First American Title
NATIONAL COMMERCIAL SERVICES

Current Developments

Deeds

Mr. and Mrs. Logan conveyed their home to their four children subject to the reservation of life estates. They also executed a Transfer of Realty and Occupancy Agreement (the "Agreement"), in which they reserved a special, limited power of appointment to change, add to or delete the interests of remainder persons under the deed. The four children also signed the Agreement, and the signatures to the Agreement were acknowledged. After the death of her husband, Mrs. Logan amended the Agreement to redistribute ownership of the property among her children and her grandchildren. After her death, an Action was commenced to determine the respective interests of the children and grandchildren and, the house having being sold, in the proceeds of the sale of the property.

The Supreme Court, Suffolk County, ruled that the proceeds of the sale should be distributed to the remainder interests as set forth in the Second Amendment to the Agreement. The Appellate Division, Second Department, affirmed, holding that the deed and the Agreement were "executed with the required level of formality to be effective" and should be read together. In addition, the four children agreed that their interests under the deed were subject to the exercise of the special power of appointment. McLaughlin v. Logan, decided November 9, 2011, is reported at 932 N.Y.S. 2d 174.

Joint Tenants

Plaintiff's decedent ("Susan") and the Defendant ("Charles"), an unmarried couple, took title to real property in Pennsylvania as joint tenants. Charles did not contribute to the purchase of the property and he paid little, if any, of the charges to maintain the property, most if not all of which were paid by Susan. After Susan's death in 2008, the Executor of her Estate, appointed in Kings County, made mortgage payments and paid other charges related to the property totaling $7,500. The Plaintiff sued Charles for reimbursement of one-half of the purchase price and the carrying charges incurred before Susan's death and for full reimbursement of the amounts paid by the Estate following Susan's death. Charles moved to dismiss the Action, alleging that there was no cause of action for payments Susan made during her lifetime and the $7,500 paid after her death was below the monetary subject matter jurisdiction of the Supreme Court. The Plaintiff opposed the motion, asserting that under Real Property Actions and Proceedings

Law Section 1201 ("Action by joint tenant or tenant in common; may maintain action against co-tenant") the Estate can maintain an Action to recover from Charles a just proportion of the money paid toward the jointly owned property.

Under RPAPL Section 1201, "[a] joint tenant or a tenant in common of real property, or his executor or administrator, may maintain an action to recover his just proportion against his co-tenant who has received more than his own just proportion, or against his executor or administrator."

The Supreme Court, Kings County, granted the Defendant's motion to dismiss. The Appellate Division, Second Department, reversed to the extent of holding that there was a viable cause of action for unjust enrichment as to the charges paid by the Estate after Susan's death. However, the Appellate Division concurred with the lower court that there was no cause of action to recover amounts paid by Susan during her lifetime. Susan was free to spend her money as she saw fit and Section 1201 is not to be applied to allow an Estate to undo a decedent's financial acts. Further, Section 1201 focuses on monies "received" by a co-tenant, such as rents and income generated by jointly owned property. The complaint did not seek to recoup monies "received" by Susan during her lifetime. Accordingly, as to amounts paid by Susan during her lifetime, the complaint failed to state a cause of action. The Appellate Division declined to take a position on whether the action should be removed to another court with limited monetary jurisdiction. Trotta v. Ollivier, decided November 15, 2011, is reported at 2011 WL 5579030.

Mechanics' Liens

In an Action to foreclose a mechanic's lien, the Defendant moved for an Order discharging the lien and dismissing the Action for the failure of the lienor to adequately describe in the lien the property subject to the lien as required by Lien Law Section 9(7) ("Contents of notice of lien"). The Defendant contended that the Plaintiff used an incorrect tax lot number to identify the property and a street address and lot number of the original building that was not a part of the work performed. The Supreme Court, Kings County, denied the motion and granted the Plaintiff leave to amend its lien nunc pro tunc to the original date on which the lien was filed.

On March 15, 2007, tax lot 9 was subdivided into tax lots 15-18. This change was reflected in the Department of Finance's "Alteration Book". However, the effective date of the subdivision was December 5, 2008, the date on which the change was reflected on the Department's Digital Tax Map. The mechanic's lien was filed on October 24, 2007. The property on which the work was performed was new tax lots 16-18.

According to the Court, "...the description of the property included in the lien is not invalid on its face and is in substantial compliance with Lien Law Section 9(7) despite plaintiff's use of superseded lot numbers and thus including excess property, as well as despite plaintiff's failure to include the new lot numbers. In accordance with Lien Law Sections 3 and 4(1), the title or interest in the real property is measured at the time of filing the notice of lien. At the time when plaintiff filed the lien…the subdivision of Lot 9 had not yet become effective…In any event...the

date when the subdivision occurs is not crucial to the lien validity." Hai Ming Construction Corp. v. 258 Devoe LLC, decided October 19, 2011, is reported at 33 Misc. 3d 1213 and at 2011 WL 5041802.

Mortgage Foreclosures

A judgment of foreclosure and sale granted a deficiency judgment against the Defendant-mortgagor but not against three individuals, also Defendants in the Action, who were guarantors of the obligation secured by the mortgage being foreclosed. The Plaintiffs moved to amend the judgment of foreclosure and sale and for leave to enter a deficiency judgment against the guarantors. The Supreme Court, Suffolk County, denied the motion and the Court's ruling was affirmed by the Appellate Division, Second Department. According to the Appellate Division, a judgment of foreclosure and sale may be amended if a provision for a deficiency judgment was inadvertently omitted, provided that the amendment does not "affect a defendant's substantive rights or cause undue prejudice." In this case, the Defendants-guarantors submitted affidavits claiming that since they did not have liability for a deficiency they did not bid at the foreclosure sale or otherwise act to protect their interests. Pirrera v. FMO Associates, LLC, decided November 15, 2011, is reported at 2011 WL 5579064.

Mortgage Foreclosures

The Defendant in an Action to foreclose a mortgage failed to assert that the Plaintiff lacked standing in an answer or in a pre-answer motion to dismiss, as required by Civil Practice Law and Rules ("CPLR") Section 3211(e) ("Motion to dismiss"). He moved for leave to serve and file an amended answer to assert the Plaintiff's lack of standing. The Supreme Court, Nassau County, denied the Defendant's motion and granted summary judgment to the Plaintiff. The Appellate Division, Second Department, reversed, holding that the lower court should have granted leave to serve and file an amended answer and, based on the facts presented, dismissed the complaint due to the lack of standing.

According to the Appellate Division, "defenses waived under CPLR Section 3211(e) can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR Section 3025 (b) ("Amended and supplemental pleadings") so long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay…[T]he plaintiff failed to demonstrate the existence of any prejudice or surprise that would result from the amendment, or that the proposed amended answer was palpably insufficient or patently devoid of merit." Under Section 3025(b), "[a] party may amend his pleading…at any time by leave of court...Leave shall be given freely upon such terms as may be just including the granting of costs and continuances."

As to the issue of standing, the Plaintiff, the assignee of the mortgage being foreclosed, did not demonstrate that it was assigned the note or physically received delivery of the note. U.S. Bank National Association v. Sharif, decided November 1, 2011, is reported at 2011 WL 5222679.

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, 2012 – March 31, 2012 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.ny.gov/pay/all/int_curr.htm.

Mortgage Recording Tax/New York State Transfer Tax

The Office of Tax Policy Analysis in New York 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 2010-2011 (April 1, 2010-March 31, 2011). According to the Report, the Real Estate Transfer Tax collected in FY 2010-2011 was $580,000,733, up from $493,049,478 in FY 2009-2010. Mortgage recording tax collected statewide in FY 2010-2011 was $1,036,827,652, with the mortgage tax collected in New York City being $544,589,565. In FY 2009-2010, the mortgage tax collected statewide was $1,015,040,422 and the mortgage tax collected in New York City was $488,306,248. The Report can be obtained at the following link:

http://www.tax.ny.gov/research/stats/statistics/new_reports.htm.

Mortgage Recording Tax/New York State Transfer Tax/Additional Tax

At the request of the New York State Land Title Association, New York State's Department of Taxation and Finance has expanded its web-based Tax Bulletins to include guidance on issues relating to the Mortgage Recording tax, the State's Real Estate Transfer Tax, and the Additional Tax, also known as the "Mansion Tax." According to the Department in an email on November 21, 2011, "[t]hese Tax Guidance Bulletins are based on the statutes, regulations, court cases, and Tax Appeal Tribunal decisions in effect on the date they are issued and [they] will be updated as changes in Tax Law or policy take effect so that they will be current when viewed on the department's web site." The following Tax Guidance Bulletins were issued:

MR-5 - $10,000 Residential Property Exclusion on Certain Mortgages
MR-15 – Advances Secured by a Mortgage Executed Under a Confirmed Plan of Reorganization in Bankruptcy
MR-165 – Debtor-in-Possession Financing
RE-10 – Additional Real Estate Transfer Tax-Application When More than Three Condominium or Cooperative Units are Conveyed to a Single Purchaser
RE-885 – Transfer or Acquisition of a Controlling Interest-Additional Guidance

Bulletins on the Mortgage Recording Tax are posted at:
http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/mortgage_recording_tax_bulletins_by_number.htm.

Bulletins on the Real Estate Transfer Tax and the Additional Tax are posted at: http://www.tax.ny.gov/pubs_and_bulls/tg_bulletins/real_estate_transfer_tax_bulletins_by_number.htm.

Real Estate Taxes

Petitioner Milea Associates commenced an Article 78 proceeding to obtain a judgment annulling and vacating the retroactive imposition of real estate taxes by the New York City Department of Finance for a ten year period following the Department's determination that a tax exemption under a Payment in Lieu of Taxes ("PILOT") program had expired in 2000. The Supreme Court, Kings County, denied the petition and dismissed the proceeding. According to the Court, "[t]he fact that no tax bills were sent to petitioner did not bar the DOF from taxing the property for the 10-year period of arrears after the error in granting petitioner an exemption for those years was discovered." The six-year statute of limitations in CPLR Section 213 ("Actions to be commenced within six years") bars an action by a taxpayer to recover back taxes incorrectly levied; "[h]owever, the six-year Statute of Limitations does not bar the collection of back taxes by the DOF. The lien of a tax assessment on real property 'persists until the assessment has been paid'". Milea Associates v. New York City Department of Finance, decided October 12, 2011, was reported in the New York Law Journal on November 3, 2011.

Recording in Suffolk County/CEMAs

A number of county recorders have raised an issue when a Mortgage Consolidation, Extension and Modification Agreement, extending or otherwise modifying a mortgage without consolidating the liens of mortgages, is submitted for recording. The Land Records Committee of the New York State Land Title Association has provided the following information as to recording a CEMA in Suffolk County:

> "When using the Fannie Mae/Freddie Mac uniform instrument form 3172 1/01 (rev. 5/01) 'Consolidation, Extension and Modification Agreement' for an Extension and Modification recording only, the following language must be contained within the document and on the accompanying 255 Tax Affidavit:
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> > 'That Mortgage (1 or A) is being extended and modified by the terms of a certain Extension and Modification Agreement between (insert mortgagor) in favor of (insert mortgagee) dated (insert date), to form a single lien in the principal sum of (insert new mortgage amount), now due and owing, which said Agreement is being recorded herewith.'
> >
> > 'That said Agreement does not secure any advances made by the mortgagee to the mortgagor, nor does it evidence any further indebtedness on the part of the mortgagor to the mortgagee, there being no other money advanced by the mortgagee to the mortgagor under the aforementioned mortgage or extension and modification agreement except the sum of $0.'
>
> "These two paragraphs must be on Exhibit A within the Agreement and on the 255 Tax Affidavit."

UCC Foreclosure

Under subsection (f) ("Additional pre-disposition notice for cooperative interests") of UCC Section 9-611, "not less than 90 days prior to the date of the disposition of the cooperative interest" the lender foreclosing on a cooperative unit is required to send a pre-disposition notice to the debtor, a statutory form captioned "Help for Homeowners at Risk of Foreclosure." The notice is required to be in bold, fourteen-point type and to be "on colored paper that is other than the color of the notice required by" subsection (b) of UCC Section 9-611(b).

In Goldman v. Emigrant Savings Bank, decided August 19, 2011 and reported at 32 Misc. 3d 1238 and 2011 WL 3821477, the owner of the cooperative unit being foreclosed commenced an Action to permanently enjoin the sale of her unit, alleging that the notice sent to her failed to comply with RPAPL Section 1304 ("Required prior notices"), which relates to real property, and UCC Section 9-611. The Supreme Court, Queens County, granted a preliminary injunction. According to the Court, UCC-9-611(f) "must be strictly construed and the documentary evidence submitted to the court does not establish that the required notice was printed on colored paper. The copy included in the defendant's papers is not colored and on a CPLR Section 3211(a)(1) motion [an] affidavit…may not be used to establish a fact in issue…Proper service of a UCC 9-611(f) notice complying with the statutory mandates is a condition precedent to foreclosure, and the documentary evidence submitted on this CPLR 3211(a)(1) motion does not establish that the defendant bank strictly complied with the statute." (Citations omitted)

A CPLR Section 3211(a)(1) motion is a motion to dismiss on the ground that a defense is founded upon documentary evidence. The bank was required to post a $5,000 undertaking, and the Court stated that the bank could bring a properly noticed motion for summary judgment.

The officers and employees of First American wish you an enjoyable Holiday Season and a healthy and prosperous New Year!

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