Liens

Closing was contingent on the contract vendees obtaining subdivision approval. In order to obtain subdivision approval, the contract vendees engaged certain companies to provide architectural and engineering services. The approvals were not obtained. The companies rendering those services were not paid in full; they filed mechanic's liens for amounts claimed to be owed to them. Plaintiff, the property owner, commenced a breach of contract action against the contract vendees and moved to have the mechanic's liens discharged. The Supreme Court, Greene County, granted the Plaintiff's motion to discharge the mechanic's liens. The Appellate Division, Third Department, affirmed.

According to the Appellate Division, "[a] mechanic's lien on real property is not valid unless the property owner or the owner's agent requested or consented to the lienor's services, and such consent must be shown by some affirmative act, and not merely by the owner's acquiescence or awareness." In this case, "[d]efendants' claims to the effect that plaintiff knew of and consented to their professional services were wholly conclusory and unsupported by any documents or other evidence" and "defendants failed to establish the existence of issues of fact as to whether plaintiff took any affirmative act indicating his consent to defendants' work." Creech v. Rufa, decided December 6, 2012, is reported at 2012 WL 6050321.

## Mortgage Foreclosures

The Supreme Court, Kings County, dismissed for lack of standing a foreclosure action because the Plaintiff did not disclose in either the summons or the complaint that it brought the Action as the agent or servicing agent of the true holder of the Note. The complaint stated that the Plaintiff was the "sole, true and lawful holder of the bond/note and mortgage securing [the] same." Saxon Mortgage Services v. Jackman, decided December 20, 2012, is reported at 2012 WL 6758044.

## Mortgage Foreclosures

The Supreme Court, Kings County, dismissed a complaint to foreclose a mortgage since the Plaintiff purportedly assigned the mortgage and note during the pendency of the Action. The Appellate Division, Second Department, reversed the ruling of the lower court. According to the Appellate Division, "an original mortgagee can continue an action even though it assigned its interest in the mortgage and note to another entity during the pendency of an action, unless the court directs a substitution of parties pursuant to CPLR 1018" ["Substitution on transfer of interest"]. Under Section 1018, "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." Indymac Bank F.S.B. v. Thompson, decided October 3, 2012, is reported at 952 N.Y.S. 2d 86.

## Mortgage Foreclosures

Under Real Property Actions and Proceedings Law Section 1307 ("Duty to maintain foreclosed property"), effective April 14, 2010, a foreclosing mortgagee which has obtained a judgment of foreclosure on residential real property that is or becomes vacant, or occupied by a tenant but abandoned by the mortgagor, "shall maintain such property until such time as ownership has been transferred…and the deed for such property has been recorded…"

The Plaintiff in an Action to foreclose a mortgage on property in Albany sought an Order vacating the judgment of foreclosure entered September 22, 2010. It asserted that it was "'unfair' to require it to continue to maintain the property" since there were no bids at auction, the property was vacant since the commencement of the Action, was subject to numerous tax liens, and the mortgagee had to make repairs required by the municipality.

The Supreme Court, Albany County, denied the motion to vacate the judgment. According to the Court, "This statute was in effect for approximately five months when [the] judgment [of foreclosure] was entered…Only one public auction has been held and two years have transpired without any further effort to transfer the property. Moreover, plaintiff has documented only limited maintenance repairs, apparently expending $431.30 during this period. On balance, plaintiff's duty to maintain the property in furtherance of the statutory objective of preserving the State's neighborhoods, outweighs the maintenance burden imposed." Trustco Bank v. Franklin, decided November 15, 2012 and reported as 2012 NY Slip Op 32758, is posted at 2012 WL 5681315.

## Mortgage Foreclosures/RPAPL Section 1303

Real Property Actions and Proceedings Law Section 1303, as amended by Chapter 507 of the Laws of 2009, effective January 14, 2010, requires the plaintiff in an action to foreclose a mortgage on property improved by a one-to-four family dwelling to serve on any mortgagor, with the summons and complaint, a statutory "Help for Homeowners in Foreclosure Notice." In an Action brought to impress and foreclose on an equitable mortgage, the Supreme Court, Queens County, dismissed the complaint and canceled the notice of pendency due to the Plaintiff's failure to comply with the notice requirement of Section 1303. According to the Court, "[p]roper service of [the] RPAPL §1303 notice with the summons and complaint is a condition precedent to the commencement of the action, and noncompliance results in dismissal of the complaint."Landau v. Haglili, decided September 10, 2012 and reported at 21012 NY Slip OP 32758, is posted at: http://www.courts.state.ny.us/reporter/pdfs/2012/2012_32758.pdf

## Mortgages/Deeds-in-Lieu of Foreclosure

A foreclosing mortgagee sought a declaration of the relative priorities of the mortgages on the property. The Plaintiff's mortgage was subordinate to a mortgage (the "Senior Mortgage") held by assignment by Empire State Bank, N.A. ("Empire"), which Senior Mortgage was consolidated with another, subordinate mortgage made to Empire. The Plaintiff asserted that since Empire accepted a deed in lieu of foreclosure, Empire's its entire consolidated mortgage was extinguished by merger. The Supreme Court, Rockland County, granted the Plaintiff's motion for summary judgment but the Appellate Division, Second Department, awarded summary judgment to Empire, holding that the Senior Mortgage had priority over the Plaintiff's mortgage.

According to the Appellate Division, "the plaintiff submitted no evidence of Empire's intent to merge its mortgage and ownership interests when it accepted the deed in lieu of foreclosure. Moreover, a merger would injure Empire by subordinating its prior assigned mortgage to the plaintiff's subsequent mortgage, and the plaintiff would not be unjustly enriched if a merger is not recognized, given that it accepted its mortgage interest with the knowledge that the previously assigned mortgage was superior." Congregation Beth Medrosh of Monsey, Inc. v. Rolling Acres Chestnut Ridge, LLC, decided December 12, 2012, is reported at 2012 WL 6176651.

## Mortgage Foreclosures/Village of Hempstead

Local Law No. 9-2012 of the Village of Hempstead in Nassau County, effective January 1, 2013, requires a mortgagee commencing an action to foreclose a mortgage on property within the Village to notify the Village Clerk, on a form prescribed by the Village Clerk, of the name of and contact information for the plaintiff, the name of the defendant, the address and tax lot identification of the property, the date on which and the court in which the action was commenced, and "such other information as the department may require by rule." The Clerk is also to be notified if the action is discontinued, a judgment has been issued, or the property is sold in

foreclosure. "The failure to notify shall not be deemed to affect in any way any pending legal proceeding related to such residential real property." Notice is not required for foreclosures commenced prior to September 30, 2010 or brought by a governmental entity. The Local Law is posted at http://ecode360.com/16263636.

## Mortgages/Yield Maintenance

The promissory note for a ten year loan made in 2003, secured by a mortgage, permitted the borrower to prepay before maturity, provided there was not a continuing Event of Default and the maturity date had not been accelerated. The note required the payment of a yield maintenance amount, which was to be calculated during the first six years of the loan as of "the actual date of default under the loan." Voluntary payment of the loan did not constitute an Event of Default.

On refinancing with another lender in 2005, notwithstanding that there had not been a default, the loan servicer demanded that the borrower pay yield maintenance. The borrower paid under protest and commenced a breach of contract Action seeking a refund of the yield maintenance amount paid. The Supreme Court, New York County, granted the Defendant-lender's motion to dismiss, holding that it would be "absurd and illogical" to conclude that a yield maintenance amount was not owed absent a default. The Appellate Division, First Department, reversed and granted the Plaintiff-borrower's motion for summary judgment, stating, at 922 N.Y.S. 2d at 568, that "it is not a court's function to imply a term to save a defendant from the consequences of an agreement that it drafted…"

The Court of Appeals affirmed. "Application of the Note's literal language relative to voluntary prepayment and the yield maintenance amount does not result in either absurdity or an unenforceable agreement…The Note, as written, is enforceable according to its terms." Jade Realty LLC v. Citigroup Commercial Mortgage Trust 2005-EMG, decided November 19, 2012, is reported at 2012 WL 5833613.

## Not-For-Profit Corporations

Affirming a ruling of the Supreme Court, Kings County, the Appellate Division, Second Department, held that a deed conveying all or substantially all of the assets of a entity formed under New York's Not-For-Profit Corporation Law ("NPCL"), executed without Supreme Court approval as required under NPCL Sections 510 ("Disposition of all or substantially all assets") and 511 ("Petition for leave of court"), and a mortgage made by the grantee of such deed, were void. Real Property Law Section 266 ("Rights of purchaser or incumbrancer for valuable consideration protected") applies only when the challenged conveyance is voidable. Further, the conveyance may not be ratified by the Supreme Court under Religious Corporation Law Section 12(9) ("Sale, mortgage and lease of real property of religious corporation") since the transferor is not a religious corporation. Solar Line, Universal Great Brotherhood, Inc. v. Prado, decided November 21, 2012, is reported at 100 A.D. 3d 862 and 2012 WL 5870703.

## Orange County

The County Clerk, Orange County, has issued a notice regarding Form RP-5217 PDF (the State Board of Real Property Services' "Real Property Transfer Report"), stating the following:

> "Please be advised that effective immediately the single page RP-5217 PDF will be an acceptable form of RP-5217 accompanying deeds for recording on or after February 7, 2012."
>
> "The RP-5217 PDF form and instructions can be found on the New York State Office of Real Property Services website: http://www.tax.ny.gov/research/property/assess/rp5217/index.htm. This form may be printed on legal size paper (8 ½ X 14) and utilize a computer as the venue for completion. A completed RP-5217 PDF form is not acceptable when typed or handwritten."

> "The standard four part RP-5217 may still be used when recording Deed conveyances and may be handwritten or typed. Fees for both types of RP-5217 remain the same."

The ORPS website indicates that RP-5217 PDF is being accepted for transfers of real property in twelve upstate counties.

## Recording Act/Notice

A Bankruptcy Trustee sought to avoid a mortgage filed pre-petition which had been improperly indexed due to an error on the recording cover page, claiming, under the Trustee's "strong arm" powers, that the Trustee was a bona fide purchaser without knowledge of the mortgage as of the date on which the bankruptcy was commenced. The Trustee also asserted that the correction to the recording made post-petition was an impermissible post-petition transfer of an asset of the bankruptcy estate. The Bankruptcy Court Judge denied the Trustee's motion and granted the mortgagee's motion to dismiss the adversary proceeding.

Since a second mortgage, later executed to the same lender as the misindexed mortgage but properly indexed, referenced an "Existing Indebtedness" and its principal balance, the Bankruptcy Court held that the Trustee could not be deemed a bona fide purchaser without notice of the first mortgage. The District Court, Eastern District of New York, affirmed, stating that "the absence of prior proper recording did not entitle the Trustee as putative purchaser to close his eyes as to what the Second Mortgage revealed."

Further, according to the District Court, "[w]hether or not the post-petition correction…was an improper conveyance of a property interest held by the debtors' estate is immaterial…the voiding of the correction does not supply a ground to extinguish the Trustee's constructive notice of the underlying encumbrance, itself." O'Connell, as Trustee v. JPMorgan Chase Bank, National Association, decided December 11, 2012, is reported at 2012 WL 6151972.

## Tax Sales/Notice

Vacant land in the Town of Chester, in Warren County, was taken by the Town for failure to pay real estate taxes and then sold at auction in 1999. Plaintiffs, the owners of the property, who lived in New Jersey, asserted that the attempts to afford them notice of the foreclosure were constitutionally inadequate, and sought a declaration that they still owned the property. The Supreme Court, Warren County, granted the County's motion for summary judgment; the Appellate Division, Third Department, affirmed, as did the Court of Appeals.

The Plaintiffs moved from South Orange, New Jersey, to which tax bills were sent, to Milburn, New Jersey; their direction to the post office to forward mail to their new address expired and mailed notices were returned as undeliverable. The Plaintiffs contended that the tax collector was required to either find some means of making personal service, to address a notice to occupant at their former address, or to search New Jersey public records for their new address. The Court of Appeals held that such actions were not constitutionally required and that the Plaintiffs were not deprived of their property without due process of law. Mac Naughton v. Warren County, decided December 11, 2012, is reported at 2012 WL 6115650.

**Michael J. Berey**
Senior Vice President
Chief Underwriting Counsel - New York
No. 147. January 16, 2013
mberey@firstam.com