First American Title Insurance Company

Current Developments

Bankruptcy/Judgments

The Supreme Court, Nassau County, granted a money judgment creditor's motion for a renewal judgment under CPLR Section 5014 ("Action upon judgment"), notwithstanding that the judgment debtors, the sellers under certain real estate contracts, had each obtained a discharge in bankruptcy. The Appellate Division, Second Department, affirmed the lower court's ruling, stating that "[w]hen the defendants [in an action for specific performance of the real estate contracts] received discharges in bankruptcy, their personal liability to the plaintiff on the judgment was discharged (see 11 USC Sec. 524[a][1]). However, the defendants did not meet their burden of establishing that the liens on their real property were invalidated or surrendered in the bankruptcy proceedings or set aside in an action brought by the receiver or trustee. Accordingly, they were entitled only to a qualified discharge (see Debtor and Creditor Law Sec. 150[4][b])...A 'qualified' discharge, as distinguished from an unqualified discharge, serves as notice to third parties that, notwithstanding the debtor-owner's discharge in bankruptcy, the property may, nonetheless, still be burdened by liens." Nelson, L.P. v. Jannace, decided August 30, 2011, is reported at 87 A.D. 3d 731 and 2011 WL 3825770.

Contracts of Sale/Seller's Concession

On October 14, 2011, the Committee on Professional Ethics of the New York State Bar Association issued its Opinion 882 concerning the "grossing up" of the sales price for residential real property to reflect the granting of a "seller's concession", under which a seller pays any of its buyer's closing costs. Opinion 882 states the following:

> "...Rule 8.4(c) does not permit lawyers to participate in residential real estate transactions involving a grossed-up sales price that was exchanged for an equivalent seller's concession unless all documents stating the grossed-up sales price also disclose that the sales price has been increased by the amount of the seller's concession. Conversely, when a residential real estate transaction involves both a seller's concession and a grossed-up sales price, but each document stating the grossed-up sales price also discloses that the sales price has been increased by a sum equal to the seller's concession, there is no misrepresentation, and therefore no ethical violation."

Opinion 882 is posted on the New York State Bar Association's web site at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=55697.

Easements

In 1966, the Plaintiff's predecessor in title granted an easement to General Motors Corp. ("GM"), the Defendant's predecessor in title, to allow GM to use a railroad spur track running from the Long Island Railroad's Main Line over the Plaintiff's property to what is now the Defendant's property. The Supreme Court, Nassau County, held that the easement was "invalid, unenforceable and extinguished." Although an easement by grant is not extinguished merely by non-use, an easement can be deemed extinguished if it is abandoned. "The acts claimed to constitute an abandonment must show a destruction of the easement, impossibility of its legitimate use resulting from some act of the easement owner or other unequivocal conduct revealing the

intention permanently to abandon and surrender the easements." Among other facts recited in the opinion, the construction in 1996, by the then owner of the property benefitted by the easement, and its affiliated entities, of a four foot high retaining wall and a four foot high barbed wire topped fence directly across the mouth of the easement was "clear and convincing evidence of defendant's unequivocal intention to abandon the easement." Cascelta Company LLC v. Ajda, LLC, decided July 22, 2011, is reported at 2011 WL 3444556.

Fraud

Plaintiff, the holder of a tenant in common interest in property in Brooklyn, claimed that her signature on a deed to the property recorded in 1986 was forged. She sought an Order declaring the deed null and void. The Defendants claimed that the Action was barred by the statute of limitations. Under Civil Practice Law and Rules Section 213(8) ("Actions to be commenced within six years"), "the time within which [an action based on fraud] must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff...discovered the fraud, or could with reasonable diligence have discovered it." The Defendants argued that the Plaintiff could have discovered the alleged fraud by examining the records of recorded deeds, and therefore the two year limitations period, in addition to the six year period, had expired. The Supreme Court, Kings County, held that the Action was brought within the two year statute of limitations and denied the Defendants' motion for summary judgment. The Defendants "presented no evidence that [the Plaintiff] was aware of any suspicious activity that would have alerted her to the occurrence of any possible fraud until 2008," and "the mere recording of a deed…[is] insufficient to alert a reasonably diligent person of a possible fraudulent transfer."

The Court noted that New York City implemented a program in 2011 enabling a property owner to be notified when a document is recorded against his or her property. According to the Court, "[i]f the allegedly fraudulent deed had been recorded after this new system had been established, this Court would be more willing to hold that recording a deed is enough to put a reasonably diligent person on notice that a fraudulent transfer has occurred." Budhu v. Budhu, decided August 23, 2011, is reported at 2011 WL 375910.

Information on the Recorded Document Notification program is posted at http://home2.nyc.gov/html/dof/html/property/property_rec_recording.shtml.

Indian Land Claims/Oneida Indians

As reported in Current Developments issued on May 31, 2007 and October 18, 2010, three Oneida Indian tribal groups brought an action to recover approximately 250,000 acres of land in the Counties of Oneida and Madison, alleging that the lands were transferred to the State of New York between 1795 and 1846 in violation of the Indian Trade and Intercourse Act (barring the sale of tribal land without the consent of the federal government), the Treaty of Canandaigua and federal common law. The case was originally brought against Madison and Oneida Counties, seeking compensation for their illegal occupancy of certain of those lands; the State of New York was named a defendant in 2000. The United States intervened in the litigation in 1998.

In 2007, the United States District Court for the Northern District of New York held, in a decision reported at 500 F. Supp. 2d 128, that laches barred the Plaintiffs' possessory claims, but the Plaintiffs' claims for unconscionable consideration in connection with the original land transfers could proceed. The Second Circuit Court of Appeals, in a decision in 2010 reported at 617 F. 3d 114, affirmed the dismissal of the Plaintiffs' possessory claims but reversed on the Plaintiffs' non-possessory claims. According to the Court of Appeals, the possessory claims were barred by equitable principles, such as laches, acquiescence and impossibility, and the non-possessory claims were barred by New York's sovereign immunity and by equitable defenses. The damage claim for violation of the Indian Trade and Intercourse Act was similarly barred. On October 17, 2011, the United States Supreme Court denied certiorari in Oneida Indian Nation of New York v. County of Oneida (2011 WL 1933740), and in the companion case of United States v. New York (2011 WL 1871013).

Judgments/Renewal Judgments

Under Civil Practice Law and Rules ("CPLR") Section 5203 ("Priorities and liens upon real property"), a money judgment is a lien on real property for ten years. Under CPLR Section 5014 ("Action upon judgment"), "[a]n action may be commenced...during the year prior to the expiration of ten years since the first docketing of the judgment [and] [t]he judgment in such action shall be designated a renewal judgment..."

The judgment creditor in Premier Capital, LLC v. Best Traders, Inc. commenced an Action for a renewal judgment by a motion for summary judgment in lieu of a complaint fourteen years after the judgment was first docketed. The Supreme Court, Kings County, denied the motion but the Appellate Division, Second Department, modified the lower court's Order, granting the motion and remitting the matter to the Supreme Court for the entry of a renewal judgment. According to the Appellate Division, "CPLR Section 5014(1) also permits a judgment creditor to commence an action for a renewal judgment where 10 years 'have elapsed since the judgment was originally docketed.'" [Citation omitted] There was no allegation of prejudice resulting from the Plaintiff's delay in seeking a renewal judgment. The Court noted that the lien of the renewal judgment would not be retroactive to the date on which the judgment had expired. This decision, issued October 4, 2011, is reported at 2011 WL 4599882.

Lien Law

A mechanic's lien and a notice of pendency in an Action to enforce the lien were filed against the entity which had entered into a contract with the Plaintiff and against the purported owner of the property, the Third Church of Christ Scientist of New York. The name of the Church had, however, been changed to the Third Church of Christ (Scientist) of New York City. The Defendants maintained that the failure to name the true owner of the property was a jurisdictional defect not able to be corrected by amendment, and they moved for an Order vacating the lien and canceling the lis pendens. The Supreme Court, New York County, denied the Defendants' motion and granted the Plaintiff's motion to amend the lien and modify the caption of the Action. Although Lien Law Section 9 ("Contents of notice of lien") requires that a notice of lien state "[t]he "name of the owner of the real property against whose interest therein a lien is claimed", Section 9 also provides that "[a] failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien." According to the Court, "[i]t is well settled that the requirement to name the true owner of the real property 'is construed liberally to secure

the beneficial interests and purposes of the Lien Law…[and that] substantial compliance… is sufficient for the validity of a lien." (Citations omitted) Delete Construction Inc. v. The Rose Group 583 Park Avenue LLC, decided August 21, 2011, is reported at http://www.nycourts.gov/reporter/pdfs/2011/2011_32320.pdf.

Limited Liability Companies

Under the Operating Agreement of a limited liability company, the individual who executed two mortgages on its behalf was the sole member of the company and had the authority to "(i)ncur any mortgage." The limited liability company moved for summary judgment, in an action to foreclose the mortgages, for an Order declaring that the mortgages were invalid and unenforceable and for the complaint to be dismissed. It alleged that a different person was sole member and the only person authorized to encumber the property. The Supreme Court, Richmond County, held that the mortgages were not valid and enforceable, but the Appellate Division, Second Department, reversed and remitted the case to the Supreme Court, Richmond County, for the entry of judgments upholding the mortgages. According to the Appellate Division, the mortgagees "do not have a duty of care to ascertain the validity of the documentation presented by an individual who claims to have the authority to act on behalf of a borrower corporation or entity." LZG Realty, LLC v. H.D.W. 2005 Forest, LLC, decided August 30, 2011, is reported at 2011 WL 3828564.

Mortgage Foreclosures

The Defendant in an Action to foreclose a mortgage on her property in Monsey, New York filed an order to show cause to vacate the judgment of foreclosure and sale, alleging that the Plaintiff did not have standing because a prior holder of the note and mortgage had executed an unrecorded assignment to the Federal Home Loan Mortgage Corporation. The Supreme Court, Rockland County, denied the motion and the ruling was affirmed by the Appellate Division, Second Department. Since standing was not raised in a pre-answer motion to dismiss or as an affirmative defense in her answer it was waived. The Defendant also alleged that the action could not proceed because an assignee of the mortgage and note, which obtained its interest after entry of the foreclosure judgment, was not formally substituted as the Plaintiff. However, "[t]he determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court" [citation omitted] and "neither party requested, and the Supreme Court did not direct, that [the assignee] be substituted as the plaintiff." Accordingly, the Action could be continued by the assignor of the mortgage. CitiMortgage, Inc. v. Rosenthal, decided October 11, 2011, is reported at 2011 WL 4839150.

Mortgage Recording Tax

New York State's Department of Taxation and Finance issued an Advisory Opinion concluding that a mortgage on the Petitioner's electric transmission system made to the New York Power Authority ("NYPA") and a mortgage made on the system to NYPA and a collateral agent for Petitioner's lenders, as co-mortgagees, each securing funds for the development and construction of the system, are exempt from mortgage recording tax. Under 20 NYCRR Section 644.1 ("Exemptions"), a mortgage is exempt from tax "where the mortgagor or mortgagee is New York State or any of its agencies, instrumentalities or political subdivisions, to the extent [the New York State entity is] immune from such taxation." The Opinion noted that NYPA is the party who is presenting the mortgages for recording. Advisory Opinion TSB-A-11(1) R, dated August 18, 2011, is posted at http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a11_1r.pdf.

Current Developments

Mortgages/Credit Lines

In 2005, at the closing of a sale of real property, the "closing agent" sent a copy of the payoff statement and a check to HSBC Bank, USA ("HSBC") to pay off a home equity line of credit. However, HSBC did not terminate the line of credit and the mortgage securing the credit line was not satisfied. In 2008 the Defendants-Sellers drew from the credit line sums which they did not repay. HSBC commenced an action to foreclose its mortgage. The Defendant-Purchaser moved to dismiss the action as to him, asserting that HSBC should have closed the credit line in 2005. The Supreme Court, Nassau County, granted the Defendant-Purchaser's motion to dismiss, but the Appellate Division, Second Department, reversed the lower court.

According to the Appellate Division, "the mere transmission of a check in the amount necessary to pay the entire outstanding balance of a line of credit, accompanied by a cover letter which does not state that the payment is intended to satisfy the credit line mortgage, or request that the mortgagee send a satisfaction of mortgage, or otherwise indicate that the borrower intends to close the credit line, does not require the mortgagee to close the line of credit or issue a satisfaction of mortgage under RPAPL Section 1921(1)." Under Real Property Actions and Proceedings Law Section 1921 ("Discharge of mortgage"), following payment of the amounts due on a credit line mortgage, the mortgagee is to execute and present a certificate of discharge for recording "on written request."

HSBC made a prima facie showing that no request was made to close the credit line and its payoff letter stated that "[t]o close your account and obtain a satisfaction of mortgage, please include with your payoff check a letter requesting this be closed." On the other hand, an affidavit executed by the closing agent stated that his practice when sending a payoff check was to request, in writing, "that the mortgage be closed and a subsequent satisfaction of mortgage be filed." There was thus a triable issue of fact as to whether a written request to close the credit line was sent to HSBC. HSBC Bank, USA v. Pugkhem, decided October 4, 2011, is reported at 2011 WL 4600603.

New York State Tax Warrants

Tax Law Section 174-b ("Limitation on the time to collect tax liabilities"), added by Chapter 432 of the Laws of 2011, changes the time within which the Department can enforce a tax liability. Under prior law, the twenty year statute of limitations for the collection of tax liabilities for which a notice and demand has been issued ran from the date a warrant was actually filed. Under Section 174-b, a tax liability will be extinguished "twenty years from the first date a warrant could have been filed by the commissioner [of the Department], without regard to whether a warrant is filed." The first day a warrant could have been filed, when there is no right to a hearing with respect to a notice and demand, is "the day after the last day specified for payment by the notice and demand issued for the tax liability." When there is a right to a hearing, the first day a warrant could have been filed is "the day after that opportunity for a hearing or review has been exhausted."

The new law applies to tax liabilities that could have been warranted prior to August 18, 2011, its effective date, as well as to tax liabilities that could first be warranted after that date. It does not change the six year limitations period for filing a warrant under Tax Law Sections 692(c)

and 1092(c), when applicable. The Department's Technical Memorandum "20-Year Statute of Limitations to Collect Tax Liabilities", dated September 9, 2011 is posted at http://www.tax.ny.gov/pdf/memos/multitax/m11_10c_10i_11m_3mctmt_4r_15s.pdf.

Putnam County/Recordings

The Putnam County Clerk has issued a notice that effective January 1, 2012 all real property documents being submitted to that office for recording will be required to be accompanied by an Electronic Endorsement Page. Although not required to be used prior to January 1, 2012, the Clerk's office "encourage[s] all of our clients to begin using the system now." The Endorsement Page can be accessed at www.landaccess.com.

According to the notice, "[a]n account must be established to use this service. An identification number is assigned to each document, recording fee's [sic] and applicable taxes will be calculated automatically and a summary of any required supporting documents provided along with a list of dollar amounts and [the] name of the agency/agencies that the checks must be made out to." A user manual can be obtained by calling 845-808-1142 X 49305. Further, as stated in the notice, "[t]he system allows for the creation of packages of groups of related documents. Each document will still get a unique identification number but by relating the documents, you ensure that related documents are put on record together and remove the need to provide individual checks for each document - checks can be made out for the combined totals."

Restrictive Covenants/Mineral Rights

Defendant Klansky, the owner of a 66.17 acre parcel in the Weiden Lake Community (the "Community"), a residential subdivision in the Town of Tusten, in Sullivan County, entered into a lease with Defendant Cabot Oil & Gas Corporation ("Cabot") granting Cabot the exclusive rights to "explore for, drill for, produce and market oil, gas and other hydrocarbons" for five years. Cabot paid Klansky a signing bonus of $99,255.

Property in the Community is subject to Protective Covenants running with the land in subdivision maps filed in 1999 and 2000, in the deeds issued by the original developer, and in the deeds in the chain of title prior to the deed to Klansky in 2007. By their terms, the Protective Covenants are enforceable by the Plaintiff Weiden Lake Property Owners Association, Inc. ("POA"). They limit the use of the parcels in the subdivision to single family homes and further provide that "[n]o commercial fishing enterprise or fee based boat launching facilities [on Weiden Lake] or any other commercial uses will be allowed on the premises." In 2008 the POA passed a Resolution affirming that the Covenants prohibited commercial uses; notice of the Resolution was sent to all property owners. The Defendants claimed that the Protective Covenants pertained only to the type of permissible residences and commercial fishing and boating.

The Supreme Court, Sullivan County, granted the Plaintiff's motion for summary judgment, holding that the Protective Covenants prohibit the use of the Defendant's land for the purposes set forth in the lease and permanently enjoining the Defendants from exploring, drilling, producing and marketing oil, natural gas and other hydrocarbons on Klansky's premises. Cabot's cross-claims for rescission of the lease and for Klansky's return of his signing bonus were denied. Weiden Lake Property Owners Association, Inc. v. Klansky, decided August 18, 2011, is reported at 2011 WL 3631955.

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Current Developments

Transfer Tax/REITS

Under Tax Law Section 1402 ("Imposition of tax"), which applies to New York State's Real Estate Transfer Tax, and, as to New York City's Real Property Transfer Tax, under Tax Law Section 1201 ("Taxes administered by cities of one million or more") and Section 11-2102 ("Imposition of tax") of the City's Administrative Code, New York State and New York City transfer taxes are applied to certain "real estate investment trust transfers" at a rate equal to fifty percent of the otherwise applicable rate.

A "real estate investment trust transfer", prior to its recent amendment, has been defined in Tax Law Section 1402 (b)(2)(B), and to similar effect in Tax Law Section 1201 and Administrative Code Section 11-2101, as follows:

> "For purposes of this subdivision, the phrase 'real estate investment trust transfer' shall mean any conveyance of real property or an interest therein to a REIT, or to a partnership or corporation in which a REIT owns a controlling interest immediately following the conveyance, which conveyance (I) occurs in connection with the initial formation of the REIT, provided that the conditions set forth in clauses (i) and (ii) of this subparagraph are satisfied, or (II) in the case of a real estate investment trust transfer [other than in connection with the initial formation of a REIT] occurring on or after July 13, 1996 and before September 1, 2011...", on the satisfaction of certain conditions.

Chapter 493 of the Laws of 2011, effective August 31, 2011, has extended the outside date before which the reduced tax rates may apply when a "real estate investment trust transfer" is other than a conveyance made in connection with the initial formation of a REIT, from September 1, 2011 to September 1, 2014.

See TSB-M-11(3)R dated September 1, 2011 issued by New York State's Department of Taxation and Finance, posted at http://www.tax.ny.gov/pdf/memos/real_estate/m11_3r.pdf.

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