



## **First American Title Insurance Company of New York CURRENT DEVELOPMENTS**

**Bankruptcy/Transfer Tax** – Under Bankruptcy Code Section 1146(a), "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax". The United States Supreme Court, in a decision issued June 16, 2008, reversing the Eleventh Circuit Court of Appeals, held that the 1146(a) exemption from stamp taxes only applies to a transfer made by a Debtor in bankruptcy after confirmation of a plan of reorganization. In the case under review, the sale on March 16, 2004 of substantially all of the Debtor's assets under Code Section 363(b)(1) was made under a Bankruptcy Court Order providing that the transfer was exempt from Florida stamp taxes. The Chapter 11 Plan was filed on March 26, 2004, amended on July 31, 2004 and confirmed by the Bankruptcy Court on October 21, 2004. Before the plan of reorganization was confirmed, the State of Florida filed an objection, seeking the payment of State stamp taxes since the transfer was not "under a plan confirmed". The Bankruptcy Court held that the sale was exempt from Florida's stamp tax because the transfer was necessary to consummate the plan; the United States District Court for the Southern District of Florida and the Court of Appeals for the Eleventh Circuit affirmed. Florida Department of Revenue v. Piccadilly Cafeterias, Inc. is reported at 2008 WL 2404077.

**Contracts of Sale** - Plaintiffs-purchasers entered into a contract to purchase a condominium unit in Brooklyn from Defendant with a closing date of February 27, 2006. The Plaintiffs notified the Defendant's attorney on February 21 that there were a number of defects in the unit which needed to be cured before closing. In response, on April 3, the Defendant's attorney notified the Plaintiffs that they were in default for failing to close and set a new closing date for May 4 "with time of the essence". The Purchasers responded on April 13 that they were not in default and would close once "the serious deficiencies [in the unit] have been addressed and remedied". In a letter dated April 27, the Seller's attorney responded that the purchase agreement would be terminated and the contract deposit returned if the balance of the purchase price was not tendered on May 4. On May 3 the Plaintiffs sent a statement to the Seller's attorney accepting the return of the deposit. However, the Seller's attorney informed the Purchasers on May 3 that if they did not close on May 4 their deposit would be forfeited. The Seller's attorney held a "closing" on May 4, found the Purchasers in default, and refused to refund the deposit. The Purchasers commenced an action to recover the contract deposit or, alternatively, for specific performance, and filed a notice of pendency. The Seller

moved for summary judgment dismissing the causes of action for specific performance and canceling the lis pendens, claiming that the Purchasers were in default, alleging that the April 27 offer to return the down payment was a typographical error. The Supreme Court, Kings County, denied the motion for summary judgment, and the lower court's Order was affirmed by the Appellate Division, Second Department. According to the Appellate Division, "as a result of the letter dated April 27, 2006, the purchasers were no longer on notice that if they failed to close on May 4, 2006, they would be held in default and forfeit their contract deposit". The notice given on May 3, one day prior to the scheduled closing, did not give the Plaintiffs sufficient time to perform. *Iannucci v. 70 Washington Partners, LLC*, dated May 20, 2008, is reported at 2008 WL 2132350.

Cooperative Corporations/"Flip Tax" – A flip tax can be effectuated by an amendment to a cooperative corporation's By-laws. In an Action brought by the seller of a cooperative apartment in a seven unit building, the Supreme Court, New York County, held that the cooperative's Board of Directors exceeded its authority in imposing a flip tax and found that the tax was null and void. The By-laws of the corporation in question provided that it could be amended by either the vote of the shareholders holding two-thirds of the shares at a meeting or by the vote of a majority of the Board of Directors at a meeting of the Board. The Court found that there was no shareholders' vote adopting a flip tax, and no minutes of a Board meeting amending the By-laws to provide for a flip tax were produced. At most, the flip tax was imposed as the result of a Board resolution adopted by less than a majority of the Directors. According to the Court, "there are only seven units in the building, and that this presents an apparently irresistible temptation for the board to forego adherence to the corporate documents and instead run the building on an informal basis. However, while this may be understandable, it is not acceptable". *Pello v. 425 E. 50 Owners Corp*, decided March 31, 2008, is reported at 19 Misc.3d 1125 and at 2008 WL 1869651.

Encroachments – Plaintiffs sought a preliminary injunction enjoining the Defendants' newly constructed building from continuing to encroach on their property and for a temporary restraining order enjoining the New York City Buildings Department from issuing a certificate of occupancy for the Defendants' building. Plaintiffs alleged that the Defendants' building encroached 2 feet 3/8 inches onto the Plaintiffs' property, the depth of the footings for the rear wall of the Defendants' building made that building unstable, the curb cut to the Defendants' property was too close to the fire hydrant, and the sidewalk Defendants installed created a tripping hazard. Defendants claimed that this Action was intended to stop them from operating a competing auto dealership on their adjoining property. The Supreme Court, Bronx County, declined to grant a restraining order. No proof was submitted that the encroachment (which the Court found to be de minimus) posed any significant danger to Plaintiffs' building; it was not shown that Plaintiffs would suffer irreparable harm from the alleged condition of the sidewalk; and the other issues raised were under review by the Building Department. An award of money damages would adequately compensate the Plaintiffs. *3333 Boston Road LLC v. Fix*

Realty Corp., decided April 21, 2008, was reported in the New York Law Journal on May 21, 2008.

**Mortgage Foreclosure** - The Defendant-homeowner brought a motion, *pro se*, for an Order vacating a judgment of foreclosure and sale and barring any attempt to sell her home. She alleged that the Plaintiff engaged in "predatory lending" under New York's Banking Law Section 6-1 ("High-cost home loans"). Judge Palmieri of the Supreme Court, Nassau County, denied the motion and vacated the temporary stay that had been entered. The two mortgage loans being foreclosed were not "high cost" loans under the Banking Law; no proof was submitted that there was either fraud or a failure to disclose the loans' terms. Nor was proof submitted that the Defendant was protected by the Home Ownership and Equity Protection Act of 1994 (15 USC Section 1639). According to the Court, "...absent the violation of some statute or other relevant legal principle the law does not permit judges to simply ignore payment obligations voluntarily taken on by mortgagors even if it should have been evident to both lender and borrower that the loan was likely beyond the borrower's ability to repay". Alliance Mortgage Banking Corp. v. Dobkin, decided March 28, 2008, is reported at 2008 WL 1758864.

**Mortgage Foreclosure** – An Action was commenced to foreclose a mortgage, securing a thirty year note with an interest rate of 9 ½ percent, on the Defendant's home in a minority neighborhood. Judge Kramer of the Supreme Court, Kings County, had held on December 6, 2007 that the burden was on the Defendant to demonstrate that she was the victim of discriminatory lending. However, in this ruling, Judge Kramer held that "a mortgage granted to a minority buyer for the purchase of property in a minority area which carries an interest rate that exceeds nine percent [which he concluded is a "higher priced loan" under the federal Home Mortgage Disclosure Act's standards, for this mortgage and most other thirty year mortgages written after 2000] creates a rebuttable presumption of discriminatory practice" and the foreclosing lender "must demonstrate by a fair preponderance of the evidence that the mortgage was not the product of unlawful discrimination. If the lender is unable to do so, the foreclosure proceeding will be dismissed and the lender left to its remedies at law". The Court further stayed the proceedings since the Defendant is on active military duty and her attorney had asked to be relieved. M&T Mortgage Corp. v. Foy, decided May 1, 2008, is reported at 2008 WL 1915125.

**Mortgage Recording Tax/New York State Transfer Tax** – The New York State Department of Taxation and Finance has announced that the interest rate to be charged for the period July 1, 2008–September 30, 2008 on late payments and assessments of mortgage recording tax and the State's Real Estate Transfer Tax will be 7% per annum compounded daily. The interest rate to be paid on refunds of those taxes will be 4% per annum compounded daily. The interest rates are published at <http://www.tax.state.ny.us/press/2008/int0608.htm>.

**New York City Real Property Transfer Tax** – The Audit Division of New York City's Department of Finance has posted the following Statements of Audit Procedure at [http://www.nyc.gov/html/dof/html/pub/pub\\_guidance\\_saps.shtml](http://www.nyc.gov/html/dof/html/pub/pub_guidance_saps.shtml):

"Real Property Transfer Tax-Transfers Into And Out Of Charitable Organizations", RPTT 2008-1, issued February 29, 2008;

"Real Property Transfer Tax Rate To Be Used For Transfers Of Vacant Land", RPTT 2008-1, issued February 29, 2008.

"All Units–Procedure for Imposition of Civil Penalties", PP-2008-19, issued April 9, 2008.

"Audits of Purported 'Dummy/Strawman' Transfers In Connection With Real Estate Syndications", RPTT-2008-03, issued 4/10/08. (Supersedes Statement of Audit Procedure 02-RPTT, issued 6/26/02).

"Fair Market Value of Real Property", PP-2008-23, issued 4/14/08.

**New York City/Recordings** – As reported in Current Developments issued on April 23, 2008, the City Register announced a new policy for the return of original recorded documents effective for all documents submitted for recording after June 1, 2008. The New York State Land Title Association was advised that any document submitted for recording (or re-recording) after June 1 not picked up within ten business days following recording would be returned to the person noted on the ACRIS Recording and Endorsement Cover Page as the addressee for the return of the document only if the Register's Office is provided when the document is submitted with either (i) a stamped, addressed return envelope or (ii) an overnight delivery service envelope with a label (such as a Federal Express "US Airbill") completed with the address of the recipient and a billing account number. Otherwise, after ten business days from the date of its recording, the original recorded document will be destroyed by the Register's Office.

The New York State Land Title Association has been advised by the City Register that this policy will be re-evaluated in December and, until that time, pending further review, original documents submitted without a return envelope will not be destroyed after recording.

**New York State Transfer Tax** – New York State's Department of Taxation and Finance has issued Publication 576, "Transfer or Acquisition of a Controlling Interest in an Entity with an Interest in Real Property". Publication 576 "answers frequently asked questions relating to the transfer or acquisition of a controlling interest...to provide guidance for the relevant provisions of Article 31 of the Tax Law and Part 575 of the Real Estate Transfer Tax Regulations (20 NYCRR)". It is posted at [http://www.tax.state.ny.us/pdf/publications/real\\_estate/pub576\\_608.pdf](http://www.tax.state.ny.us/pdf/publications/real_estate/pub576_608.pdf),

**New York State Transfer Tax/Islamic Financing** – The New York State Department of Taxation and Finance issued an Advisory Opinion dated April 28, 2008. As set forth in the Advisory Opinion, the Petitioner-bank's borrower, who is the true purchaser of the property in question (the "Client"), makes the contract down-payment; Petitioner pays the balance of the purchase price at closing. The Seller conveys title to the property to Petitioner which, in turn, leases the property to its Client. The monthly lease payment is equivalent to the amount that would have been payable as principal and interest on a conventional loan. The Petitioner is to deed the property to its Client on payment of the remaining principal balance. A Memorandum of Lease and a Memorandum of an Agreement to Purchase are recorded. According to the Department, no real estate transfer tax is due on the creation of the lease or the re-conveyance of fee title. "[T]hese transactions are entered into solely to effect and secure Petitioner's financing of the client's acquisition of the real property". Advisory Opinion TSB-A-08(2)R is posted at [http://www.nystax.gov/pdf/advisory\\_opinions/real\\_estate/a08\\_2r.pdf](http://www.nystax.gov/pdf/advisory_opinions/real_estate/a08_2r.pdf).

**Notaries** – In an Action to set aside the conveyance of real property by means of allegedly forged powers of attorney, the purchaser commenced a third-party action against the person who notarized the signatures on the powers and his employer. The Defendants in the third-party action moved for summary judgment, claiming that the duties imposed on a notary were complied with, but the Supreme Court, Queens County, denied the motion. Although the notary was given acceptable proof of identification, he did not administer the oath ("do you swear or affirm that the signatures you have affixed to this document are true?") before witnessing the execution of the powers of attorney. As to the claim of vicarious liability against the notary's employer, there were issues of fact to be tried since the notary followed procedures that had been established by his employer. *Edwards v. Rockaway Storage Inc.*, decided April 28, 2008, was reported in the New York Law Journal on May 13, 2008.

**Predatory Lending** - Plaintiffs, an elderly woman and her son, owned a house in Brooklyn. The mortgage on the property, on which there was a balance due of \$61,120.77 and on which the mortgage payments were \$469.88 a month, was in foreclosure. Plaintiffs conveyed their home, assessed at \$395,000, to Defendant Melnikoff for \$25,000 in cash, the Defendant agreeing to pay off the mortgage. The Plaintiffs were to rent the home for twelve months for \$1,495 a month, have the right to re-purchase at the end of that period for \$250,000, and vacate the property upon thirty days notice if they did not then re-purchase. Plaintiffs commenced an Action to void the deed and mortgages given by Defendant Melnikoff to First Franklin Financial Corp. and to Citibank, N.A. The Supreme Court, Kings County, found that Defendant Melnikoff and other Defendants, claiming to save the Plaintiffs' home from foreclosure, conspired to swindle the Plaintiffs, voided the deed and declared Plaintiffs to be the sole owners of the property. It also voided and canceled the Citibank mortgage, which was executed after the *lis pendens* in the Action was filed. First Franklin's mortgage was upheld since the funds from that

loan were applied to pay off the mortgage in foreclosure. *Watson v. Melnikoff*, decided May 6, 2008, is reported at 19 Misc.3d 1130 and at 2008 WL 1990943.

Westchester County – The Westchester County Clerk has developed a system which enables the filing of Uniform Commercial Code Financing Statements over the Internet. Forms that can be filed electronically are the UCC Financing Statement (UCC1), the UCC Financing Statement Addendum (UCC1Ad), the UCC Financing Statement Additional Party (UCC1AP), the UCC Financing Statement Amendment (UCC3), the UCC Financing Statement Amendment Addendum (UCC3 Ad), the UCC Financing Statement Amendment Additional Party (UCC3AP), and the UCC Financing Statement Cooperative Addendum (UCC1CAAd). Filing fees can be paid on-line with a credit card and a confirmation of filing is sent to the customer by e-mail. The UCC E-Filing System can be accessed at <http://ucc.westchesterclerk.com>.

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