First American Title Insurance Company

Current Developments

Cooperative Units

The Appellate Division, Second Department, held that the purchaser at a non-judicial foreclosure sale of a cooperative unit under Article 9 ("Secured Transactions") of the Uniform Commercial Code was required, before obtaining possession of the unit and the shares allocated to it, to obtain the cooperative corporation's approval of the sale. The Terms of Sale provided that the sale was subject to the terms of the cooperative's governing documents and the proprietary lease required that such approval be obtained. After the sale, the Defendant cooperative corporation notified the Plaintiff that its application had been rejected. The Appellate Division reversed the rulings of the Supreme Court, Suffolk County which granted Plaintiff's motion to compel the closing of title and denied the Defendant cooperative corporation's motion to enjoin the Plaintiff from entering the unit pending resolution of the Action. LI Equity Network LLC v. Village in the Woods Owners Corp., decided October 19, 2010, is reported at 910 N.Y.S. 2d 97.

Deeds/Life Estates

A deed was executed to Jennie Dance ("Dance") "for her life", the life estate to be forfeited and the property to revert to Wilhelmina Cornell ("Cornell") if anyone other than the property owner was in residence. The deed then described Dance and Cornell as "Joint Tenants with the right of survivorship". Dance subsequently executed a deed purporting to convey "her undivided one-half (1/2) interest" to two individuals (the "Defendants") who claimed, on the death of Dance, that they were tenants in common with Cornell. The Supreme Court, Queens County, held that Dance was granted only a life estate, Cornell was granted a future estate, and the Defendants were only conveyed Dance's life estate which terminated on the death of Dance. Partial summary judgment was granted declaring Cornell to be the sole owner of the property. Cornell v. Estate of Dance, decided December 13, 2010, is reported at 29 Misc. 3d 1233 and 2010 WL 5060650.

Escrow

For the closing of a property in Brooklyn an escrow was held by the closing title agent to ensure the discharge of various unpaid municipal liens. If the encumbrances were not removed within sixty days of closing, the escrow agent, on notice to Plaintiff, was to disburse to the Defendant-Purchaser "so much of the Deposit as may be necessary to pay, satisfy and discharge [the] Encumbrances in full". Once the charges were paid in full the balance of the escrow was to be refunded to the Plaintiff.

Plaintiff brought an Action against the Purchaser and the title agent, seeking specific performance and sanctions for the failure to act in good faith. He claimed that since the outstanding charges were reduced to $6,746.18, with the remaining amounts being litigated or otherwise having been resolved, there was no reason to continue to hold the escrow. Further, according to the Plaintiff, after sixty days from the date of closing, he had the right to receive the remaining escrow, from which he would pay the remaining charges.

The Supreme Court, Kings County, denied the Plaintiff's motion and dismissed the complaint. According to the Court, "[p]laintiff has admitted that the encumbrances have not been paid in full to date. Therefore, plaintiff has not performed the condition precedent to his right to the funds in escrow". Brady v. VII Realty LLC, decided October 29, 2010, is reported at 29 Misc. 3d 1217 and 2010 WL 4274647.

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Fraudulent Transfers

While Plaintiff's action seeking a money judgment against her son was pending, her son and his wife, the Defendants in the action, sold their jointly owned home to a third party and purchased a new residence ("Residence 2") in the wife's name only. Title to Residence 2 was then transferred to the wife's mother as Trustee of the mother's revocable trust. Having obtained a money judgment against her son which remained unsatisfied, Plaintiff sought an Order setting aside the deeds to Residence 2 as having been fraudulent as to her under New York's Debtor and Creditor Law. The Supreme Court, Nassau County, held that the deeds to Residence 2 were fraudulent as to the Plaintiff under Debtor and Creditor Law Sections 273-a ("Conveyances by defendants"), 276 ("Conveyance made with intent to defraud") and 278 ("Rights of creditors whose claims have matured"), that title to the Premises was in the Defendants, and the Plaintiff had the right to execute on the Defendants' interest in the property in excess of their homestead exemption. Delaney v. Delaney, decided October 8, 2010, was reported in the New York Law Journal on November 9, 2010.

Mortgage Foreclosures

The foreclosing Plaintiff moved for summary judgment and an order of reference. The Plaintiff's Counsel had not, however, submitted the Affirmation required by the Rule promulgated on October 20, 2010 by the Chief Administrative Judge of New York State's Courts because the Plaintiff did not yet have in place procedures to comply with the Rule. The Rule requires the Plaintiff's Counsel to affirm, under penalty of perjury, that a specifically named representative of the Plaintiff has informed counsel that he or she has "confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affirmations filed with the Court [in the foreclosure action] as well as the accuracy of the notarizations contained in the supporting documents filed therewith" and to further certify, on the basis of Counsel's knowledge, information and belief, that the papers filed in the foreclosure "contain no false statements of fact or law".

The Supreme Court, Kings County, denied the Plaintiff's motion, dismissed the action without prejudice, and canceled the lis pendens. According to Judge Schack, "[t]he Court does not work for CITI and cannot wait for CITI, a multi-billion dollar financial behemoth, to get its 'act' together". Citimortgage, Inc. v. Nunez, decided December 13, 2010, is reported at 2010 WL 5092865.

Mortgage Foreclosures

As reported in Current Developments dated July 8, 2009, in Argent Mortgage Company, LLC v. Mentesana (866 N.Y.S. 2d 66), an action to foreclose a mortgage on a residence in Brooklyn, Judge Jacobson of the Supreme Court, Kings County, found that the transfer of title to the Defendant-mortgagor appeared to be a transfer to a "straw man" to facilitate a fraud, denied the Plaintiff's unopposed motion for summary judgment and referred the matter to the District Attorney, the Attorney General's Fraud Division, and the Banking Department's Criminal Investigation Bureau. The Appellate Division, Second Department has reversed the lower court's ruling, remitting the case to the lower court to appoint a referee to compute. According to the Appellate Division, there was "no support in the record for the court's conclusion that the mortgage sought to be foreclosed was obtained by fraudulent means…evidence that the plaintiff's decision to lend money to the mortgagor was unwise was insufficient by itself to raise a triable issue of fact as to whether the plaintiff engaged in fraudulent or unconscionable conduct". The Appellate Division's opinion, decided December 28, 2010, is reported at 2010 WL 5395010.

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Partition

The Defendant and her husband were divorced in 1979, thereby becoming tenants in common as to a property they owned as tenants by the entirety. Under the divorce judgment, the Defendant was awarded exclusive possession of the property. In 2005, her former husband died; his heirs, children of a prior marriage, subsequently sold their tenant in common interest to the Plaintiff, who commenced an Action for partition. The Supreme Court, Queens County denied the Plaintiff's motion for summary judgment, which ruling was reversed by the Appellate Division, Second Department. According to the Appellate Division:

> "In a partition action where, as here, one of the tenants in common was previously awarded exclusive possession pursuant to a judgment of divorce, 'the right of exclusive occupancy… and the restriction on partition which results therefrom, must be deemed limited to a *reasonable duration* absent an express or implied agreement to the contrary' [citations omitted]…[T]he defendant failed to raise a triable issue of fact as to whether partition was barred by express or implied agreement or as to whether her right to exclusive possession, which had no stated duration in the judgment of divorce, had not expired after the passage of approximately 30 years".

The Appellate Division also found that there were no triable issues of facts raised in support of Defendant's claim of laches, her claim that the property was her separate property, or her assertion that the Plaintiff should be barred from seeking partition under the doctrine of unclean hands. Pando v. Tapia, decided December 21, 2010, is reported at 2010 WL 5187739.

Real Estate Transfer Tax ("RETT")

The New York State Department of Taxation and Finance issued an Advisory Opinion dated November 24, 2010 concerning the sale and leaseback of multiple properties. In addition to noting that the sale of the properties and the leases was subject to the RETT, and the granting to the tenant of an option to purchase is a taxable event, the Department ruled that granting the lessee a right of first refusal to purchase was not subject to the RETT. Under Tax Law Section 1402 ("Definitions"), the granting of an option to purchase to a lessee having the "use and occupancy" of the property subject to the option is taxable. TSB-A-10(5)R, dated November 24, 2010, is posted on the Department's website at http://www.tax.ny.gov/pdf/advisory_opinions/real_estate/a10_5r.pdf.

Recording Act

A second mortgage on a condominium unit executed on November 3, 2004, consolidated with a prior mortgage, was recorded on August 9, 2005. Another mortgage, made to a Defendant in the foreclosure of the consolidated mortgage, was executed on May 5, 2005 and recorded on July 1, 2005. The Supreme Court, New York County, granted the Defendant mortgagee's motion for a determination that the Defendant's mortgage had priority over the second mortgage. The Appellate Division, First Department, reversed the ruling of the lower court; the second mortgage was delivered to the recorder on or about June 10, 2005, before the Defendant's mortgage was recorded. According to the Appellate Division, "provided that it is entitled to be recorded [which was the case here], an instrument is deemed recorded from the time it is delivered to the clerk for recording. When a party establishes that an instrument was entitled to be recorded and was

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delivered [to the recorder], subsequent lienholders are deemed to have constructive notice of the first-delivered lien". The Bank of New York v. Resles, dated November 16, 2010, is reported at 2010 WL 4608340.

Rule Against Perpetuities

The vendee of a condominium unit commenced an Action against the Sponsor seeking a declaratory judgment that its Purchase Agreement was void and that he was entitled to the return of his contract deposit. The Defendant-Sponsor contended that the failure of the Plaintiff to close on the purchase of the unit was a default under the contract entitling it to retain the deposit as liquidated damages.

The Plaintiff contended that since no date was specified for closing, and the closing could therefore take place more than twenty-one years after execution of the Purchase Agreement, the Agreement violated the Rule Against Perpetuities (Estates Powers and Trusts Law Section 9-1.1). However, under the Offering Plan, which was incorporated by reference into the contract, the Sponsor was to schedule a closing date on thirty days' notice, and if construction of the building was not substantially completed or if the first unit closing did not take place by dates specified in the Offering Plan the contract could be rescinded.

The Supreme Court, New York County, found that the parties intended that the sale of the unit take place within a period of less than twenty-one years from the date of the execution of the Purchase Agreement and, applying EPTL Section 9-1.3 ("Rules of construction"), ruled that the Plaintiff was not entitled to the return of its contract deposit. Under Section 9-1.3 (d), "[w]here the duration or vesting of an estate is contingent upon…the occurrence of any specified contingency, it shall be presumed that the creator of such estate intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate". Jeffcock v. MCP So Strategic 56, L.P., 2010 NY Slip Op 32786 decided September 29, 2010, was reported in the New York Law Journal on November 3, 2010.

Streets

An unimproved parcel of land in Staten Island, identified as tax lot 30 in Block 5491, is entirely in the bed of Barlow Avenue which has been on the official map of The City of New York since 1959. In the area in question it is an unpaved street which has not been legally opened. The owners of tax lot 30, and of an adjoining parcel on which their house is located, brought an Action to have the mapping of the street declared void or, alternatively, to de-map tax lot 30. They alleged that they were unable to sell tax lot 30 due to the cloud on title cast by the mapping of the street; they requested the same relief as that obtained by the owner of another adjoining tax lot within Barlow Avenue who settled her suit in 2000 by entering into a consent judgment with the City declaring the map void as it applied to her property. The City claimed that the Plaintiffs had not exhausted their administrative remedies and that the City was not obligated to offer the same relief to different parties in separate actions.

Under the City Charter, the City Planning Commission may authorize the City Map to be changed for the use, development or improvement of real property. However, the Plaintiffs had no intention to use, develop or improve tax lot 30. Under the City Charter and the City's Administrative Code,

proceedings may also be maintained to close an opened street or to abandon a street which is part of a plan for waterfront development, but neither applied here. Thus, according to the Supreme Court, Richmond County, there was no process allowing for an administrative hearing for the de-mapping of this street.

There being no administrative process through which the Plaintiffs could achieve the de-mapping of the street, their only recourse was to the state Legislature, which the Court indicated would be "onerous and effectively impractical", or to the courts. The Court therefore held the City Map as to tax lot 30 void and without legal effect and it ordered the City to place a legend to that effect on the City Map. According to the Court, "[i]t has been over fifty years since the City mapped Lot 30 and the City has still not used it. There should be a definite finality for certain nebulous government plans…By granting the Consent Judgment [in the other matter], the City has manifested no intent to open and build that portion of Barlow Avenue…this court finds no reason to rule that the plaintiffs who have the adjacent Lot 30 [are] to be treated differently". Chevere v. The City of New York, decided December 3, 2010, is reported at 2010 WL 4942823.

Tenancy by the Entirety

Title to property in Brooklyn was conveyed in 1984 to Arthur Holder, since deceased, his wife Shirley Holder also known as Shirley Stewart, and to Lydia Smartt, as tenants in common. An Order for the partition of the property was granted by the Supreme Court, Kings County in 2009. In an Action for further relief brought by Lydia Smartt, Ty Holder, the purported son and representative of the Estate of Arthur Holder, moved to vacate the underlying partition action, claiming that the Estate of his father held a one-third interest in the property and therefore he should have been a party to the proceeding for partition. The Supreme Court denied his request for intervention due to his lack of standing. Although Arthur Holder and Shirley Holder were separated when he died, "[t]here is no evidence that the parties altered their tenancy by the entirety either by a judicial decree such as a divorce judgment, or by a written instrument satisfying General Obligations Law Section 3-309 ["Husband and wife may convey to each other or make partition"], that clearly expressed an intent to convert the form of tenancy…The result, therefore, is that the tenancy continued to be held by the entirety and, upon the [sic] Arthur's death, Stewart-Holder became seized of" the tenant in common interest she held with her husband. Stewart-Holder v. Smartt, decided November 11, 2010, was reported in the New York Law Journal on November 29, 2010.

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