



First American Title™
NATIONAL COMMERCIAL SERVICES

Current Developments

By *Michael J. Berey*
Senior Underwriting Counsel
First American Title National Commercial Services

No. 169; September 15, 2015

First American Title Insurance Company, and the operating divisions thereof, make no express or implied warranty respecting the information presented and assume no responsibility for errors or omissions. First American, the eagle logo, First American Title, and firstam.com are registered trademarks or trademarks of First American Financial Corporation and/or its affiliates.

REV. 09, 2015

©2015 First American Financial Corporation and/or its affiliates. All rights reserved. • NYSE: FAF

First American Title National Commercial Services

Current Developments

Condominiums & Cooperatives

The New York State Department of Law's Real Estate Finance Bureau issued the following Memoranda, which are posted at <http://www.ag.ny.gov/real-estate-finance-bureau/hot-topics> — "Guidance on Housing Development Fund Corporations Seeking to Transfer or Sell Property for, or Otherwise Convert Property to Market Rate Use" (July 16, 2015), "Guidelines for Advertising Out-of-State Real Estate Securities Offerings on An Internet Web Site or App" (August 5, 2015), and "Required Disclosure for Occupied Conversion Plans Involving Renovations, Combinations and Expansions" (August 19, 2015).

Contracts of Sale

October 30, 2013 was the closing date under a contract of sale; if the purchaser defaulted the seller was to retain the down payment as liquidated damages. In a letter dated November 8, 2013, sent by the seller's attorney, the purchaser was advised that the closing was scheduled for December 3, 2013, that time was of the essence, and that if the closing did not occur on that date the down payment would be forfeited. The purchaser did not appear at the closing, and the seller declared the purchaser in default. The seller retained the downpayment as liquidated damages. The purchaser commenced an action for specific performance.

The Supreme Court, Kings County, denied the seller's motion seeking dismissal of the complaint and a judgment that the seller was entitled to retain the down payment. The Appellate Division, Second Department, reversed and remanded the case to the Supreme Court. According to the Appellate Division,

"[t]he Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint and on its counterclaims, inter alia, for a judgment declaring that it is entitled to retain the down payment as liquidated damages. The defendant established, prima facie, that it was ready, willing and able to perform on the law day, and that the plaintiff failed to proceed with the closing. [Citations omitted] In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff did not appear at the closing, tender performance, or demand good title, nor did he show that any alleged defect rendered the title unmarketable." [Citation omitted]

An email from the seller's attorney to the purchaser's attorney prior to closing offering to extend the closing date for additional consideration, to which the purchaser's attorney did not respond, did not void the declaration that time was of the essence, and there were no post-closing negotiations that might have estopped the seller from declaring the purchaser in default. *Imperatore v. 329 Menahan Street, LLC*, decided July 15, 2015, is reported at 13 N.Y.S.3d 526.

Deeds

In proceeding under Real Property Actions and Proceedings Law ("RPAPL") Article 15 to quiet title to residential property in Brooklyn, the plaintiff submitted a deed executed in 1999 by his mother, since deceased, to the plaintiff and herself, as joint tenants with a right of survivorship. The deed did not include a property description above his mother's signature; there was a blank space in the area in which a description of the property is customarily set forth. The deed did include the tax section, block and lot number. A deed, apparently unrecorded, was also executed by his mother to his sister in 2005. The Supreme Court, Kings County, held that his sister was the sole owner of the property; the Appellate Division, Second Department, affirmed the Order of the lower court. According to the Appellate Division,

"Since the 1999 deed contained a blank space in the area designated for a property description, and contained no property description anywhere above the mother's signature, it was void for uncertainty. A document designated as 'Schedule A.' which contained a metes and bounds description of the property, and allegedly found in the files of the law firm which prepared the 1999 deed, could not serve as a legal property description, as the 1999 deed contained no language incorporating it by reference. Furthermore, the section,

First American Title National Commercial Services

Current Developments

block, and lot number that were inscribed on the deed also could not serve as a legal property description, since that information appeared below the mother's signature and the acknowledgement thereof and, thus, was not part of the instrument purportedly subscribed and executed by the mother." [Citations omitted]

Maurice v. Maurice, decided August 5, 2015, is reported at 2015 WL 4634902.

Easements

The deed to the plaintiff, the owner of an unimproved parcel of land bordering Sound View Road in a subdivision in Nassau County, granted the plaintiff a "perpetual right of way...over the private roads and drives giving access from the premises hereby conveyed to the public highway..." The defendant homeowner's association retained title to the private roads, drives and rights-of-way.

The County required the defendant to install an emergency generator for its water supply system; the defendant placed the generator in Sound View Road in front of the plaintiff's property. The plaintiff commenced an Action for injunctive relief and for damages for trespass and nuisance. The Supreme Court, Nassau County, granted the defendant's motion for summary judgment dismissing the complaint, which Order was affirmed by the Appellate Division, Second Department. According to the Appellate Division, "[t]here was no evidence presented that the generator substantially interfered with or unlawfully encroached upon the plaintiff's right-of-way on Sound View Road or her right to ingress and egress from Sound View Road." [Citations omitted] Mazzaferro v. Association of Owners of Mill Neck Estates, Inc., decided September 2, 2015, is reported at 2015 WL 5125339.

Limited Liability Companies/De Facto Corporation Doctrine

The Appellate Division, Second Department, has ruled that the de facto corporation doctrine applies to limited liability companies. Although a purported entity which is not yet in legal existence generally cannot acquire title to real property in New York, an unincorporated entity can take title if there is an attempt to organize the corporation under applicable law and it exercises corporate powers. The Court, in an Action brought by a limited liability company to quiet title under RPAPL Article 15 and for a judgment that it owned certain real property, affirmed the Order of the Supreme Court, Kings County, which Order denied the Defendants' motion to dismiss and to have the notice of pendency canceled. According to the Appellate Division, there was a "'colorable' attempt to comply with the statutes governing the formation of an LLC, including the filing requirement, and that the plaintiff exercised its powers as an LLC thereafter." Lehlev Betar, LLC v. Soto Development Group, Inc., decided August 12, 2015, is reported at 2015 WL 4744444.

Mortgage Foreclosures/Endorsement of Note

The Plaintiff-assignee of a mortgage being foreclosed, in response to the Defendants' claim that it was not assigned the note secured by the mortgage and therefore lacked standing, submitted the promissory note with an endorsement in blank attached to the note by a paper clip. The Appellate Division, Second Department, held that "the purported endorsement did not constitute a valid transfer of the underlying note to the plaintiff" and affirmed the ruling of the Supreme Court, Kings County, dismissing the complaint for lack of standing. Uniform Commercial Code Section 3-202 ("Negotiation") requires that "[a]n indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." HSBC Bank USA, National Association v. Roumiantseva, decided July 29, 2015, is reported at 130 A.D.3d 983 and 2015 WL 4546774.

Mortgage Foreclosures/Right of Redemption

JP Morgan Chase Bank, N.A., as successor to Washington Mutual Bank, a junior mortgagee and therefore a defendant in a mortgage foreclosure, defaulted; its motion to vacate its default was denied. The foreclosing plaintiff asserted that the denial of the motion prevented the issuance of an Order requiring that it provide JP Morgan a payoff quote to enable it to redeem the property. The Supreme Court, Westchester County, ordered that the plaintiff provide the requested payoff statement. According to the Court, JP Morgan "is entitled to exercise the right of redemption in the subject property at any time prior to the sale of the property at a foreclosure sale and, therefore, the plaintiff is

First American Title National Commercial Services

Current Developments

compelled to provide WaMu/JPMorgan with a payoff quote.” However, the Court denied JP Morgan’s motion to stay the foreclosure; there having not been a motion for a judgment of foreclosure and sale, “WaMu/JPMorgan can, upon receiving a payoff quote from the plaintiff, redeem its interest in the subject property without a need to disturb the underlying proceedings.” *Blanc Holdings LLC v. Midollo*, decided July 21, 2015, is reported at 48 Misc.3d 1212 and 2015 WL 4471138.

In a similar case, the day before the scheduled auction of property being foreclosed, the holder by assignment of a junior mortgage faxed a letter to the plaintiff asking for a “payoff amount pursuant to the judgment of foreclosure and sale”. The plaintiff did not respond and the property was sold at auction. The junior mortgagee moved for an Order setting aside the sale and permitting it to redeem the property. The Supreme Court, Nassau County, denied the motion and the Appellate Division, Second Department, affirmed. According to the Appellate Division, “...the letter from [the junior mortgagee] requesting the payoff amount, even if deemed to be a stated intention to redeem the mortgage, was not tantamount to an unconditional tender of the full amount due prior to the sale of the property and, once the property was sold at auction, the right to redeem was extinguished.” [Citation omitted] *LIC Assets, LLC v Chriker Realty, LLC*, decided September 2, 2015, is reported at 2015 WL 5125422.

Mortgage Recording Tax/New York State Transfer Tax

New York’s Department of Taxation and Finance announced that the interest rate to be charged for the period October 1, 2015 – December 31, 2015 on 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 will be 2% per annum, compounded daily. The notice issued by the Department is posted at 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 2014-2015 (April 1, 2014-March 31, 2015). According to the Report, the Real Estate Transfer Tax collected in FY 2014-2015 was \$1,037,880,453, up from \$911,351,843 collected in FY 2013-2014. Mortgage recording tax collected statewide in FY 2014-2015 was \$1,971,878,465, the mortgage recording tax collected in New York City was \$1,465,427,230. As reported in the Annual Statistical Report issued for FY 2013-2014, for that fiscal year the mortgage recording tax collected statewide was \$1,765,071,336; the mortgage tax collected in New York City was \$1,216,719,377. The Report for Fiscal Year 2014-2015 is posted at http://www.tax.ny.gov/pdf/stats/stat_fy/2014_15_annual_statistical_report_of_ny_state_tax_collections.pdf.

Streets

Under RPAPL Section 871 (“Action for the removal of encroaching structures”) “[a]n action may be maintained by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land”. New York City commenced an Action under Section 871 seeking the removal of a fence bisecting and narrowing Broadway, an unmapped street in Howard Beach, Queens, and the issuance of a permanent injunction enjoining the Defendant from erecting any structure encroaching on Broadway.

Broadway, also known as Bayview Avenue, has been used by the public since at least the 1970s and has been maintained by New York City since 1994. Passing over public and private lands, including Defendant’s property, Broadway is the only means of vehicular access to a number of homes. There are no easements of record over private lands for the use of Broadway.

New York City asserted that the public had an easement over the Defendant’s property under Highway Law Section 189 (“Highway by use”), stating that “[a]ll lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway...” However, the Supreme Court, Queens County, holding that Highway Law Section 189 does not apply to streets within a City, denied the City’s motion for summary judgment and awarded the defendant summary judgment dismissing the complaint. The Appellate Division, Second Department, affirmed.

Current Developments

According to the Appellate Division, Highway Law Section 189 applies only to Town highways. Further, no evidence was provided that the defendant's property was dedicated to public use by either the Defendant or a prior owner. Not being able to establish that it had a legal interest in that portion of the defendant's land affected by Broadway, the City could not proceed under RPAPL Section 871. *City of New York v. Gounden*, decided August 19, 2015, is reported at 2015 WL 4923559.

Tax Sales

Essex County sold at public auction real property which it had acquired through its foreclosure of tax liens. The "Terms and Conditions of the Auction" recited that "[a]ll sales are subject to approval by the Essex County Board of Supervisors, which shall have the right, in the Board's sole discretion, to reject any bid for any reason whatsoever."

The County Board of Supervisors passed resolutions rejecting the petitioner's bid and authorizing the transfer of the property to the Town of North Hudson. The petitioner sought an Order vacating the Board's resolutions and directing the County to accept the petitioner's original bid, or the petitioner's later, higher bid. The petitioner contended that Real Property Tax Law Section 1166 ("Real property acquired by tax district; right of sale") precluded the County from rejecting the highest bid at a public auction. Under Section 1166(2), no sale of property acquired by a tax district in a tax lien foreclosure "shall be effective unless and until the sale shall have been approved and confirmed by a majority vote of the governing body of the tax district, except that no such approval shall be required when the property is sold at public auction to the highest bidder."

The Supreme Court, Essex County, dismissed the petition/complaint and vacated the notice of pendency filed in the Action. According to the Court, "...RPTL 1166(2) does not preclude the County from rejecting the highest bid obtained for a property at public auction. Rather, the County was entitled to implement a procedure whereby all sales to the highest bidder at public auction were subject to approval by the Board and, further, to utilize this procedure in rejecting petitioner's bids..." *Moore v. County of Essex*, decided August 14, 2015, is reported at 2015 NY Slip Op 25297 and posted at http://www.courts.state.ny.us/reporter/3dseries/2015/2015_25297.htm.

Michael J. Berey

Senior Underwriting Counsel

Reporting Current Developments since 1997

No. 169; September 15, 2015

mberey@firstam.com