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

**Adverse Possession – In an Action claiming title to a multiple dwelling by reason of adverse possession, the Plaintiff moved for an injunction preventing the holder of the mortgage from foreclosing. The Supreme Court, New York County, granted the Defendant-mortgagee's motion to dismiss as against it for the failure to state a cause of action, and the Appellate Division, First Department, affirmed. According to the Appellate Division, "even if it [the motion court] were to declare that plaintiffs' adverse possession…had given them title thereto by the time defendant City [of New York] purported to transfer title to defendant UHAB, the mortgage on the building delivered by UHAB to NCB is nonetheless valid under Real Property Law Section 260". Section 260 ("Lands adversely held may be conveyed or mortgaged") provides that "[n]o grant, conveyance or mortgage of real property or interest therein shall be void for the reason that at the time of the delivery thereof such real property is in the actual possession of a person claiming under title adverse to that of the grantor". The Rainbow Coop v. The City of New York, decided June 2, 2009, is reported at 879 N.Y.S. 2d 329.**

**Condominiums – Surplus monies resulted from the foreclosure of a first mortgage on a condominium unit. The Referee recommended that the Supreme Court, Kings County, allow the Condominium's Board of Managers' claim for unpaid common charges to be applied to the surplus. The Supreme Court's denial of the Defendant mortgagor's motion to reject that part of the report was reversed by the Appellate Division, Second Department. Since a verified notice of lien for unpaid common charges was not filed in the recorder's office as required by Real Property Law Section 339-aa ("Lien for common charges"), the Condominium had no recognizable claim to a share of the surplus. With no other claimant, the surplus money, after deducting administrative charges of the Kings County Treasurer and the Referee's fees, was payable to the mortgagor. MERS v. Levin, decided June 16, 2009, is reported at 2009 WL 1696090.**

**Contracts – The principals of the owner of certain real property and the Plaintiff signed a letter agreement granting the Plaintiff an option to purchase. In an Action brought to enforce the option, the Defendants moved to dismiss, asserting that the option was not enforceable because material terms were left for negotiation. The Supreme Court, Delaware County, granted the Defendants' motion and the Appellate Division, Third Department, affirmed. According to the Appellate Division, "the omission of several material terms [such as the identity of the property owner and the consideration to be paid] demonstrates that there was no**

**final meeting of the parties' minds as to the purchase option". Further, the letter agreement stated that the parties would later sign "a more formal document". The letter agreement "was merely an agreement to agree". Follender v. Prior, decided June 25, 2009, is reported at 2009 WL 1794428.**

**Contracts – Defendant offered to sell property located between boundary markers which, according to the tax map, included 83 feet of lake frontage. A survey done after the contract of sale was executed disclosed that the property actually included 114.7 feet of lake frontage. The Defendant sought to rescind the contract, claiming that there was a mutual mistake as to the actual size of the property. The Plaintiff sued for specific performance. The Supreme Court, Chautauqua County, granted the Plaintiff's motion for summary judgment, and the Appellate Division, Fourth Department, affirmed. According to the Appellate Division, "there was no mutual mistake with respect to the property that defendant contracted to sell to plaintiffs…The failure of defendant to obtain a survey of the property to determine its actual size prior to entering into the contract or to specify in the contract a price per foot for the lake frontage belies her contention that a price based on the precise amount of lake frontage and a per foot calculation was a material element of the contract about which the parties were mistaken". Nowicki v. Espersen, decided June 12, 2009, was reported at 2009 WL 1652829.**

**Equitable Subrogation – Plaintiff brought an Action to impose a constructive trust on property to which title was held by his former cohabitant, Defendant Hoffman ("Hoffman"). Notwithstanding the filing of the notice of pendency, Defendant Hoffman obtained a mortgage loan from Delta Funding ("Delta"), a portion of the proceeds of which were used to pay off a prior recorded mortgage securing an obligation of both Plaintiff and Hoffman. HSBC, the assignee of the Delta mortgage, moved to intervene, requesting that its mortgage be equitably subrogated to the mortgage satisfied with the proceeds of the loan secured by its mortgage. The Supreme Court, Otsego County, granted judgment in favor of the Plaintiff for a constructive trust, ordered an inquest to determine the interests of the Plaintiff and Hoffman in the property, and dismissed HSBC's cross and counter claims for equitable subrogation. The Appellate Division, Third Department, holding that equitable subrogation applied, reversed that part of the lower court's Order dismissing HSBC's claims and granted its motion to intervene. To hold otherwise, according to the Court, because Delta did not have actual knowledge of the prior mortgage when it made the loan, "would provide a windfall to plaintiff by allowing him to have his original mortgage debt extinguished while at the same time maintain a right to the subject property that is superior to the mortgagee that furnished the funds that extinguished the first mortgage". Delta's title agent did not report the prior mortgage. Elwood v. Hoffman, decided April 2, 2009, is reported at 876 N.Y.S. 2d 538.**

**Legal Representation - The Plaintiff had informed the Defendant, her attorney in the purchase of a condominium unit in Brooklyn, that she was purchasing the unit**

**specifically because of the view from the unit. The Defendant did not disclose to the Plaintiff that the adjoining one-family dwelling was intended to be demolished and replaced by a four family structure which would obstruct the view, knowledge he had obtained from representing the seller of that adjoining property. The new building was constructed and does obstruct the Plaintiff's view. The Supreme Court, Kings County, denied the Defendant's motion to dismiss the cause of action for legal malpractice but dismissed causes of action claiming breach of contract and breach of fiduciary duty, since they sought the same relief as the legal malpractice cause of action. Romano v. Ficchi, decided May 22, 2009, is reported at 2009 WL 1460781.**

**Mortgage Foreclosures/Power of Sale – The authority to commence a foreclosure under Article 14 of the Real Property Actions and Proceedings Law, "Foreclosure of [a] Mortgage by [a] Power of Sale", has not been extended past June 30, 2009. Foreclosures commenced under Article 14 prior to July 1, 2009 may, however, continue. According to Chapter 123 of the Laws of 2005, extending the prior sunset date, "[t]his Act shall take effect immediately and shall remain in force and effect until July 1, 2009, when, upon such date article 14 of the real property actions and proceedings law, as added by this act, shall be deemed repealed, but shall apply to any non-judicial proceeding in which the notice of pendency has been filed on or before such date".**

**Mortgage Fraud – In the foreclosure of a mortgage for $315,000 on a residence in Brooklyn, Plaintiff moved for the appointment of referee to determine the amount owed and for a judgment of foreclosure. No payment on the note had been made. In inquiring into the circumstances attending the loan, Judge Jacobson, of the Supreme Court, King County, found that the Defendant was a taxi driver earning less than $70,000 a year, and his loan was approved without any verification of the assets he claimed on the loan application. The Court stated that the transfer of title to the Defendant appeared to be a transfer to a "straw man" to facilitate a fraud. The Court denied the relief sought and it referred the matter to the District Attorney, the Attorney General's Fraud Division, and the Banking Department's Criminal Investigation Bureau. Argent Mortgage Company LLC v. Mentesana, decided April 17, 2009, is reported at 2009 WL 1110635.**

**Municipalities/"Gift or Loan Clause" – In 2002, the Village of Valley Stream sold a parcel of land, taking back a purchase money mortgage to secure a note at 5% interest for the entire purchase price. A civic organization and residents of the Village brought an Article 78 proceeding seeking an Order annulling the Village's resolution which authorized the sale and enjoining the Village from closing on the sale. Petitioners alleged that the transaction violated the "Gift or Loan clause", Article VIII Section 1, of the New York State Constitution which provides, in part, that "[n]o county, city town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking…". The Supreme Court, Nassau County, dismissed the petition, but the Appellate Division, Second Department, held that the purchase money mortgage was a loan prohibited by the Gift or Loan clause. The Court of**

**Appeals reversed the Order of the Appellate Division and reinstated the judgment of the Supreme Court. Citing its 1968 decision in Mandelino v. Fribourg (23 N.Y.2d 145), in which the Court held that a purchase money mortgage was not a loan for the purpose of the application of the State's usury laws, the Court of Appeals held the deferred payments were consideration for the sale and not an unconstitutional loan. Matter of 10 East Realty, LLC v. Incorporated Village of Valley Stream, decided March 31, 2009, is reported at 12 N.Y.3d 212.**

**New York City/Department of Buildings – Current Developments issued April 16, 2009 reported that The City of New York will require architects and engineers filing applications with the Building Department (the "Department") for new buildings and for major enlargements of existing buildings to upload to the Department's website a new Zoning Diagram Form ZD1 and certain other documents. The Department of Buildings has announced that the new procedure will be effective on July 13, 2009. The period within which the public can challenge the proposed development has been changed from 30 days to 45 days.**

**The Department's Press Release, dated June 9, 2009, is posted at http://www.nyc.gov/html/dob/html/news/pr_development_challenge_060909.shtml. New RCNY Section 101-15 ("Public challenge of department zoning approvals") is available at http://www.nyc.gov/html/dob/downloads/rules/1_RCNY_101-15.pdf.**

**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. Current Developments issued April 16, 2009 reported that effective May 3, 2009, pursuant to the requirements of Local Law 56 of 2008, a Registration Statement is also 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, can be obtained at http://www.nyccouncil.info/pdf_files/bills/law08056.pdf.**

**The Department of Housing Preservation and Development has issued a revised Affidavit in Lieu of Registration, a copy of which accompanies this Bulletin. The New York City Register, in whose offices documents are recorded in New York, Bronx, Brooklyn and Queens Counties, advises that the prior form of Affidavit will be accepted by her offices only until the end of July.**

**New York City/Tax Lien Sales –An Action was commenced to foreclose a tax lien representing unpaid water and sewer charges sold by The City of New York to the Bank of New York, as collateral agent and custodian of the NYCTL 1998-2 Trust. Following issuance of a judgment of foreclosure and sale, the referee appointed to compute the amount due found that certain of the amounts assessed were invalid and recalculated the amount due based on prior meter readings. The referee's report also recommended that the Plaintiff refund to the property owner the part of the water and sewer charges that was paid under protest. The Supreme Court, Kings County, granted the property owner's motion to confirm the report and ordered the Plaintiff to refund the overpayments. The Appellate Division, Second Department, however, reversed the Order of the lower court and remitted the matter to the Supreme Court for a determination of the amount due the Plaintiff based on the original assessments underlying the tax lien certificate. According to the Appellate Division, the property owner having failed to pursue administrative remedies under 15 RCNY Appx A, Part VI ("Department of Environmental Protection/Billing Programs") or commence an Article 78 proceeding to challenge the assessments, was precluded from challenging the assessments in the foreclosure. NYCTL 1998-2 Trust v. T. Jan Realty Corp., decided June 9, 2009, is reported at 2009 WL 1636258.**

**Notice of Pendency/The City of New York –The Civil Court, City of New York, for Kings County, denied a motion to cancel a notice of pendency filed in an Action seeking an Order directing the Respondents to correct violations of the Multiple Dwelling Law and the Housing Maintenance Code at a property in Brooklyn. Although the parties had entered into a Consent Order "so ordered" by the Civil Court, pursuant to which all outstanding violations were to be corrected within certain time frames, proof was not submitted that the violations had been cured. Absent such proof, the matter had not been "settled" within the meaning of Civil Practice Law and Rules Section 6514 ("Motion for cancellation of notice of pendency") which provides, in part, that "[t]he court, upon motion…shall direct any county clerk to cancel a notice of pendency,...if the action has been settled, discontinued or abated…". The motion was denied without prejudice to renew upon certification that all of the violations had been certified as corrected. Department of Housing Preservation and Development v. French Open LLC, decided June 10, 2009, is reported at 23 Misc. 3d 1138 and 2009 WL 1636537.**

**Rule Against Perpetuities – According to Estates, Powers and Trusts Law Section 9-1.1(b), "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved…". In Bleecker Street Tenants Corp. v. Bleecker Jones LLC, the Appellate Division, First Department, reversing the decision of the Supreme Court, New York County, held that a renewal option in a commercial lease drafted by the tenant and having nine options to renew for consecutive ten year periods, exercisable after expiration of the initial 14 year term of the lease, violated the remote vesting rule because the rights that would arise under the renewal option could vest at a time beyond the statutorily permissible**

**period. The renewal option was not exercised before the end of the lease term in 1997 and the tenant remained in possession month-to-month pending the landlord's notice that the tenant had 60 days to exercise the option, as provided in the lease. Under the 1996 ruling of the Court of Appeals in Symphony Space, Inc. v. Pergola Properties, Inc., concerning a tenant's option to purchase (88 N.Y. 2d 466), an exception to the rule against remote vesting applies when an option in a lease is "not exercisable after lease expiration". The Appellate Division held that the renewal option clause did not violate the rule against unreasonable restraints on alienation codified in EPTL Section 9-1.1(a) since the Plaintiff was not directly restrained from transferring its property. The occupancy continued as a month-to-month tenancy. This case, decided June 23, 2009, is reported at 2009 WL1753132.**

**First American News - The article "Transfer Taxes on the Enforcement of Mezzanine Loans", co-authored by Michael J. Berey of First American, and by John M. Zizzo and Bonnie A. Newman of Cadwalader, Wickersham & Taft, LLP, was published on June 22, 2009 in the "Real Estate and Title Insurance Trends" section of the New York Law Journal.**

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