

First American Title Insurance Company of New York

Current Developments

MICHAEL J. BEREY, GENERAL COUNSEL

ADVERSE POSSESSION

As reported in Current Developments dated August 15, 2008, New York's laws setting forth the elements of a claim of adverse possession were changed by Chapter 269 of the Laws of 2008 ("Chapter 269"), which amended various Sections of the Real Property Actions and Proceedings Law ("RPAPL") and added RPAPL Section 543 ("Adverse Possession; how affected by acts across a boundary line"). The changes in the law made by Chapter 269 apply to claims filed on or after July 7, 2008. The Appellate Division, Third Department, held that the law in effect prior to July 7, 2008 applied in an action commenced in March 2009. The complaint in the action alleged that the prescriptive periods for the claimed easement "commenced and concluded prior to" July 7, 2008 and "[s]hould plaintiffs succeed in proving their claims, titles to the easement would have vested prior to the effective date of the amendments... '[they] may not be disturbed retroactively by newly-enacted or amended legislation' [citations omitted]". *Barra v. Norfolk Southern Railway Company*, decided July 8, 2010, is reported at 2010 WL 2680107.

The Appellate Division, Fourth Department, has also ruled that the laws in effect prior to July 7, 2008 apply to claims of adverse possession which have ripened into title prior to that date. *Franza v. Olin*, decided March 19, 2010, is reported at 897 N.Y.S. 2d 804.

ELECTRONIC FILING

Pursuant to Chapter 416 of the Laws of 2009, the Administrative Judge for the Supreme Court, New York County, and the Statewide Coordinator for Electronic Filing, Uniform Court System, have issued an "Important Notice to Commercial Practitioners: Mandatory Electronic Filing" dated May 19, 2010, which was posted to the New York County Supreme Court's website at <http://www.nycourts.gov/supctmanh/MEF-Notice%20to%20CD.pdf>. According to the Notice:

"Any mandatory commercial case commenced [in the Supreme Court, New York County] on or after May 24 [2010] must be electronically filed through the New York State Courts Electronic Filing System ("NYSCEF"), as must subsequent filings therein. Mandatory commercial cases consist of certain commercial matters (not limited to Commercial Division cases) in which the amount in controversy is over \$100,000 (exclusive of interest, costs, disbursements, counsel fees and punitive damages).

"Except to the extent that the rules provide otherwise, on and after May 24, the County Clerk and court clerks will not accept documents filed in mandatory commercial cases in hard copy form..."

The classes of cases for which mandatory electronic filing is required, when the amount in controversy is over \$100,000, are listed in Chapter 416, posted at <http://www.nycourts.gov/supctmanh/E-Filing.htm>. The list includes "transactions involving commercial real property" and "residential real estate disputes, including landlord-tenant matters, and commercial real estate disputes involving the payment of rent only".

EMINENT DOMAIN

Current Developments dated December 28, 2009 reported that the Appellate Division, First Department, had annulled the determination of the New York State Urban Development Corporation d/b/a Empire State Development Corporation, approving the acquisition by condemnation of approximately 17 acres in the Manhattanville area of West Harlem for the development of a new campus for Columbia University. The Appellate Division found “the true beneficiary of the scheme to redevelop Manhattanville is not the community that is supposedly blighted, but rather Columbia University”; citing the 2005 decision of the United States Supreme Court in *Kelo v. City of New London* (545 U.S. 469), the Court held that this use of eminent domain to benefit a private entity violated the “Takings Clause” of the United States Constitution. The decision of the Appellate Division has been reversed, and the petitions dismissed, by New York’s Court of Appeals. The project was designated by ESDC as a “land use improvement project” under Section 6253 (“Definitions”) of the New York State Urban Development Corporation Act; according to the Court of Appeals, “since there is record support...for ESDC’s determination that the Project site was blighted, the Appellate Division plurality erred when it substituted its view for that of the legislatively designated agency”. The Court of Appeals also held that this expansion of a private university was a “civic project” under Section 6253, for which the ESDC could acquire property by condemnation. *Kaur v. New York State Urban Development Corporation*, decided June 24, 2010, is reported at 2010 WL 2517686.

FORGERY

Plaintiff, foreclosing a mortgage on property in Brooklyn, claimed that the satisfaction of the mortgage was a forgery. It moved for the satisfaction to be vacated and for summary judgment. The Supreme Court, Kings County, denied the Plaintiff’s motion for summary judgment and dismissed the complaint. The Court held that Plaintiff did not overcome the presumption of validity created by the acknowledgment of the signature of the person who executed the instrument. Further, the Plaintiff lacked standing to foreclose; the acknowledgment on the assignment of the mortgage to the Plaintiff was of the signature of a person who did not sign the instrument. The Court also held that if the Plaintiff’s mortgage were reinstated it would be subordinate to the mortgage which had been executed and assigned after the satisfaction of the Plaintiff’s mortgage was recorded. The other mortgagee and its assignee were bona fide purchasers for value without notice of the alleged prior fraud. Real Property Law Section 266 (“Rights of purchaser or incumbrancer for valuable consideration protected”) provides that:

“This article [Article 8. Conveyances and Mortgages] does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor”.

Wells Fargo Bank NA v. Moise, decided April 27, 2010, was reported in the *New York Law Journal* on May 27, 2010.

FORGERY

A property in the Bronx is owned by two limited liability companies as tenants in common. Mark M. Benun, since sentenced to serve time in prison, forged a deed from one of the tenants in common to the other and a deed from the grantee tenant in common to a third party purchaser. He also forged recorded satisfactions of three mortgages and the termination of an assignment of leases and rents. The Supreme Court, Bronx County, held that the deeds, the mortgage satisfactions and the termination of the assignment of leases and rents were void. As for the third party purchaser, the Court noted that “it may continue to pursue claims for money damages” and, in addition, “[c]ourts have also considered that ‘title insurance is available to purchasers of real estate [to protect] them against situations such as this one’ [citation omitted]”. *Lido Realty LLC v. 67-79 LLC*, decided June 21, 2010, is reported at 27 Misc. 3d 1238 and 2010 WL 2519636.

MECHANIC’S LIENS

A commercial tenant moved for the summary discharge of a mechanic’s lien, claiming that because the owner of the property did not consent to the work the lien was invalid. Under Lien Law Section 3 (“Mechanic’s lien on real property”), a contractor can file a mechanic’s lien for the performance of labor or the furnishing of materials to improve real property that was done “with the consent or at the request of the owner thereof, or his agent, contractor or subcontractor...” The Supreme Court, New York County, denied the motion; “disputes over the validity of the lien must be decided at the trial on the foreclosure action, not on a motion to vacate”. A mechanic’s lien is subject to summary discharge, under Lien Law Section 19(6) (“Discharge of lien for private improvement”), when there is a “defect upon the face of the lien”. *Landmark Ventures v. Sy Construction*, decided June 24, 2010, was reported in the *New York Law Journal* on July 16, 2010.

MORTGAGE FORCLOSURE

The proceeds from the foreclosure sale of property in Port Washington were sufficient to pay the amount due on both the first mortgage being foreclosed and a second mortgage held by the Plaintiff in this action. However, the first sale was ineffective; the Plaintiff did not receive any part of the proceeds of the second sale. The Plaintiff sued for money damages, claiming that the Defendant, the foreclosing mortgagee, failed to give adequate notice of the second sale and was negligent in its sale of the premises. The Supreme Court, Rockland County, dismissed these causes of action and granted the Defendant’s motion for summary judgment. First, according to the Court, the Referee complied with the notice requirements of RPAPL Section 231 (“Sale; notice of; where and how conducted”) for both sales. In particular, as to the second sale, according to a ruling of the Appellate Division, Second Department, when “the adjournment of the foreclosure sale was for a period not exceeding four weeks, a single publication of the postponed date [as was done in this second sale] sufficed as adequate notice of the foreclosure sale, regardless of the fact the sale was adjourned for a reason other than the failure of the Referee appointed to conduct the sale to appear [citations omitted]”. Second, the foreclosing mortgagee was not required to take the names of the other bidders at the first sale in case the winning bidder at that sale was unable to complete the purchase. *Rabinowitz v. Deutsche Bank, National Trust Company, as Trustee*, decided May 12, 2010, is reported at 2010 WL 2106217.

MORTGAGE RECORDING TAX/NYS TRANSFER TAX/ISLAMIC FINANCING

New York State's Department of Taxation and Finance has issued an Advisory Opinion (TSB-A-10(3) R) dated June 16, 2010 concerning the imposition of mortgage recording tax on the assignment to a purchase money lender of a deed that was given as security for a loan. As set forth in the Advisory Opinion, the owner ("Owner") of property in Queens County executed, as part of a loan transaction structured to comply with the requirements of Islamic Law, a deed to the lender's special purpose entity ("SPE"). Mortgage recording tax was paid on the recording of the deed. The Owner also entered into an "Operating Ijara Agreement", a leaseback of the premises under which rent would be paid in amounts equivalent to payments that would be due to a lender, and an agreement for the property to be re-conveyed to the Owner on the final payment of the purchase price in installments over a twenty-five year period.

Petitioner, the contract vendee of the property, is to obtain purchase money mortgage financing. Petitioner asked whether the deed executed by the Owner to the SPE could be assigned to Petitioner's lender and consolidated with a new, additional mortgage executed by Petitioner without the payment of additional New York State Real Estate Transfer Tax or mortgage recording tax. According to the Advisory Opinion, the deed is a financing agreement not subject to payment of the State's transfer tax. Mortgage tax is payable not on the unpaid principal obligation secured by the instrument being assigned but "only to the extent the supplemental mortgage secures an amount in addition to the unpaid principal debt or obligation secured by the mortgage that is assigned to the new lender". The Advisory Opinion stated that the Department would not opine whether "the assigned deed can be treated as a mortgage and modified by increasing the debt that is secured and by changing the form of the security instrument to a mortgage". The Advisory Opinion is posted at http://www.tax.state.ny.us/pdf/advisory_opinions/multitax/a10_3r.pdf.

NYC/REAL PROPERTY INCOME AND EXPENSE (RPIE) STATEMENTS

The City's Department of Finance has posted the following announcement on its web site at http://home2.nyc.gov/html/dof/html/property/property_info_rpie.shtml:

"Starting with the 2009 RPIE due on September 1, 2010, owners of [income producing] properties subject to filing requirements but fail to file on time will face a penalty of up to 3% of the actual assessed value of their property. Furthermore, all filed RPIEs are subject to audit and erroneous filings will be penalized in accordance with the law".

The authority to impose penalties for the failure to timely file an RPIE is contained in NYC Code Section 11-208.1 ("Income and Expense Statements")

NYC – RECORDED DOCUMENT PROGRAM

According to a Notice issued by New York City’s Department of Finance, the Department has implemented a program “to allow property owners, lienors, or their designees (or executors/administrators of the estates of owners) to register to receive electronic notification when a deed or deed-related document, or a mortgage, or mortgage-related documents, affecting an ownership interest in real property has been recorded against a property in the City of New York. This program will alert registered property owners when documents are recorded without their knowledge and will allow them to take steps to limit the harm caused by the recording of a fraudulent document”.

Further, according to the Notice, “Property owners, lienors or their designees, or executors/administrators of the estates of owners, who have an interest in real property in the City of New York can register using the borough, block and lot number or the address of the property to receive an email, text message or letter each time a deed, mortgage or related document is recorded against the registered property”.

The following have been posted to ACRIS:

Program Description

http://nyc.gov/html/dof/html/pdf/recorded_documents/notice_of_rec_descrip.pdf

Frequently Asked Questions

http://nyc.gov/html/dof/html/pdf/recorded_documents/notice_of_rec_faq.pdf

Registration for notice by email or SMS

<http://a836-acris.nyc.gov/nrd/>

Form for Notice by Mail

http://nyc.gov/html/dof/html/pdf/recorded_documents/notice_of_rec_doc.pdf

RECEIVERS

Civil Practice Law and Rules Section 5106 (“Appointment of receiver”) provides that “[a] court, by or after judgment, may appoint a receiver of property which is the subject of an action, to carry the judgment into effect or to dispose of the property according to its directions..”

Relying on the authority of CPLR Section 5106, Justice Goodman of the Supreme Court, New York County, granted the motion by the Plaintiff-purchasers of a cooperative unit for the appointment of a receiver to transfer to them a cooperative unit owned by the Defendant-seller “in order to effectuate the Court’s Decision and Order, dated 7/13/09” granting specific performance of their contract of sale. The Court appointed a receiver and “Ordered that the Receiver is empowered to take any actions, that Defendant would have taken, or sign any documents, that Defendant would have signed, in connection with the transfer [of] ownership of [the] cooperative unit....” *De Azevedo v. Angel*, decided June 21, 2010, was reported in the *New York Law Journal* on July 7, 2010.

RIGHT OF FIRST REFUSAL

Defendant-seller notified its tenant, the Plaintiff in the action, that it had executed a contract to sell the leased property. Plaintiff's lease afforded it a right of first refusal exercisable for thirty days after notice of an offer to purchase "for the same price and upon the same terms". Following receipt of notice of the contract Plaintiff exercised its right of first refusal, but it rejected as unenforceable a provision in the contract requiring the vendee to make a loan to Defendant secured by a mortgage on replacement property the Defendant was acquiring as part of a 1031 exchange. Plaintiff moved to enjoin the Defendant from selling to a third party and sought a declaratory judgment that the right of first refusal was properly exercised without accepting the provision for a loan. The Plaintiff agreed to make the loan if the Court held that it was necessary to do so to exercise the right of first refusal.

The Supreme Court, Kings County, granted the motion for injunctive relief so long as Plaintiff executed the proffered contract, made a down payment, and proceeded to close. The Court held that the Plaintiff was required to accept the requirement that a loan be made. The provision for the loan was "entirely rational" and constituted "an element of the consideration for the sale of the property"; there was "nothing about this clearly defined and detailed loan provision that suggests that it was intended to discourage plaintiff's exercise of its rights." *Lester's Activewear, Inc. v. Combine Distributing Inc.*, decided April 5, 2010, is reported at 2010 WL 1293733.

SALES AND COMPENSATING USE TAX

New York State's Department of Taxation and Finance has issued a Memorandum dated July 19, 2010 captioned "Sales and Compensating Use Tax Treatment of Certain Information Services". According to the Memorandum, "[a]s a general rule, furnishing information created or generated from a common database, or information that is widely accessible, is a taxable information service". The following are among the services listed in the Memorandum as being taxable information services for which sales tax must be collected, commencing September 1, 2010:

- "public records furnished (electronically or in paper format) by a private entity, such as a document retrieval service (examples include real property deeds...however, public records sold by a governmental entity, such as a county clerk, are not subject to tax...) as an "information service"
- "real property information databases..."

The Memorandum specifically deals with abstracts of title:

"..beginning on September 1, 2010, the sale of an abstract of title to real property is the sale of taxable information services. This includes the sale of an abstract of title to either a prospective purchaser of real property or to an attorney representing a prospective purchaser. However, opinions of title offered by an attorney are considered legal services and are not subject to tax. Therefore, the sale of an abstract of title to an attorney for use in conjunction with rendering an opinion of title or providing other legal services is a retail sale subject to sales tax as described herein."

TSB-M-10(7)S is posted on the Department's web site at http://www.tax.state.ny.us/pdf/memos/sales/m10_7s.pdf.

TRUSTS

Estates, Powers and Trusts Law Section 7-1.18 (“Funding of lifetime trust”) provides that “[a] lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trust. For purposes of this section, (a) transfer is not accomplished by recital of assignment, holding or receipt in the trust instrument, and (b) in the case of a trust of which the creator is the sole trustee, transfer shall mean in the case of assets capable of registration, such as real estate...the recording of a deed...in the name of the trust or trustee...”

Although a trust instrument recited that various assets belonged to or had been assigned to the trust, there was no evidence in the record that any deed had been executed. Accordingly, the Appellate Division, First Department, affirming a ruling of the Surrogate’s Court, New York County, held that certain real property had not been transferred to the trust and remained property of the decedent’s Estate. “In order for assets to become part of a trust under EPTL Section 7-1.18, ‘the grantor is obligated to actually transfer the assets’ to the trust [citation omitted]”. In re Lisa Bishop v. Maurer, decided May 6, 2010, is reported at 2010 WL 1791235.

Michael J. Berey, General Counsel

First American Title Insurance Company of New York

No. 123. August 2, 2010

mberey@firstam.com