First American Title Insurance Company

Current Developments

Easements

The boundary lines of two adjoining properties bisected a loading dock; one half of the loading dock being within each property. The owner of one of the parcels brought an action for a ruling that it owned the strip of land under the portion of the loading dock on the other owner's property. The Defendant counterclaimed for a judgment declaring that it had an easement over the land under that part of the loading dock on the Plaintiff's property, and for a judgment directing the Plaintiff to remove the portion of a cement platform encroaching on the Defendant's property.

The Appellate Division, Second Department, reversed the ruling of the Supreme Court, Nassau County, which held that the Plaintiff had acquired title by adverse possession and that the Defendant did not have an easement. According to the Appellate Division, the Plaintiff's possession had not been "exclusive" for the ten year period necessary to establish title by adverse possession under the law in effect when the action was commenced and Plaintiff's use was with the Defendant's permission.

The Defendant, on the other hand, had acquired an easement. A predecessor in title to the Defendant's property had been the common owner of the parcels. When the predecessor in title conveyed the property now owned by the Plaintiff, it reserved an easement over the strip of land for the benefit of the land now owned by the Defendant. That the deeds in the chain of title to the Defendant did not contain an appurtenance clause is "inconsequential", since the Plaintiff was on notice of the easement when it purchased the property. ['A] person who purchases the servient estate with actual or constructive notice of the easement is estopped from denying the existence of the easement' (citation omitted).

The Appellate Division directed the Plaintiff to remove that part of the platform encroaching on the Defendant's property. Air Stream Corp. v. 3300 Lawson Corp., decided May 17, 2011, is reported at 2011 WL1902657.

Insurance Law, Section 6409

The New York State Insurance Department's Office of General Counsel issued Opinion (OGC Op. No. 11-05-04) on May 31, 2011 on the subject of "Real Estate Broker Referral to Affiliate Title Agency." The Opinion responded to the following question: "May a residential real estate broker refer its clients to a list of 'pre-approved' or 'recommended' attorneys if the attorneys have an informal arrangement with the real estate broker to refer all of their clients to the real estate broker's affiliate title agent?" According to the Department, if "there is a quid pro quo, then a residential real estate broker may not refer its clients to attorneys on an 'approved' or 'recommended' list if the attorneys, in turn, refer those clients to the broker's affiliate title agency".

According to the Insurance Department, interpreting Insurance Law Section 6409(d) ("commissions and rebate prohibited"):

> "No title insurance corporation, or any person acting for or on behalf of it, may pay or give any insurance applicant or a buyer's or seller's representative or attorney, any commission or any part of its fees or charges, or any other consideration or valuable thing as an inducement

for, or as compensation for, title insurance business. Furthermore, any person or entity that accepts or receives such a commission or rebate is subject to a penalty equal to the greater of $1,000 or five times the amount thereof."

The Opinion is posted at http://www.ins.state.ny.us/ogco2011/rg110504.htm.

Mortgage Foreclosures/MERS

A mortgage was executed to MERS, as nominee for Countrywide Home Loans, Inc. ("Countrywide"), securing a note to Countrywide, The Mortgagors-Defendants also executed a second note to Countrywide secured by another mortgage executed to MERS, as nominee for Countrywide. A consolidation agreement was executed with MERS, as nominee, consolidated the two mortgages and notes into a single lien securing a single obligation. Countrywide was not a party to the consolidation agreement. MERS, as nominee, assigned the consolidated mortgages to the Bank of New York, which commenced an action to foreclose.

The Defendants moved for an Order dismissing the complaint on the ground that the Plaintiff did not own the notes and mortgages when it commenced the action and it therefore did not have standing to foreclose. The Supreme Court, Suffolk County, denied the motion. The Appellate Division, Second Department, reversed the Order of the lower court and granted the motion, finding that the Plaintiff did not have standing. According to the Appellate Division, MERS "was never the lawful holder or assignee of the notes" and "although the consolidation agreement gave MERS the right to assign the mortgages themselves, it did not specifically give MERS the right to assign the underlying notes, and the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender." Bank of New York v. Silverberg, decided June 7, 2011, is reported at 2011 WL 2279723.

Mortgage Foreclosures

Real Property Actions and Proceedings Law ("RPAPL") Section 1304 ("Required prior notices"), as enacted by Chapter 472 of the Laws of 2008 effective September 1, 2008, and as amended by Chapter 507 of the Laws of 2009, requires a lender, an assignee or a mortgage loan servicer to provide a borrower who is a natural person, at least 90 days before commencing a legal action against property improved by a 1-4 family dwelling, a statutory form of "You Could Lose Your Home" notice. The notice is to be sent to the borrower by registered or certified mail and by regular mail.

The Supreme Court, Westchester County, granted a foreclosing mortgagee's motion for summary judgment and denied the Defendants-mortgagors' cross-motion to dismiss the complaint. The Appellate Division, Second Department, reversed, holding that proper service of the RPAPL Section 1304 notice is a condition precedent to the commencement of a mortgage foreclosure, that the foreclosing lender has the burden of establishing that it satisfied that condition, and the Plaintiff in this case did not comply with the notice requirements of Section 1304. The notice was not sent to one of the borrowers, and the other borrower, her husband, did not receive the notice by registered or certified mail. In addition, the notice provided with the motion papers did not include a required list of counseling agencies.

The mortgage being foreclosed was a consolidated mortgage securing a consolidated note. However, no evidence was produced that MERS, as nominee for Lehman Brothers, either physically transferred the first note to the Plaintiff or had the authority to assign that note, or that the Plaintiff was assigned the second note, the second mortgage, the consolidated note or the consolidated mortgage. Accordingly, the Appellate Division also held that the Plaintiff did not have standing. Reversing the Order of the lower Court, the Appellate Division granted the Defendants-mortgagors' motion for summary judgment, and it dismissed the complaint as to them.

The Court noted that the assignment of the first mortgage to the Plaintiff recorded after the action was commenced did not, in itself, effect the Plaintiff's standing, because the assignment was delivered prior to commencement of the action. Aurora Loan Services, LLC v. Weisblum, decided May 17, 2011, is reported at 2011 WL 1902620.

Mortgage Foreclosures

RPAPL Section 1303, as amended by Chapter 507 of the Laws of 2009, effective January 14, 2010, requires the plaintiff in an action to foreclose a mortgage on property improved by a one-to-four family dwelling to serve on any mortgagor, with the summons and complaint, a statutory "Help for Homeowners in Foreclosure" notice. The Supreme Court, Nassau County, held that this requirement applies to the foreclosure of a homeowners association lien arising under the association's Declaration for a homeowner's failure to pay assessments and related costs. According to the Court, "[t]he plain language of RPAPL Section 1303 indicates that it applies to all foreclosures of owner-occupied one-to four family dwellings." Since the Plaintiff homeowners association had not complied with the notice requirement, the Court granted the Defendant-homeowners' motion to dismiss. Board of Directors of House Beautiful at Woodbury Homeowners Association v. Godt, decided May 18, 2011, is reported at 2011 WL 1886581.

Mortgage Foreclosures

The Supreme Court, Kings County, denied a motion by tenants of a building under foreclosure that the Court vacate the judgment of foreclosure and sale and dismiss the action due to the failure of the Plaintiff to serve them with a summons and complaint and the notice required by RPAPL Section 1303. That Section, as amended by Chapter 507 of the Laws of 2009, effective January 14, 2010, requires the plaintiff in an action to foreclose a mortgage on a one-to-four family dwelling to also serve the statutory "Help for Homeowners in Foreclosure" notice on tenants. According to the Court, the amendment to Section 1303, adding the requirement to serve the statutory notice on tenants, was effective on January 14, 2010 and the foreclosure action was commenced on November 19, 2009. That a judgment of foreclosure was issued after the effective date of the amendment does not make the requirement of notice to tenants applicable to this case. Further, tenants are necessary but not indispensable parties to foreclose and "the failure to name a tenant does not render the judgment of foreclosure and sale defective". Flushing Savings Bank, FSB v. 509 Rogers LLC, decided May 23, 2011, is reported at 2011 WL 2139080.

First American Title Insurance Company

Current Developments

Mortgage Foreclosures

Under RPAPL Section 1371 ("Deficiency judgment"), a motion for a deficiency judgment is to be "made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser." In this case, the Referee delivered the foreclosure deed on November 23, 2009, the deed was recorded on or after January 13, 2010, the date on which appraisals of the mortgaged properties were received, and the Plaintiff moved for a deficiency judgment on March 25, 2010. The Plaintiff contended that the ninety day period within which to move for a deficiency judgment commenced to run when the appraisals were delivered, because they were needed to complete forms required to be submitted to the county recorder with the deed. The Appellate Division, Third Department, affirmed the Supreme Court, Fulton County's denial of the motion for a deficiency judgment. According to the Appellate Division, the ninety day period in which to move for a deficiency judgment runs from the date of delivery of a properly executed deed, not the date of its recording. Cicero v. Aspen Hills II, LLC, decided June 16, 2011, is recorded at 2011 WL 2374918.

Mortgage Recording Tax

Affirming a decision of the Supreme Court, New York County, the Appellate Division, Second Department, held that mortgages made to federal credit unions to secure loans made to its members are not exempt from the mortgage recording tax. Since the mortgage tax is a tax on the privilege of recording a mortgage and not a tax on property, the exemption from taxation for the property of a federal credit union in 12 USC Section 1768 of the Federal Credit Union Act of 1934 does not apply. Notwithstanding, a letter ruling of the New York State Department of Taxation and Finance dated October 30, 1986 states that "no one is liable to pay the special additional tax [one-quarter of one percent of the mortgage recording tax] when the property is 'principally improved by one or more structures containing in the aggregate not more than six residential units, each dwelling unit having its own separate cooking facilities' and the lender is a Federal Credit Union." The Appellate Division's ruling in Hudson Valley Federal Credit Union v. New York State Department and Finance, decided June 2, 2011, is reported at 2011 WL 215005.

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