First American Title Insurance Company

Current Developments

Adjoining Lands

The Supreme Court, Westchester County, held that the Plaintiffs owned land encroached upon by a fence, tree, shrubs and flowers, and it ordered the Defendants, the owners of the adjoining land, to remove the encroachments. The Appellate Division, Second Department, reversed the ruling of the lower court. According to the Court, "the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law on their motion. In support of their motion for summary judgment and to establish the alleged encroachment, the Plaintiffs submitted a survey by a licensed surveyor. Other evidence submitted by the Plaintiffs was based on the survey. "However, this survey did not constitute competent evidence of the alleged encroachment, as it was not accompanied by an affidavit of the surveyor." Thomson v. Nayyar, decided December 27, 2011, is reported at 2011 WL 6845878.

Benefit Corporations

Chapter 599 of the Laws of 2011, signed into law on December 12, 2011 and effective February 10, 2012, amends Section 66 ("Definitions") of the General Construction Law and adds Article 17 to the Business Corporation Law to authorize the incorporation of "Benefit Corporations." According to Section 1706 ("Corporate purposes") of the Article, "[e]very benefit corporation shall have the purpose of creating general public benefit", which is defined in Section 1702 to mean "a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation." "A sale, lease, conveyance, exchange, transfer, or other disposition of all or substantially all of the assets of a benefit corporation, unless the transaction is in the usual and regular course of business of the benefit corporation shall not be effective unless the transaction is approved by at least the minimum status vote [as defined in Section 1702] in addition to any other vote required by this chapter, the certificate of incorporation or the by-laws."

IT-2663/IT-2664

The Taxpayer Guidance Division of the New York State Department of Taxation and Finance on December 21, 2011 issued an email addressed to Recording Officers and others advising as follows:

> "Due to recent law changes, the 2012 Form IT-2663, Nonresident Real Property Estimated Income Tax Payment Form, and the instructions for this form have been revised. After the form was posted on our web site for a short period of time, legislation was enacted changing the highest effective rate of income tax to 8.82%. The revised form reflects the correct applicable personal income tax rate at which taxpayers must calculate and pay their estimated tax liability on a sale or transfer of real property located in New York State occurring on or after January 1, 2012, but before January 1, 2013."
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> "Attached is a PDF version of the revised 2012 Form IT-2663 and Form IT-2663-I. A box has been added around the form number and a revision date of 12/11 was added under the form number to identify the revised forms. You should not accept a 2012 Form IT-2663 when recording a deed unless the form shows this revision box and date. For sales or transfers that occur on or after January 1, 2012, but before January 1, 2013, taxpayers must use the revised 2012 Form IT-2663 to calculate and pay their estimated personal income tax liability. Using the previ-

ous version of the form would incorrectly calculate the tax."

"…The revised Form(s) IT-2663 and IT-2663-I ['Instructions'] are also available on the Tax Department's Web site (at www.tax.ny.gov)."

Form IT-2664, the Nonresident Cooperative Unit Estimated Income Tax Payment Form", and related instructions have also been revised to reflect the correct applicable personal income tax rate of 8.82%. Revised Form IT-2664 and IT-2664-I can also be accessed at the Department's Website at www.tax.ny.gov."

Joint Tenants

A person, now deceased, executed a contract to purchase real property. When he and his fiancé, the Defendant, became engaged, the Defendant was added to the contract as a purchaser and they took title to the property as joint tenants. The decedent subsequently ended their engagement and commenced an Action pursuant to Civil Rights Law Section 80-b for the return of the engagement ring and to have the Defendant's name removed from the deed. Under Section 80-b, "[n]othing in this article [8. 'Causes of action for alienation of affections, criminal conversation, seduction and breach of contract to marry abolished"] contained shall be construed to bar a right of action for the…rescission of a deed to real property when the sole consideration for the transfer of the…real property was a contemplated marriage which has not occurred…"

The Supreme Court, Monroe County, awarded the Administrator of the Estate of the decedent the proceeds from the sale of the property, which ruling was affirmed by the Appellate Division, Fourth Department. Although the Defendant alleged that the property became solely hers when the decedent died and therefore the Supreme Court erred in permitting the action to continue, the Appellate Division held that "a Section 80-b action for the return of real property is not extinguished upon the death of the party who commenced the action, even where, as here, the subject property is held as joint tenants with right of survivorship." Further, "the court's conclusion that the property was given solely in consideration of marriage is supported by the record…" Northern Trust, N.A., as Administrator of the Estate of Richard Sarkis v. Delley, decided December 30, 2011, is reported at 2011 WL 6848431.

Lien Law

Under Lien Law Section 70 ("Definition of trusts"), "funds…received by an owner for or in connection with an improvement of real property in this state…shall constitute assets of a trust", subject to the requirements of Lien Law Article 3-A ("Definition and Enforcement of Trusts"). It was asserted that mortgage proceeds received by Respondent for the acquisition of property and air rights were required to be held subject to the trust provisions of Lien Law Article 3-A.

The Appellate Division, First Department, affirming the ruling of the Supreme Court, New York County, held that "…no funds were received by respondent 'under or in connection with a contract for an improvement of real property" and, therefore, "petitioner has not established that the trust provisions of Lien Law Article 3-A are applicable." According to the Court, the purpose of article 3-A is "to insure that funds obtained for financing of an improvement of real property…will in fact be used to pay the costs of that improvement. [citations omitted]…To hold that funds received for the

purpose of purchasing real property become part of a trust constituted for the purpose of improving property would unduly enlarge this clearly defined purpose." The Court noted that neither of the mortgages contained an express promise to improve the property. Mayrich Construction Company v. Oliver LLC, decided December 15, 2011, is reported at 2011 WL 6220782.

Limited Partnerships

A New York limited partnership was converted to a Delaware limited liability company. Although the general partner and a majority of the limited partners voted for the conversion, Seth Miller ("Miller"), the sole "Class Z" limited partner, dissented. The Certificate of Conversion was filed in Delaware and a Certificate of Cancellation of the Limited Partnership was filed in New York.

Miller claimed that he received for his interest on the conversion less than 20% of what his interest was worth, and he and a Special Limited Partner commenced an Action to nullify the conversion. The Supreme Court, New York County, held that the conversion of the limited partnership was not permitted, and it granted the Plaintiffs summary judgment, nullifying the conversion.

According to the Court, under Section 17-901 of the Delaware Limited Liability Company Act, "the laws of...the jurisdiction or country under which a foreign limited partnership is organized govern its organization and internal affairs…" Under Section 1006 ("Conversion of partnership or limited partnership to limited liability company") of New York's Limited Liability Company Law, "…the terms and conditions of a conversion of a limited partnership to a limited liability company must be approved…by limited partners representing at least a majority in interest of each class of limited partners…" This limited partnership could not lawfully convert to a limited liability company without the consent of Miller, the sole Class Z partner.

An Order was to be entered directing the Defendants to "take all necessary steps to nullify the conversion and to re-establish [the entity] as a New York limited partnership." Miller v. Ross, 2007 NY Slip Op 52683, decided February 6, 2007 was posted on January 13, 2012 at http://www.courts.state.ny.us/reporter/3dseries/2007/2007_52683.htm.

"Martin Act"

Section 353 of the New York General Business Law ("Action by attorney-general") authorizes New York State's Attorney General to bring an action in the name and on behalf of the People of the State if he believes that a fraudulent practice under Article 23-A of the General Business Law ("Fraudulent practices in respect to stock, bonds and other securities"), known as the "Martin Act", has been or is about to be committed. The Martin Act includes the regulation of the offering and sale of condominium and cooperative units.

Assured Guaranty (UK) Ltd. claimed that the Defendant breached its fiduciary duty and was grossly negligent in investing the assets of an entity whose obligations it guaranteed in high-risk securities, such as subprime mortgage backed securities, without the investments being diversified and without advising of the true level of risk. The Supreme Court, New York County, dismissed the complaint on the grounds that the causes of action were pre-empted by the Martin Act, which the Attorney General had the exclusive power to enforce. The Appellate Division reinstated the breach of fiduciary duty and gross negligence causes of action, and part of the contract claim, and the Court of Appeals affirmed.

The Court of Appeals held that the common law claims of breach of fiduciary duty and gross negligence were not barred by the Martin Act. According to the Court, "…the plain text of the Martin Act…does not expressly mention or otherwise contemplate the elimination of common-law claims." "[A] private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability." Assured Guaranty (UK) LTD. v. J.P. Morgan Investment Management Inc. was decided by the Court of Appeals on December 20, 2011 and is reported at 2011 WL 6338898.

Mortgage

The Defendants executed a purchase money second mortgage and a consolidation agreement, consolidating the second mortgage with a first mortgage taken by assignment. The second mortgage and the consolidation agreement were not recorded and were either lost or misplaced. The Defendants did not respond to a demand that they re-execute the documents and the Plaintiff commenced an Action seeking a declaration that it was the holder of an equitable mortgage on the property. The Defendants did not file an Answer to the Complaint.

The Supreme Court, Nassau County, found that the parties intended to execute the instruments in question. However, the documentation submitted to the Court included a consolidation agreement with an unsigned acknowledgment and the acknowledgment of a person who was not a party to the document, and a Note signed by only one of the two mortgagors. Further, there was no proof that the Defendants actually received the proceeds of the second mortgage.

The Court ordered the Plaintiff and the Defendants to appear at a hearing, and "[i]f [the evidence produced at the hearing] uncovers that defendants have indeed received proceeds from a mortgage encumbering the subject residence and for the benefit of the home ownership, this Court will then compel the defendant Moutopouloses to re-execute the mortgage documents and such other relief as may be appropriate." Wells Fargo Home Mortgage vs. Moutopoulos, 2011 NY Slip Op 33374, decided December 12, 2011, is posted at
http://www.nycourts.gov/reporter/pdfs/2011/2011_33374.pdf.

Mortgage Foreclosures

Deutsche Bank assigned the mortgages it was foreclosing after issuance of a judgment of foreclosure and sale. More than two months after the assignment, Deutsche Bank inadvertently filed a satisfaction of the mortgage. The Supreme Court, Queens County, granted a motion to cancel and expunge the satisfaction and the Appellate Division, Second Department affirmed that ruling. Although the appellant contended that he detrimentally relied on the recording of the satisfaction of mortgage when he contracted for renovations to be made to the property in June 2008, the Appellate Division noted that the motion to vacate the satisfaction was made as early as November 19, 2007, "thus putting the appellant on notice that the satisfaction should not reasonably be relied upon." However, due to the delay in the litigation resulting from the erroneous recording of the satisfaction, the appellant was not to be responsible for interest or penalties accruing after recording of the satisfaction. Deutsche Bank Trust Co., Americas v. Stathakis, decided December 27, 2011, is reported at 2011 WL 6825700.

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Current Developments

Mortgage Foreclosures/Standing

MERS, the nominee for the lender under a mortgage recorded in Kings County, assigned the mortgage to Citigroup Global Markets Realty Corp. However, the note secured by the mortgage was endorsed to Citimortgage, Inc. The Supreme Court, Kings County, denied Citigroup Global Markets Realty Corp.'s application for an Order of Reference. Although the Defendant had not served an answer or moved to dismiss the Action and he had therefore waived any objection to the Plaintiff's standing, the assignment of the mortgage by MERS to Citigroup was a nullity and "it would be inappropriate to grant Plaintiff an order of reference, where it is clear that it cannot make out its prima facie case of entitlement to Judgment." Citigroup Global Markets Realty Corp. v. Smith, decided December 13, 2011, is reported at 33 Misc. 3d 1234 and 2011 WL 6224555.

Mortgage Foreclosures/Standing

A note and a mortgage were executed to H & R Block Mortgage Corporation ("Block") on April 19, 2006. A "gap" note and mortgage, and a consolidated, restated note and a consolidation, extension and modification agreement were executed to Option One Mortgage Corporation ("Option One") on August 13, 2007. On November 17, 2007, Block assigned the 2006 mortgage to Option One which, on December 18, 2009, re-assigned the consolidated note and mortgages to Wells Fargo, which commenced an Action to foreclose the mortgage on December 22, 2009. The mortgage assignment to Wells Fargo was recorded on January 11, 2010.

Since the consolidated note and mortgage were assigned to Wells Fargo before the foreclosure was commenced, the later recording of the assignment of the consolidated mortgage did not defeat standing. However, there was no evidence that the 2006 note had been assigned from Block to Option One or that the Plaintiff was in possession of that Note. Accordingly, the Supreme Court, Queens County, granted the Defendant's motion to dismiss for lack of standing. Wells Fargo Bank, N.A. v. Gallo, 2011 NY Slip Op 33318, decided June 27, 2011, is posted at http://www.nycourts.gov/reporter/pdfs/2011/2011_33318.pdf.

Mortgage Foreclosures/Standing

The Defendant moved to vacate the judgment of foreclosure and sale entered on default and the foreclosure sale due to a deficiency in the notice of sale and on the basis that the Plaintiff did not have standing. The Supreme Court, Richmond County, found that the notices of sale were defective and that there was no evidence that the note secured by the mortgage being foreclosed was delivered to the Plaintiff before the action was commenced. The Plaintiff argued that the Defendant waived the defense of standing by failing to raise the issue in an answer or in a timely filed pre-answer motion.

The Court vacated the judgment of foreclosure and the sale, directed the County Clerk of Richmond County to vacate the lis pendens, and dismissed the Action without prejudice. According to the Court, the "failure to have standing at the commencement of an action is a jurisdictional defect which is covered by CPLR Section 3211 (a)(2) and therefore not subject to the waiver provisions of CPLR Section 3211(e)." Under Section (a)(2) of Rule 3211 ("Motion to dismiss"), " …[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:…(2) the court has not jurisdiction of the subject matter of the cause of action." Section 3211(e) provides that "[a] motion based on a ground specified in paragraphs two…of subdivision

(a) may be made at any subsequent time or in a later pleading, if one is permitted..."

The Court noted that the Defendant was not represented by counsel and therefore "had no legal understanding of making an earlier technical motion to challenge the standing of the plaintiff." EMC Mortgage Corp. v. Carlo, 2011 NY Slip Op 33339, decided September 13, 2011, is posted at http://www.nycourts.gov/reporter/pdfs/2011/2011_33339.pdf.

Mortgage Foreclosures/Standing/Collateral Assignments

The Defendant asserted that the Plaintiff lacked standing to foreclose because the Plaintiff had executed a collateral assignment of the mortgage and the collateral assignee was a necessary party whose absence required that the Action be dismissed. The Supreme Court, Richmond County, held that the defense was "totally devoid of merit" and granted the Plaintiff's motion for summary judgment. While a collateral assignee may bring a foreclosure action in its own right if its assignor is named a party defendant, a collateral assignor is not required to join its assignee in an Action to foreclose the mortgage. "In any event", according to the Court, "it is well settled that the absence of a necessary party in a mortgage foreclosure action is not a ground for dismissal, but simply leaves such party's rights unaffected by the judgment of foreclosure and sale." Eastern Capital Group, LLC v. 2480 Richmond Terrace Real Estate Corp., 2011 NY Slip Op 33346, decided August 4, 2011, is posted at
http://www.nycourts.gov/reporter/pdfs/2011/2011_33346.pdf.

New York City Real Property Transfer Tax (RPTT)/Mortgage Foreclosures

The Queens County Bar Association has disseminated a letter dated November 28, 2011 from Michael A. Cardozo, Corporation Counsel for The City of New York, to Honorable Fern Fisher, the Deputy Chief Administrative Judge for the New York City Courts. The letter concerns the "Referee responsibility for penalties and interest on late filed Real Property Transfer Tax Returns" and states, in part, the following:

> "By law, referees selling properties at foreclosure are treated as grantors subject to the RPTT. Specifically, 19 RCNY Section 23-02(a)(2) provides that the RPTT will apply to '[d]eeds given by referees, receivers, sheriffs, etc., for realty sold under foreclosure or execution…' There is no provision of law or regulation that exempts a referee, acting as a grantor, from the penalty and interest provisions otherwise imposed under the RPTT."
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> "Beginning in May 2011, [the New York City Department of] Finance began to actively enforce the late filing penalty and interest provision, which it had not done previously. As a result, many referees found themselves faced with the imposition of penalties and interest that they were not expecting. Accordingly, to mitigate the harsh impact of these penalties on referees, Finance has decided to suspend enforcement of the penalties and interest previously charged to the referees. However, as of January 1, 2012, referees will be responsible for the payment of any penalties and interest that will be imposed for late filing of the RPTT return."

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