



First American Title

First American Title Insurance Company

Current Developments

Mortgage Foreclosures/High-Cost Home Loans

In an action to foreclose a mortgage on a one-family dwelling as to which the lender is a natural person, the Defendant-borrowers claimed that the loan violated Banking Law Section 6-l (“High-cost home loans”). According to Real Property Actions and Proceedings Law Section 1302 (“Foreclosure of high-cost home loans and subprime home loans”), a violation of Banking Law Section 6-l is a defense to an action to foreclose a high-cost home loan. The Plaintiff argued that Section 6-l did not apply to him since he is not a “Lender”, defined in Section 6-l as a mortgage banker or an exempt organization under Banking Law Section 590.

Judge Schreier of the Supreme Court, Kings County, citing Section 1 of the Banking Law, which states that the Banking Law applies to “all...individuals as shall subject themselves to special provisions thereof, or who shall, by violating any of its provisions, become subject to the penalties provided therein”, held that the mortgage violated Section 6-l’s restriction on balloon payments and its requirement that a high-cost mortgage include a legend that the mortgage is a high-cost mortgage. The Court denied the Plaintiff’s motion for a judgment of foreclosure and sale and vacated its prior Orders granting the Plaintiff summary judgment and appointing a Referee to compute. *Balsam v. Fioriglio*, decided November 22, 2010, is reported at 2010 WL 4807520.

Mortgage Foreclosure

As reported in Current Developments dated December 28, 2009, Judge Spinner of the Supreme Court, Suffolk County, in a judgment issued November 19, 2009, noting what he considered to be the Plaintiff-lender’s “inequitable, unconscionable, vexatious and opprobrious” conduct in the foreclosure of a subprime mortgage, voided the note, cancelled and ordered the mortgage being foreclosed to be discharged, vacated the judgment of foreclosure, and canceled the notice of pendency for the action. The Appellate Division, Second Department, in a decision dated November 16, 2010, reversed the decision of the lower court, reinstated the note and mortgage and the foreclosure judgment, and directed the County Clerk to reinstate the notice of pendency. According to the Appellate Division, “the severe sanction imposed by the Supreme Court of cancelling the mortgage and note was not authorized by any statute or rule...”. Judge Spinner’s ruling in *IndyMac Bank, F.S.B. v. Yano-Horoski* is reported at 890 N.Y.S. 2d 313; the Appellate Division’s decision is reported at 2010 WL 46767301.

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Mortgage Foreclosures/“Access to Justice In Lending Act”

On October 20, 2010, Governor Paterson signed into law Chapter 550 of the Laws of 2010, the “Access to Justice in Lending Act”, adding Section 282 (“Mortgagor’s right to recover attorneys’ fees in actions or proceedings arising out of foreclosures of residential property”) to the Real Property Law. Effective 60 days after enactment, Chapter 550 applies to residential real property mortgages in existence on and after the effective date and to actions and proceedings commenced on and after said date. “Residential real property” is defined to include real property improved by a one-to-four family residence, and a condominium unit or cooperative apartment occupied by the mortgagor.

Under Section 282, in connection with the foreclosure of a mortgage on residential real property, the mortgagor is afforded a right to recover reasonable attorneys’ fees and/or expenses incurred “as the result of the failure of the mortgagee to perform any covenant or agreement on its part to be performed under the mortgage or in the successful defense of any actions or proceeding commenced by the mortgagee against the mortgagor arising out of the [mortgage] contract.”

Mortgage Recording Tax

In order to finance improvements at JFK International Airport’s Terminal 4 the Port Authority of New York and New Jersey issued bonds and leased the terminal for an amount sufficient to pay the debt service. To further secure the repayment of the bonds, the Port Authority executed to the Trustee for the bondholders a First Supplemental Assignment of Rents (“Assignment of Rents”) which was recorded. As the Port Authority is considered a political subdivision of New York and New Jersey, the recording of the Assignment of Rents was exempt from the payment of mortgage recording tax. A Supplemental Leasehold Mortgage executed by the lessee to the Trustee for the bondholders was also exempt from payment of the tax, under subsection 1(a) of Tax Law Section 255 (“Supplemental mortgages”); the mortgage secured the same principal indebtedness as the prior recorded Assignment of Rents. Advisory Opinion TSB-A-10(4)R of New York State’s Department of Taxation and Finance, dated September 27, 2010, is posted at http://www.tax.state.ny.us/pdf/advisory_opinions/mortgage/a10_4r.pdf.

Mortgage Recording Tax/New York State Transfer Tax

New York State’s Office of Tax Policy Analysis in the State’s Department of Taxation and Finance has posted its Annual Statistical Report of New York State Tax Collections for the State’s fiscal year 2009-2010 (April 1, 2009-March 31, 2010). According to the Report, the amount of the State’s Real Estate Transfer Tax collected in FY 2009-2010 was \$493,049,478, down from \$701,163,664 in FY 2008-2009. Mortgage Recording Tax collected statewide in FY 2009-2010 was \$1,015,040,422, with the tax collected in New York City being \$488,306,248. In FY 2008-2009 the mortgage tax collected statewide was \$1,433,276,367; the tax collected on mortgages recorded in New York City was \$860,445,376. The Report can be obtained at the following link: http://www.tax.ny.gov/research/collections/fy_collections_stat_report/2009_10_annual_statistical_report_of_ny_state_tax_collections.htm.

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Mortgage Recording Tax/New York State Transfer Tax

New York State's Department of Taxation and Finance has announced that the interest rate to be charged for the period January 1, 2011 – March 31, 2011 on late payments and assessments of mortgage recording tax and the State's Real Estate Transfer Tax will be 7.5% per annum, compounded daily. The interest rate to be paid on refunds of those taxes will be 2% per annum, compounded daily. The interest rates are published at http://www.tax.state.ny.us/taxnews/int_curr.htm.

Nassau County Recordings

Sections 19-17.0 and 19-18.0 of the Nassau County Administrative Code have been amended effective December 1, 2010 to increase the block index recording fee from \$10.00 to \$75.00 "for each block under which such instrument is required to be indexed" or "re-indexed". As stated in a Notice issued by the Nassau County Clerk, the Clerk's Office "is unable to process papers unaccompanied by the correct fee".

Peekskill Transfer Tax

Pursuant to the authority granted by Chapter 228 of the Laws of 2009, which added Tax Law Section 1206 ("Imposition of taxes on deeds in the city of Peekskill") to New York State's Tax Law, the Common Council of the City of Peekskill, in Westchester County, has adopted Local Law No. 11 of 2010 imposing a Real Property Transfer Tax on the conveyance of real property, or an interest therein, located in whole or in part in the City of Peekskill. The transfer tax is one percent (1%) of consideration, payable by the grantor on a deed delivered on or after December 1, 2010. The tax is required to be paid within thirty days of the delivery of a deed and prior to its recording. Local Law 11 is posted to the City's website, <http://www.cityofpeekskill.com>. Its Real Property Transfer Tax Return is posted at <http://www.cityof-peekskill.com/finance/real-property-transfer-tax-return>.

Sales Tax

Current Developments dated September 27, 2010, as amended, posted at http://www.firstamny.com/doc/Current_126.pdf, reports that New York State's Department of Taxation and Finance has issued "Sales and Compensating Use Tax Questions Regarding Abstracts of Title" dated July 19, 2010.

***The officers and employees of First American wish you
good health and prosperity in the New Year.***

Michael J. Beroy
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No. 129. December 29, 2010
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