First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

Bankruptcy – Two commercial leases were purchased out of the bankruptcy of the original lessee "free and clear of all liens and encumbrances". The Debtors-Assignees, on filing their Chapter 11 petitions, rejected the leases. The owners of the leased properties then filed a motion under Bankruptcy Code Section 365(d)(3) ("Executory contracts and unexpired leases") seeking to compel the Debtors to remove mechanics' liens filed for work done on the leased premises or to indemnify them against the liens. Under Section 365(d)(3), "the trustee shall timely perform all obligations of the debtor…arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected..". The leases required the tenants to keep the premises and the leases free of any mechanics' liens.

The United States Bankruptcy Court for the Southern District of New York held that no claim arose as to the two mechanics' liens filed before the Debtors assumed the leases "free and clear". The owner of the premises affected by a mechanic's lien that was filed prepetition but after the leases were assigned had a general, unsecured claim; that Debtor's indemnity obligation under the lease was also a prepetition general unsecured claim. Lastly, the five other mechanics' liens, filed post-petition and before the leases were rejected, were administrative expense claims within the scope of Section 365(d)(3). It did not matter that the liens related to work prior to the bankruptcy filing; under New York law the lien arises at the time of its filing. As to those five mechanics' liens, under Section 365(d)(3), the Debtors were required to comply with their lease obligations and either remove the mechanics' liens or indemnify the owners as to them. In Re BH S&B Holdings LLC, et al., Debtors, decided February 10, 2009, is reported at 2009 WL 306700.

Condominiums – The Board of Managers of a residential condominium in White Plains entered into a twenty-five year lease with a cellular telephone company to construct and operate cell towers on the roof of the condominium. Plaintiffs, unit owners, moved for preliminary and permanent injunctions, for rescission, and for damages against members of the Board for violations of their fiduciary duties. The By-laws of the Condominium limited the units' uses to residential uses and provided that "[t]he common elements shall be used only for the furnishing of services and facilities for which they are reasonably suited and which are incident to the use and occupancy of the units".

The Supreme Court, Westchester County, held that the Plaintiffs could not seek rescission of the lease, since only the parties to an agreement or third-party beneficiaries have the capacity and standing to seek rescission. However, it also held that the placement of cell towers on the Condominium's roof to provide wireless communications to a vast area of White Plains was not "incident to" the residential use of the units, particularly where the unit owners had cellular service and there were no complaints about the quality of their cellular service. The Court therefore held that the lease was void, and it permanently enjoined the defendant company from constructing any cell towers on the common elements of the Condominium. The causes of action against the Board Members were dismissed, there being no claim of fraud, self-dealing or other wrongdoing. Kaung v. Board of Managers of the Biltmore Towers Condominium Association, dated December 10, 2008, is reported at 873 N.Y.S. 2d 421.

Condominiums – New York's Attorney General accepted for filing Petitioners' non-eviction offering plan for the conversion of their building to condominium ownership. After submission of the plan, but before its acceptance for filing, the Petitioners commenced holdover summary proceedings against twenty-nine tenants on the ground that their unregulated, market-rate leases had expired. The Respondents moved to dismiss, claiming that they were protected from eviction under New York's General Business Law, Section 352-eeee ("Conversions to cooperative or condominium ownership in the City of New York"), generally known as the "Martin Act". The Appellate Term, First Department, reversing the ruling of the Civil Court of the City of New York, New York County, held that the Respondents-tenants were not entitled to Martin Act protection. Their leases being unregulated, and their terms having expired before the offering plan was accepted for filing, the Respondents were not "tenants in occupancy". The protection of the Martin Act is afforded only to "tenants in occupancy" when an offering plan is declared effective. MH Residential 1, LLC v. Barrett, decided November 26, 2008, is reported at 871 N.Y.S. 2d 805.

Condominiums/New York City's Department of Finance – The New York City Register has advised a committee of the New York State Land Title Association that Condominium Declarations and Floor Plans may now be submitted for recording in any of the offices of the City Register, regardless of the County within the City (excepting Staten Island, which is not a part of the City Register's office) in which the property is located. In addition, the Department of Finance intends to require that all condominium Floor Plans be submitted to the City Surveyor's Office on 8 ½" X 11" sized paper, enabling their recording and viewing in ACRIS (the Department's "Automated City Register Information System").

Constructive Trusts/Notices of Pendency – A lawsuit was commenced seeking to impose a constructive trust on a house owned of record by the Plaintiff's estranged wife. The Plaintiff alleged that he had paid for improvements to the property based on his wife's promise that she would hold title in constructive trust for the Plaintiff and her daughter, who was also a Defendant. The Supreme Court, Nassau County,

held that the complaint adequately alleged the requisite elements for the imposition of a constructive trust, but the Court also granted the Defendants' motion to cancel the lis pendens if the Defendants' filed an undertaking from a corporate surety for $200,000, which appeared to be the maximum amount the Plaintiff could recover at trial. A contract to sell the home had been executed and, according to the Court, "equity cannot permit the plaintiff to effectively have the benefit of an injunction against the sale of the home, particularly during a dramatically declining market. The defendant has been prevented from closing the sale of the premises [under contract] for $1,600,000 because of the notice of pendency. Under the current circumstances, it is not only possible that the defendant will not find another purchaser for $1,600,000, but that she may not find any other purchaser at all". Kasan v. Perlin, decided January 30, 2009, was reported in the New York Law Journal on February 18, 2009.

<u>Easements</u> – Plaintiff, the owner of a small shopping plaza, commenced an action seeking damages for the adjoining property owner's unauthorized use of the Plaintiff's property. Plaintiff claimed that the owner of the adjoining property, and the restaurant and customers of the restaurant on the Defendant's property, used the Plaintiff's land for access and parking. The Appellate Division, Fourth Department, upholding the ruling of the Supreme Court, Onondaga County, held that the Defendant's parcel had the benefit of a valid easement. Although the deed conveying the Defendant's property in 1978 by the then common owner did not expressly refer to an easement, under a rider to the contract of sale executed in connection with that deed the seller was to convey to the vendee a perpetual easement for parking and for ingress and egress to run with the land and benefit the vendee's successors and assigns. The contract further recited that all representations and warranties were to survive the closing. According to the Appellate Division, the parties intended that the provisions creating the easement were to survive the closing, as evidenced by the fact that the contract, the rider, and an annexed map were recorded prior to the deed. The Court noted that even if the contract and rider had not been recorded, the general appurtenance clause in the deed would have been sufficient to convey the benefits of the easement. Franklin Park Plaza, LLC v. V&J National Enterprises, LLC, decided on December 31, 2008, is reported at 870 N.Y.S. 2d 193.

<u>Equalization and Assessment Form</u> – New York State's Budget, enacted on April 7, 2009 as Chapter 56 of the Laws of 2009, amends Subdivision "3" of Real Property Law Section 333 ("When conveyance of real property not to be recorded") to increase the filing fee for the State Board of Real Property Services Real Property Transfer Report, generally known as the RP-5217 and the RP-5217NYC or as the Equalization and Assessment Form. The increased fees are required for all deeds submitted for recording on and after June 1, 2009. When the property being transferred is a "Qualifying residential property" or a "Qualifying farm property" the filing fee will increase from the $75.00 now being charged to $125.00. The filing fee for the transfer of any other type of property will increase from the $165.00 now being charged to $250.00. The fee to file the New York City Real Property Transfer

Tax Return when the Equalization and Assessment form is not required to be filed, such as on the transfer of a cooperative interest or of a controlling economic interest, will increase from $50.00 to $100.00

"Qualified residential property" is defined in Section 333 as property which satisfies at least one of the following conditions:

1. The property classification code assigned to the property on the latest final assessment roll, as reported on the transfer report form, indicates that the property is a one, two, or three family home or a rural residence, or

2. The transfer report (Equalization and Assessment) form indicates that the property is one, two or three family residential property that has been newly constructed on vacant land, or

3. The transfer report (Equalization and Assessment) form indicates that the property is a residential condominium.

"Qualifying farm property" is defined in Section 333 as property for which the property classification code on the latest final assessment roll, as reported on the transfer report (Equalization and Assessment) form, is in the agricultural category.

Federal Tax Liens – An Internal Revenue Service press release (IR-2008-141) dated December 16, 2008 announced "an expedited process that will make it easier for financially distressed homeowners to avoid having a federal tax lien block refinancing of mortgages or the sale of a home". Taxpayers may be able to obtain the subordination of a federal tax lien on the refinance of an existing mortgage or a discharge of a federal tax lien when a home is being sold for less than the amount of a mortgage on the property senior to the tax lien. The process should take "approximately thirty days after the submission of the completed application, but the IRS will work to speed those requests in light of the economic downturn". The press release is at http://www.irs.gov/newsroom/article/0,,id=201343,00.html.

See "Instructions on How to Apply for a Certificate of Discharge of Property from Federal Tax Lien"), Publication 783, posted at http://www.irs.gov/pub/irs-pdf/p783.pdf, and "How to Prepare an Application for a Certificate of Subordination of Federal Tax Lien", Publication 784. posted at http://www.irs.gov/pub/irs-pdf/p784.pdf.

Mortgage Foreclosure – A Court ordered inspection of premises sold at foreclosure for $410,000 revealed an estimated $150,000 of property damage. Among other damage, "interior walls in the basement had been removed; a sauna was stripped and the electrical outlets removed; granite countertops had been removed; kitchen appliances were removed; lighting fixtures were removed; gas lines to the house were capped and electrical lines to the upper level removed; all exterior lines, piping, machinery and electrical fixtures for the in ground pool were removed; the

hot tub was destroyed; and there was general destruction of the landscaping". The damage was caused by the former owner subsequent to the sale,

The successful bidders moved for an Order voiding the sale or abating the purchase price under the Uniform Vendor and Purchaser Risk Act (General Obligations Law Section 5-1311) (the "Act") or, alternatively, declaring the sale void on the grounds that marketable title could not be conveyed. Under the Act, when neither legal title nor possession has been transferred to the purchaser and "unless the contract expressly provides otherwise", if all or a material part of the premises is destroyed without fault of the purchaser, the purchaser may receive a return of the down-payment or an abatement of the purchase price, depending on whether the damage is "material".

According to the Supreme Court, Orange County, relief could not be afforded under the Act. Under the Terms of Sale and the Judgment of Foreclosure the"[p]urchaser assumes all risk of loss or damage to the premises from the date of the auction to the date of closing and thereafter". Also, there was no proof that marketable title could not be conveyed. The parties were ordered to proceed to closing, "time being of the essence". U.S. Bank National Association v. Cedeno, decided February 6, 2009, is reported at 2009 WL 294715.

Mortgage Foreclosure/"Mortgage Rescue Scams"– Unable to make his mortgage payments, the Defendant property owner deeded his property to the other Defendant on March 29, 2006 and they entered into an "Occupancy Agreement and Re-purchase Option". Proceeds of a loan secured by a purchase money mortgage made by a third-party lender executed at the closing were applied to pay off two existing mortgage loans. An Action to foreclose the purchase money mortgage was commenced in February 2007 and a judgment of foreclosure was entered on May 9, 2008. The former property owner, who had defaulted in answering the complaint, moved post-judgment for Orders staying all proceedings, dismissing the complaint, and rescinding his conveyance. The Supreme Court, Suffolk County, denied the motions. If the deed was fraudulently induced it was merely voidable and the purchase money mortgage made to an encumbrancer for value would not be canceled. Further, although Real Property Law Section 265-a, known as the Home Equity Theft Prevention Act, was enacted to protect victims of mortgage rescue scams, its remedies of deed rescission and the cancellation of a related mortgage "are subject to the rights of bona fide purchasers and encumbrances [sic] for value and are available only to qualifying claimants who sue within two years of the transaction". The Court noted that the Defendant's claims could have been considered if an application to vacate his default in answering the complaint had been made and granted. Wells Fargo Bank, N.A. v. Edsall, decided January 22, 2009, is reported at 2009 WL 175029.

Mortgage Foreclosure/Standing – Plaintiff commenced an action on September 4, 2007 to foreclose a mortgage that was assigned to it on September 17, 2007 by an instrument which recited that its effective date was July 29, 2007. The Supreme

Court, Kings County, denied the Plaintiff's motion for an Order of Reference, without prejudice to file a renewed motion within ninety days accompanied by proof that the Plaintiff owned the mortgage and note prior to the commencement of the foreclosure. Otherwise, the action would be dismissed for lack of standing. According to the Court, "[w]]here there is no evidence that plaintiff, prior to commencing the foreclosure action, was the holder of the mortgage and note, took physical delivery of the mortgage and note, or was conveyed the mortgage and note by written assignment, an assignment's language purporting to give it retroactive effect prior to the date of the commencement of the action is insufficient to establish the plaintiff's requisite standing". Washington Mutual Bank v. Patterson, decided December 15, 2008, is reported at 21 Misc. 3d 1145 and 2008 WL 5233195.

Mortgage Foreclosure/Standing – The Supreme Court, Kings County, denied the foreclosing Plaintiff's motion for summary judgment and for an Order of Reference, holding that the Plaintiff lacked standing. It held that the purported assignment of the note and mortgage by MERS, as nominee for First Franklin, to the Plaintiff was invalid. It recited that it was executed by an attorney on behalf of MERS pursuant to a corporate resolution. However, neither a corporate resolution nor a power-of-attorney was recorded. The Court granted the Plaintiff leave to renew upon providing the Court within sixty days with (i) a valid assignment of the mortgage, (ii) an affirmation that the assignor and the assignee consented to simultaneous representation in connection with the assignment, and (iii) an affidavit explaining why the Plaintiff purchased a nonperforming loan. In addition, "if a power of attorney is used for an agent to act as MERS' assignor of the instant mortgage and loan to Deutsche Bank, the power of attorney presented to the Court must be an original or a copy certified by an attorney, pursuant to CPLR Section 2105" ("Certification by attorney"). Deutsche Bank National Trust Company, as Trustee, v. Campbell, decided December 16, 2008, is reported at 2008 WL 5220543.

Mortgage Foreclosure/Standing – A mortgage foreclosure commenced by New Century Mortgage Corporation ("New Century") on March 7, 2007 was dismissed by the Supreme Court, Kings County, for lack of standing. On May 11, 2007, MERS, the record holder of the mortgage (which appears to have been intended to have held the mortgage as nominee for New Century), purportedly assigned the mortgage to New Century by Assignment of Mortgage which included the phrase: "Date of Transfer: March 5, 2007". According to the Court, "[w]here there is no evidence that plaintiff, prior to commencing the foreclosure action, was the holder of the mortgage and note, took physical delivery of the mortgage and note, or was conveyed the mortgage and note by written assignment, an assignment's language purporting to give it retroactive effect prior to the date of the commencement of the action is insufficient to establish the plaintiff's requisite standing". In addition, on April 30, 2007 MERS had assigned the mortgage to a different lender. New Century Mortgage Corporation v. Durden, decided February 2, 2009, is reported at 22 Misc. 3d 1118 and at 2009 WL 264134.

Mortgage Foreclosure/Standing –The Defendant in a mortgage foreclosure asserted that the Plaintiff did not have standing to commence the action on October 11, 2007 since the mortgage being foreclosed and the note it secured were assigned to it by an assignment dated October 15, 2007 which recited that it was effective on October 8, 2007. The note, endorsed in blank, was delivered to the Plaintiff on October 8, 2007. According to the Supreme Court, Suffolk County, "an indorsement of a mortgage note in blank together with its delivery by the owner or its agent to a transferee is sufficient to transfer ownership of said note and of a mortgage given to secure it….Said assignment [on October 15, 2007] accurately reflected that the plaintiff acquired ownership of the note and mortgage on October 8, 2007, by its receipt of delivery of the note indorsed in blank. The mortgage followed as an incident to the transfer of the note. The plaintiff was thus the owner of the note and mortgage at the time of the commencement of this action". Deutsche Bank National Trust Company v. Gillio, dated February 26, 2009, is reported at 22 Misc.3d 1131 and at 2009 WL 595560.

Mortgages/Recording – The owners of property in Patchogue, New York executed a mortgage that was never recorded and was presumed lost. The original mortgagee indorsed the note by allonge in favor of an assignee which, in turn, endorsed the note by allonge to the Plaintiff. The Plaintiff brought an action pursuant to Real Property Actions and Proceedings Laws Article 15 ("Action to compel the determination of a claim to real property"), seeking a declaration that it owned the mortgage and that the rights of the defendant property owners were subordinate to the mortgage, and for an order directing the County Clerk to record a copy of the mortgage nunc pro tunc as of its date of execution. The Supreme Court, Suffolk County, held that the Plaintiff owned the mortgage because "an indorsement of a mortgage note that constitutes a negotiable instrument effectively transfers any mortgage given as security for said note as an incident thereof" and that the rights of the Defendant property-owners were subject to the unrecorded mortgage. However, the Court, in ordering its judgment to be recorded together with a copy of the mortgage, did not direct that the copy of the mortgage be recorded nunc pro tunc to the date of its execution. According to the Court, "[t]o do so, would adversely affect the rights and extinguish the priorities afforded to bona fide purchasers and encumbrancers for value who recorded conveyances and encumbrances" between the date on which the mortgage was executed and the date on which the notice of pendency in this Action was filed. Wells Fargo Bank, N.A. v. Perry, decided February 20, 2009, is reported at 2009 WL 440908.

Mortgage Recording Tax – The Office of Counsel of the Advisory Opinion Unit of New York State's Department of Taxation and Finance has issued an Opinion on the application of the mortgage recording tax to a mortgage made to an exempt entity which is either the sole mortgagee or a co-mortgagee with the entity making the loan being secured. The mortgage is intended to be submitted for recording by the exempt entity and then immediately assigned by the exempt entity to the true lender. According to the Department, the mortgage is exempt from the application of the mortgage recording tax since it is being submitted for recording by an exempt

entity. In addition, and assuming there is no new or further indebtedness secured, no tax will be due on the recording of any assignment, supplement, modification or amendment of the mortgage. TSB-A-09(1)R, dated March 17, 2009, is posted at http://www.tax.state.ny.us/pdf/advisory_opinions/mortgage/a09_1r.pdf.

Mortgage Recording Tax/New York State Transfer Tax – New York State's Budget, Chapter 56 of the Laws of 2009, has changed the interest rates to be charged on late payments and assessments for the mortgage recording tax and the State's Real Estate Transfer Tax effective April 7, 2009. The interest rate for late payments and for assessments is 8% per annum compounded daily for the period April 7, 2009 through June 30, 2009. The rate for the period January 1, 2009 through March 31, 2009 was 7% per annum compounded daily, and the rate for the period April 1, 2009 through April 6, 2009 was 6% per annum compounded daily. The interest rate for refunds for the period April 1, 2009 through June 30, 2009 is 3% per annum compounded daily. The Department of Taxation and Finance's press release is at http://www.tax.state.ny.us/press/2009/int0409.htm

New York City/Department of Finance/Digital Tax Maps –Digital Tax Maps are available through ACRIS (http://nyc.gov/html/dof/html/jump/acris.shtml) or at http://www.nyc.gov/html/dof/html/property/property_info_taxmaps.shtml. Current tax maps, and, on a going-forward basis, a library of prior tax maps and a history of tax map changes are available. Distances are in decimals and may need to be converted to inches; for example, a tax lot line with a measurement of 85.83 converts to 85 feet 10 inches. There is a disclaimer on the site stating, in part, that "[t]he maps and information presented are for information purposes only. The City of New York Department of Finance is not responsible for errors, omissions, or geographical accuracy on these digital maps...Any use of this map for conveyances of property or any other legal proceeding is at the sole risk of the parties".

New York City/Department of Buildings – In a press release issued February 2, 2009, The City of New York announced a program to require architects and engineers filing applications for new buildings or major enlargements of existing buildings to upload to the Department of Buildings' website a new Zoning Diagram Form ZD1 and other documents when building plans are filed. The Zoning Diagram will detail "critical information that can be used by the public to determine whether a project is in compliance with required zoning regulations". There will be a thirty-day period following the document upload within which the public can challenge the proposed development. The ZD1 is not required for applications for which the initial document reached "application processed" status prior to March 9, 2009. The press release, announcing that New York is the "First City in the Nation to put Development Diagrams Online", is posted on the City's website at http://www.nyc.gov/html/om/html/2009a/pr055-09.html.

New York City/Registration Statements – A Registration Statement, also known as a "Preliminary Residential Property Transfer Form", is required to be filed when recording a deed or a lease of a building which is a multiple dwelling in New York

City, unless an affidavit is submitted that the premises is not a multiple dwelling. Effective May 3, 2009, pursuant to the requirements of Local Law 56 of 2008, a Registration Statement will also be required to be filed for all one-and-two family dwellings "when neither the owner nor any family member occupies the dwelling". A "family member" for this purpose is defined to include "an owner's spouse, domestic partner, parent, parent-in-law, child, sibling, sibling-in-law, grandparent or grandchild". The Local Law, which amends Sections 27-2097 ("Registration; time to file"), 27-2098 ("Registration statement; contents") and 27-2099 ("Registration statement; change of ownership or title") of the City's Administrative Code, is at http://www.nyccouncil.info/pdf_files/bills/law08056.pdf.

New York City/Reversion of Title – On February 5, 2003 the New York City Economic Development Corporation ("EDC") conveyed the former Corn Exchange Bank Building on 125th Street in Manhattan to Corn Exchange, LLC. The deed required the grantee to rehabilitate the building, restore its façade to its original state, and obtain a certificate of occupancy within 36 months of the date of the deed. If the grantee failed to meet those conditions, title was to revert to the EDC. The Defendant-grantee did not complete the work, a certificate of occupancy was not obtained, and the EDC commenced an action in 2007 to obtain title. The Defendant claimed that the EDC should not be allowed to retake title because the issuance of violations by the City's Department of Buildings in April 2006 substantially hindered the renovation. The Supreme Court, New York County, held that EDC was vested with title, and it ordered the Defendant to execute and deliver a deed after the Court determined whether certain filed mechanics' liens encumbered title. As to the City's issuance of notices of violations, "[e]ven if defendant could show that there was a conspiracy between the [Department of Buildings] and plaintiff to stymy defendant's efforts to rehabilitate the premises by issuing these notices of violation, defendant has not otherwise challenged the legitimacy of the corresponding violations nor claimed that the city, plaintiff, or any other entity should be responsible for remedying these violations…Having to remedy violations issued by the DOB is one aspect of owning land in New York City, and should have reasonably been contemplated by defendant and cannot support a claim that plaintiff somehow prevented or hindered defendant's ability to comply with the Deed". New York City Economic Development Corporation v. Corn Exchange, LLC, decided January 29, 2009, is reported at 22 Misc. 3d 1132 and at 2009 WL 620245.

New York State Estimated Income Tax Payment Forms – The 2009 versions of the New York State Department of Taxation and Finance's Non-Resident Real Property Estimated Income Tax Payment Form ("IT-2663") and Non-Resident Cooperative Unit Estimated Income Tax Payment Form (IT-2664") have been revised to reflect the recent change in the applicable personal income tax rate on the sale or transfer of real property in New York from 6.85% to 8.97%. The prior versions of these forms for 2009 are not to be used, as doing so would incorrectly calculate the tax. A box in the upper right corner of the forms identifies the version to be used by reference to "4/09". The previously issued Instructions for 2009 have not been

changed. The revised forms can be obtained on the Department's website at http://www.tax.state.ny.us/forms/form_number_order_income.htm

New York State Franchise Tax - The Office of Counsel of the Advisory Opinion Unit of New York State's Department of Taxation and Finance has issued an Opinion on the application of the State's franchise tax under Tax Law Article 9-A ("Franchise tax on business corporations"). According to the Department, "a dissolved corporation that is merely a record title holder of real property located in New York, as nominee for the benefit of others, and [which] is otherwise inactive, is not conducting business" and is not subject to franchise tax for the taxable years after its dissolution. TSB-A-09(4)C, dated March 5, 2009, is posted at http://www.tax.state.ny.us/pdf/advisory_opinions/corporation/a09_4c.pdf

Partition/Joint Tenants – Plaintiff sought the partition of real property which she owned with her two siblings as joint tenants. The Supreme Court, Kings County, had granted the Plaintiff's motion to proceed with the partition and a Defendant's motion to appoint a referee to ascertain the interests of the parties. The Plaintiff then died. There had been no accounting or sale, and no final judgment of partition had been entered. Plaintiff's husband, the Executor of Plaintiff's Estate, moved to be substituted into the Action and for a declaratory judgment that he had a continuing interest in the property, allowing the Action to continue. The Court held that only the Defendants, the surviving joint tenants, had interests in the property, and that the Plaintiff's husband was not entitled to a partition. The Court cited the "apparently universal rule in this country… that a pending suit for partition of a joint tenancy does not survive the death of one of the tenants… {U]nless partition has been decreed before the death of the joint tenant [resulting in the severance of the joint tenancy], no interest in the property remains in the representatives of the decedent which can support an action for partition". (Citations omitted) If the parties to the Action had consented to the partition, or if an interlocutory judgment declaring the interest of each party and directing a sale had been entered before the Plaintiff's death, the partition action could have continued. Orlando v. Deprima, decided December 18, 2008, is reported at 870 N.Y.S. 2d 871.

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