First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

Contracts of Sale – Defendant, the vendee under a contract to purchase a cooperative unit, lost her job. The bank which had issued a loan commitment thereupon informed the Defendant that it was unable to approve her loan application. The Defendant notified the Sellers that she was canceling the contract and requested a return of her down payment. The Sellers sued to enforce the contract, seeking to retain the down payment and recover money damages. According to the pre-printed provisions of the contract of sale, the Purchaser could not cancel the contract if the lender did not fund the loan due to an adverse change in her financial condition or employment. However, under a Rider to the contract the Purchaser could cancel the contract if the lender did not "fund the loan for reasons not due to purchaser's willful acts". According to the Civil Court, City of New York, the typewritten Rider controlled over any conflicting provisions of the pre-printed contract, and the bank's withdrawal of the loan commitment was not due to any willful act of the Defendant. The complaint was dismissed, and the escrowee was directed to return the down payment. Heilig v. Maron-Ames, decided August 24, 2009, is reported at 2009 WL 2710239.

Contracts of Sale – A house in Mamaroneck suffered "catastrophic" flooding in 2007. The Plaintiff, who had purchased the property in 2006, sued her broker, the Sellers and the listing broker, seeking money damages. She claimed that water damage from a 2004 flood should have been disclosed to her, that the Sellers had misrepresented the condition of the house, and that her broker had a fiduciary duty to advise her of the history of water damage. The Supreme Court, Westchester County, dismissed the complaint, and the Appellate Division, Second Department, affirmed.

According to the Appellate Division, "the Plaintiff was put on fair notice that the house was subject to water intrusion, perhaps of a serious nature…yet she failed to perform even minimum due diligence in investigating the subject property's water intrusion history". The home inspector engaged by the Plaintiff discovered some evidence of water intrusion in the basement of the house and recommended that she inquire as to the prior history of the home for water damage. The survey of the property showed the Mamaroneck River inside the property's northern boundary line and an easement through the backyard to the State of New York for access to the river. The Court stated that "…any reliance on alleged statements by one of the sellers that they never had 'water problems in the house' was unreasonable and unjustifiable".

The Plaintiff did not claim active concealment of a condition, the contract of sale provided that the property was being sold "as is" (a representation that there was no seepage was stricken from a Rider to the contract of sale), the Sellers gave the Plaintiff a $500.00 credit in lieu of a Property Condition Disclosure Statement under Real Property Law, Title 14 ("Property Condition Disclosure in the Sale of Residential Real Property"), and there was otherwise no affirmative duty to disclose the history of water damage. As to the claim against the Plaintiff's broker, since the Plaintiff was on notice of a water intrusion in the basement of the property, her damages were not directly caused by her broker's conduct. Daly v. Kochanowicz, decided August 18, 2009, is reported at 2009 WL 2516932.

Cooperatives/"Unsold Shares" – The surviving proprietary lessee of a cooperative unit in a building in New Rochelle purchased the apartment with her mother from the Sponsor in 1986. The unit had been occupied by a tenant when it was purchased and it had been continuously rented. The Petitioner-proprietary lessee claimed that she was the holder of "unsold shares" and, therefore, no consent of the cooperative corporation's Board of Directors was required to transfer of the unit. To be the holder of unsold shares under the cooperative corporation's offering plan and under the proprietary lease (i) the apartment must have been occupied by another person when the building converted to common ownership, (ii) the apartment must not have been occupied by the proprietary lessee and his or her successor and (iii) the original purchaser of the shares must have been either "produced" as the holder of unsold shares by the Sponsor when title to the building was transferred to the cooperative corporation or "designated" as the holder of unsold shares by the Sponsor after the cooperative closing. The Civil Court, New Rochelle, held that the proprietary lessee was not the holder of unsold shares, notwithstanding that the shares attributed to the apartment were listed as "unsold shares" in an amendment to the Offering Plan. The unit was purchased by Petitioner and her mother after the cooperative corporation took title and they were not "designated" by the Sponsor as the holders of unsold shares. The contract of sale under which the cooperative corporation sold the apartment to the Petitioner and her mother did not identify the shares as "unsold shares" or the purchasers as the "designated" holder of unsold shares. 210-220-230 Owners Corp. v. Arancio, decided July 21, 2009, is reported at 2009 WL 2356893.

Equitable Mortgage – Plaintiff-lender funded the purchase money financing for a closing to an attorney who, after paying off the Seller's existing mortgage, absconded with the balance of the proceeds. The deed and the "purported" purchase money mortgage were not recorded. The Supreme Court, Westchester County, imposed an equitable mortgage on the property in favor of the Plaintiff, but the ruling of the lower court was reversed by the Appellate Division, Second Department. The Appellate Division held that the Plaintiff had not made a prima facie showing that it intended to create a mortgage on the property. Fremont Investment & Loan v. Delsol, decided September 8, 2009, is reported at 2009 WL 2884728.

Foreclosures/Tax Liens/Notice – Property in Hempstead, in Nassau County, was owned of record by Rose Rainey ("Rainey"), who died intestate in 1986. Letters of Administration were issued for the Rainey Estate to the Public Administrator of Nassau County. William Simpkins ("Simpkins"), who appears to have been her sole distributee, died in 1994; his Will left all of his property to his cousin, Abraham Lincoln Calhoun ("Calhoun"), who died in 2000. The Plaintiffs, co-Administrators of the Estate of Calhoun, claimed to be his non-marital children and the only distributees of his Estate.

In the foreclosure of a tax lien by Florence Toledano ("Toledano") in 2002, only the Public Administrator for the Rainey Estate, an occupant of the property, and the third-party holder of a tax lien were named as defendants and served with notice. The Plaintiffs, claiming that they should have been given notice of the foreclosure, brought an Action to vacate the foreclosure, the tax deed to the current owners of record, and the purchase money mortgage made by the current record owners.

The Surrogate's Court, Nassau County, granted the Plaintiffs' motion for summary judgment. A title search done for Toledano had disclosed that Rainey was deceased, that she was survived by Simpkins, who had also died, and whose Will left his Estate to Calhoun. In addition, the Nassau County Treasurer's records indicated that Calhoun had paid the property's prior real estate taxes. Further, Calhoun's niece, in a 2000 letter to Toledano, advising that she, as his Guardian, would be applying for an extension of time to redeem the tax delinquency, noted that Calhoun had 19-year-old twin children. Accordingly, Toledano was aware that Calhoun had children and should have at least provided them with notice by publication. The children were therefore not bound by the foreclosure judgment. Robinson v. Singh, decided June 30, 2009, is reported at 2009 WL 1904686.

Future Estates - In December 2006, Plaintiff's father executed and recorded a deed to the Plaintiff reserving a life estate and "the power to appoint the remainder and/or Grantor's life use in the premises [by a deed] to…any one or more of the issue of the Grantor". In December 2007, the father executed and recorded a second deed to his two other sons, exercising his reserved power of appointment and making the other sons the sole owners of the property. The father and the two other sons sought to eject Plaintiff from the premises, and Plaintiff, in turn, commenced an Action for a declaration that the 2007 deed was a nullity. The Supreme Court, Montgomery County, confirmed Plaintiff's title under the 2006 deed, subject to the father's life estate, but the Appellate Division, Third Department, reversed the decision of the lower court. According to the Appellate Division, Plaintiff's interest under the 2006 deed "was a future estate because it gave him no present right of enjoyment or possession and would ripen into ownership of the property only upon the termination of his father's life estate". The 2007 deed, which conveyed the remainder interest to the Plaintiff's siblings, divested Plaintiff of his remainder interest. Voght v. Voght, decided July 9, 2009, is reported at 2009 WL 1956165.

Lien Law – The Supreme Court, New York County, cancelled a mechanic's lien filed after the recording of a Declaration of Condominium against the prior base tax lot, for failure to comply with the requirements of Lien Law Section 9 ("Contents of notice of lien"). The Court, however, on reargument granted the lienor's motion to amend its mechanic's lien *nunc pro tunc* to reflect the new condominium tax lots. The mechanic's lien substantially complied with the Lien Law in all other respects, it was filed only ten days after the recording of the Declaration, and the Sponsor, for whom the work was performed, was the sole owner of all of the units affected by the filing of the mechanic's lien on the date the lien was filed. A mechanic's lien filed against a former superseded tax lot number would be invalid if it was filed after the Declaration was recorded and condominium units were sold to third parties. East Coast Electric, Inc. v. 1200 Fifth Avenue Associates, LLC, decided July 10, 2009, is reported at 2009 WL 2883418.

Mortgage Foreclosure – An Action was commenced to foreclose a mortgage executed by Ronald Ralph Torres and Carmen L. Torres. In its complaint, the Plaintiff also sought a deficiency judgment against Mr. Torres, who was the sole obligor under the note. However, Mr. Torres had died more than two years prior to the commencement of the foreclosure. Accordingly, the Supreme Court, Suffolk County, dismissed the plaintiff's claims for foreclosure and for the recovery of any deficiency judgment against Mr. Torres, amending the caption of the action to drop him as a party defendant. "A claimant may not bring a legal action against a person already deceased at the time of the commencement of such action, but instead, must proceed against the personal representatives of the decedent's estate". Deutsche Bank v. Torres, decided July 10, 2009, is reported at 2009 WL 2005599.

Mortgage Foreclosures - The Current Developments issue of December 20, 2007 reported that Kings County Justice Herbert Kramer, in Bardi v. Morgan, decided October 16, 2007 and reported at 2007 WL 3023001, ruled that "[i]n any case where an auction sale has been scheduled more than one year after the entry of the judgment of foreclosure and sale, the Notice of Sale is invalid and the Clerk of this Court is directed to reject it, unless an amended and updated order of reference and a supplementary foreclosure judgment reflecting the corrected amount is provided". In GRP Loan LLC v. Ivery, decided July 21, 2009, Justice Kramer denied the foreclosing Plaintiff's argument that one year from the date of the entry of the judgment had not expired, such that an updated order of reference was not required, since an intervening bankruptcy had stopped the "Bardi clock" from running. The Plaintiff was directed to submit an order for the appointment of a referee to conduct an updated reference and to submit a supplemental judgment. Justice Kramer also ordered that a settlement conference be conducted, notwithstanding that the date on which the loan was made was outside the scope of Civil Practice Law and Rules Rule 3408 ("Mandatory settlement conference in residential foreclosure actions"). The decision is reported at 2009 WL 2170225.

Mortgage Foreclosure – A mortgage being foreclosed was assigned by MERS to the Plaintiff by an assignment executed by an attorney on behalf on MERS "by [a] Corporate Resolution dated 8/27/07". Justice Schack, of the Supreme Court, Kings County, held that since neither a corporate resolution nor a power of attorney to the person executing the assignment were recorded with the assignment, the Plaintiff lacked standing. According to the Court, "[t]o foreclose on a mortgage, a party must have title to the mortgage. The instant assignment, without a recorded corporate resolution or power of attorney, is a nullity". The Plaintiff was granted leave to again move for summary judgment within sixty days of the Court's ruling, on submission to the Court of (i) a copy of a valid assignment of the mortgage to the Plaintiff, (ii) an explanation of why MERS and the Plaintiff were represented by the same counsel, and (iii) an affidavit of an officer of the Plaintiff explaining why it purchased a non-performing loan 161 days in arrears on the date of the assignment. HSBC Bank USA, N.A. v. Vasquez, decided August 21, 2009, is reported at 2009 WL 2581672.

Mortgage Foreclosure – Justice Mayer, of the Supreme Court, Suffolk County, denied a foreclosing lender's application for an Order of Reference without prejudice and with leave to resubmit upon proper papers, due to the lender's failure to submit the following "evidentiary proof", which the Justice ruled is required under the so-called Subprime Lending Reform Act (Chapter 472 of the Laws of 2008) and related statutes:

> **1. Proof, including an affidavit by one with personal knowledge, as to whether the loan in foreclosure is a "subprime home loan", as defined in Real Property Actions and Proceedings Law ("RPAPL"), Section 1304 ("Required prior notices") or a "high-cost home loan", as defined in Banking Law, Section 6-l ("High-cost home loans");**
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> **2. Proof of compliance with the requirements of Civil Practice Law and Rules Section 3215(f) ("Default judgment"), including but not limited to a proper affidavit of facts by the Plaintiff or its agent, "provided there is proper proof in evidentiary form of such agency relationship, or a complaint verified by Plaintiff and not merely by an attorney or non-party, such as a servicer, who has no personal knowledge";**
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> **3. Proof, including an affidavit from one with personal knowledge, of the proper assignment(s) of the subject mortgage, sufficient to establish the plaintiff's ownership of the note and mortgage (as the foreclosing Plaintiff had assigned the mortgage back to the original lender before the foreclosure was commenced);**

4. Proof, including an affidavit from one with personal knowledge, of proper compliance with the time and content requirements specified in the notice of default provisions in the mortgage, and proof of proper service of said notice;

5. Proof, including an attorney's affirmation, of compliance with the form, type size, type face, paper color and content requirements for foreclosure notices, pursuant to RPAPL Section 1303 ("Foreclosures; required notices") (for a foreclosure involving owner-occupied one-to-four family dwellings), as well as an affidavit of proper service of such notice; and

6. Proof, including an attorney's affirmation, of compliance with the form, content, type size, and type face requirements of RPAPL Section 1320 ("Special summons required in private residence cases") regarding special summonses (for a foreclosure involving residential property containing not more than three units), and evidentiary proof of proper service of said summons.

Since the Action was commenced prior to September 1, 2008, no final judgment had been issued, and the Plaintiff had failed to show that the loan in foreclosure was not a "subprime home loan" or a "high-cost home loan", the Court held that the Defendant-homeowner was entitled to a settlement conference.

Further, according to the Court, "…with regard to any future applications by the plaintiff, if the Court determines that such applications have been submitted without proper regard for the applicable statutory and case law, or without regard for the required proofs delineated herein, the Court may, in its discretion, deny such applications with prejudice and/or impose sanctions….and may deny those costs and attorneys fees attendant with the filing of such future applications". Deutsche Bank Trust Company Americas v. Eisenberg, decided June 23, 2009, is reported at 2009 WL 1789407.

<u>Mortgage Foreclosure/"Quiet Title Act"</u> – The United States was named a defendant in a mortgage foreclosure on property in which it leased space for the Social Security Administration. The United States District Court for the Eastern District of New York, on motion of the fee owner, dismissed the action for lack of subject matter jurisdiction based on 28 U.S.C. Section 2409a ("Real property quiet title actions"), known as the "Quiet Title Act", which states that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights…" According to the Court,

"[b]ecause the Quiet Title Act does not waive the sovereign immunity of the United States unless the United States holds an interest in real property adverse to the plaintiff, this action must be dismissed for lack of subject matter jurisdiction." United International Bank v. Redstone USA Corp., decided August 17, 2009, is reported at 2009 WL 2525132.

Mortgage Recording Tax – Form MT-15 ("Mortgage Recording Tax") is used to compute New York State's mortgage recording tax when a mortgage encumbers property in more than one locality and different rates of mortgage recording tax apply. A revised Form MT-15, which is effective October 1, 2009, has been issued by the New York State Department of Taxation and Finance. The form sets forth the mortgage recording tax rates in effect in each County as of October 1, and accounts for the change in the mortgage tax rate in Greene County on October 1 to $1.25 for each $100.00 of principal indebtedness secured. Revised Form MT-15 is posted at http://www.tax.state.ny.us/forms/form_number_order_mt_pt.htm.

New York City/Environmental Control Board ("ECB") Violations – Under a new "Penalty Relief Program", the base fine for an ECB violation can be paid without also paying interest, a penalty or a late fee, provided that the condition which caused the fine was cured. The Program applies to violations "in default" for which a hearing was scheduled before May 1, 2009. An application must be filed before December 21, 2009. See http://nyc.gov/html/dof/html/pdf/ecb/ecb_faq.pdf.

Notices of Pendency – According to Real Property Actions and Proceedings Law Section 611 ("…property not exceeding six inches in width…"), an action may be maintained seeking the removal of an exterior wall encroaching not more than six inches onto adjoining property, provided that the action is brought within one year after the construction of the wall is completed. An Action to recover damages for the encroachment may be sought for one additional year, "and upon the satisfaction of the judgment for such damages the title of the plaintiff to the strip of land shall thereby be transferred to and vest in the defendant".

In Chan v. 2368 West 12th Street LLC, the Plaintiffs sought an Order requiring the removal of an encroachment onto their land which did not exceed six inches in width and moved for the cancellation of the notice of pendency filed in the Action. The Supreme Court, Kings County, denied that part of the Defendants' motion seeking to cancel the lis pendens. Even if the wall had been erected for more than one year when the Action was commenced and therefore could not be removed, the notice of pendency would remain in effect until the action for damages was completed; under the statute an award of damages could result in a transfer of title. This case, decided August 10, 2009, is reported at 2009 WL 2742757.

Transfer Tax/"Additional Tax" – The "Additional Tax", also known as the "Mansion Tax", is a tax of 1% of gross consideration when the consideration for a transfer is $1,000,000 or more. Under Tax Law Section 1402-a, the tax is payable by the grantee, unless the grantee is exempt from payment of the tax, in which case it is payable by the grantor. In Deutsch Tane Waterman & Wurtzel, P.C. v. Hochberg, the Seller erroneously paid the Additional Tax. The Seller's law firm reimbursed the Seller, took an assignment of the Seller's rights, and sued the Purchasers to recover the tax payment. The Appellate Term, First Department, sustained the judgment of the lower court awarding the tax payment to the Plaintiff. According to the Appellate Term, "defendants may not reap a windfall by retaining the payment, even if the payment may be said to have resulted from negligence". The Court also noted that the parties in the contract of sale could have transferred to the Seller the responsibility to pay the tax. "We perceive no public policy reasons…that would foreclose negotiation on the issue of the tax allocation". This case, decided September 11, 2009, is reported at 2009 WL 2948486.

Transfer Tax/City of Peekskill – Chapter 228 of the Laws of 2009, signed into law on July 16, 2009, authorizes the City of Peekskill to enact a local law imposing a local transfer tax at a rate not to exceed 1% of consideration payable on the transfer by a deed of real property within the City. The City is authorized to allow a deduction for pre-existing liens and an exemption in an amount not to exceed $100,000.00 of consideration. Conveyances made pursuant to contracts executed prior to September 1, 2007 [as stated in Chapter 228] will be exempt.

Westchester County Clerk – The Office of the Westchester County Clerk has issued a Notice stating that "[a]s of January 1, 2010, land record submissions must be supported by cover pages and tax forms created on the Westchester County Clerk's PREP System…The Property Records Electronic Portal (PREP) System is a web-based application…Beginning October 1st, the PREP System will be available to users who simply wish to simply test it out or begin using it to create cover pages and tax forms for actual document submissions…The cover page created on the PREP system will replace the current Land Records Recording Sheet".

The website to create the forms is https://prep.westchesterclerk.com.

First American News – "DIP Financing, Bankruptcy Concerns For Transactional Real Estate Lawyers", authored by S.H. Spencer Compton and Andrew D. Jaeger of First American, was published in the New York Law Journal on September 25, 2009.

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