First American Title National Commercial Services

Current Developments

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First American National Commercial Services

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Condominiums

Under 13 NYCRR 20.3(o)(12), a Regulation issued by New York's Attorney General, a Sponsor is required to state in a condominium offering plan when the first closing of a unit is expected to occur and that purchasers may rescind their purchase agreements if the first closing of a unit is delayed twelve months or more. The Offering Plan in question stated that the anticipated first closing date was September 1, 2008 and if the first closing did not occur by September 1, 2008 "any Purchaser electing rescission will have their Deposits and any interest earned thereon returned." The Sponsor argued that the second date referenced was incorrect due to a scrivener's error; the date after which purchasers were entitled to rescind their contracts was intended to be September 1, 2009. Purchasers of units sought to rescind their contracts on the ground that the first closing of a unit had not taken place by September 1, 2008.

The Attorney General's Office issued a determination in favor of the respondents-purchasers, directing the release of their down payments with interest. It found the Sponsor had not shown that the alleged scrivener's error was contrary to the intention of the parties, that the law of mutual or unilateral mistake did not apply, and that the purchase agreements' integration clause might preclude a consideration of parol evidence. The Sponsor's challenge to the Attorney General's determination in the United States District Court for the Southern District was dismissed. It then commenced an Article 78 proceeding in the Supreme Court, New York County, seeking an Order reversing the Attorney General, and reforming the offering plan and the purchase agreements. It claimed that the Attorney General should have considered extrinsic evidence of the parties' intent.

The Supreme Court denied the application and ordered the Sponsor and the escrow agent to return the down payments, with any accumulated interest, within thirty days of receipt of its decision. According to the Court, the "administrative decision thoroughly analyzes petitioner's arguments regarding scrivener's error, mistake and reformation and accurately applies principles of New York contract law…We find such determinations entirely rational based on the record before us." CRP/Extell Parcel I, L.P. v. Cuomo, decided January 19, 2012, is reported at 34 Misc. 3d 1214 and 2012 WL 181412.

3/2012

First American Title National Commercial Services

Current Developments

Deeds/Constructive Trust

The Plaintiff alleged that his sister, exercising duress and undue influence over their mother, caused her mother to convey the mother's residence to his sister, frustrating their mother's intention to devise her assets approximately equally between them. He sought an Order setting aside the deed, ordering the re-conveyance of the property to a family trust, and imposing a constructive trust for the benefit of his mother and thereafter for him. The Supreme Court, Westchester County, granted his mother and sister's motion to dismiss the action, ruling that the Plaintiff lacked standing. The Appellate Division, Second Department affirmed; a power of attorney executed to him by his mother had been revoked and being a "potential heir" did not confer standing. Their mother "had the absolute right to change her intentions regarding the distribution of her assets." Sharrow v. Sheridan, decided January 31, 2012, is reported at 937 N.Y.S. 2d 320.

Electronic Filing

The Administrative Judges for the First Judicial District, Supreme Court, Civil Branch, have issued a "Notice to the Bar Regarding Mandatory E-Filing", dated January 19, 2012, which reads, in part, as follows:

> "Pursuant to an Administrative Order, dated Jan. 12, 2012, issued by the Chief Administrative Judge in accordance with legislation enacted in 2011, electronic filing of litigation documents through the New York State Courts Electronic Filing System ('NYSCEF') will become mandatory in all commercial, contract, and tort actions, without regard to the amount in controversy, that are commenced in New York County Supreme Court on or after February 27, 2012. On and after that date, such cases must be commenced electronically and initiating documents will not be accepted in hard copy form…."

A User's Manual and FAQS are posted on the NYSCEF website at https://iapps.courts.state.ny.us/nyscef/HomePage. Attorneys may register for a two-hour live training course, with CLE credits and at no charge, through the "Training" link on the website.

Excavation/NYC

In 2006 the Defendant began excavating on its parcel which was adjacent to the building located at 287 Broadway ("287"), causing the building at 287 to lean to the south by approximately nine inches. The Department of Buildings issued a vacate order; the owner of 287 and one of its tenants sued. They claimed that the Defendant, its parent company and its contractor were negligent and strictly liable under Section 27-1031(b)(1) of the City's Administrative Code.

That Section of the Administrative Code, which was amended in 2008 and is now a part of the City's Construction Code, in 2006 stated the following:

> "When an excavation is carried to a depth more than ten feet below the legally established curb level [as was here the case] the person who causes such excavation to be made shall, at all times and at his or her own expense, preserve and protect from injury any adjoining structures, the safety of which may be affected by such part of the excavation as exceeds ten feet below the legally established curb level provided such person is afforded a license to enter and inspect the adjoining buildings and property."

Current Developments

New York State's Court of Appeals granted the Plaintiffs' motion for summary judgment, reversing the holding of the Appellate Division, First Department, and reinstated the ruling of the Supreme Court, New York County. The Court held that a violation of Section 27-1031(b)(1) results in strict liability and is not merely "evidence of negligence." Yenem Corp. v. 281 Broadway Holdings, decided February 14, 2012, is reported at 2012 WL 443945.

Forgery

In an action to foreclose a mortgage, the Defendant-mortgagor's wife, who had been granted leave to intervene, alleged that her signature on a deed conveying the property to her husband was forged. The Supreme Court, Westchester County, agreed that her signature had been forged and entered a judgment holding that the deed and the mortgage being foreclosed were void. The Court also held that the judgment imposed an equitable lien on the property in favor of the foreclosing lender. The Appellate Division, Second Department, affirmed the ruling of the lower court. Bank of New York v. Spadafora, decided February 7, 2012, is reported at 938 N.Y.S. 2d 200.

Mortgage Foreclosures

The prior owner of property being foreclosed moved to vacate the judgment of foreclosure and sale. He claimed that he was fraudulently induced to convey his home to a so-called "straw buyer." The Supreme Court, Kings County, vacated the judgment and the Appellate Division, Second Department, affirmed. According to the Appellate Division, "the plaintiff [assignee of the mortgage being foreclosed] failed to establish that it was a bona fide encumbrancer for value, as the record indicates that the circumstances under which its assignor conveyed the mortgage in question were such that a reasonably prudent lender would have made inquiries about the true nature of the transaction." Wells Fargo Bank v. Hodge, decided February 14, 2012, is reported at 2012 WL 502440.

Mortgage Foreclosures

In Aurora Loan Services, LLC v. Sookoo, decided August 14, 2009 and reported at 901 N.Y.S. 2d 897, Justice Schack of the Supreme Court, Kings County, dismissed the complaint and canceled the notice of pendency in an Action to foreclose a mortgage. The Plaintiff had failed to comply with an Order to produce all loan origination documents to enable the Court to determine whether the Defendant's inability to pay the mortgage loan was due to fraud on the part of the loan originator. This ruling was reversed by the Appellate Division, Second Department. According to the Appellate Division, "[t]he defendants failed to answer within the time allowed, and the plaintiff submitted, in support of its unopposed motion, the mortgage, the note, the verified complaint setting forth the facts establishing the claim, and an affidavit of its employee attesting to the default." Therefore, the Plaintiff's motion for an order of reference should have been granted. The case was remitted to a different Justice. The Appellate Division's decision, dated February 14, 2012, is reported at 2012 WL 503663.

Mortgage Foreclosures/MERS

The People of the State of New York v. JP Morgan Chase Bank, N.A. was filed on February 3, 2012 in the Supreme Court, Kings County, against a number of lenders, Merscorp, Inc., and the Mortgage Electronic Registration Systems, Inc. ("MERS"). The Attorney General of the State of New York alleges that the Defendants, in their failure to record transfers of mortgages in the public

records and in the handling of foreclosures, engaged in repeated fraudulent or illegal acts in violation of Executive Law Section 63 ("Department of Law; General Duties") and engaged in deceptive acts and practices in violation of General Business Law Section 349 ("Deceptive acts and practices unlawful"). The Complaint asserts, among other things, that MERS often lacked standing to foreclose, that representations that MERS held the promissory notes secured by the mortgages being foreclosed "were often false and deceptive," and that the creation and use of MERS has "resulted in a myriad of fraudulent, deceptive and illegal acts and practices." The Plaintiff seeks declaratory and injunctive relief, and monetary damages, and an Order "directing Defendants to take all actions necessary to cure any title defects and clear any improper liens resulting from the fraudulent and deceptive acts and practices alleged" in the Complaint.

Mortgage Foreclosures/Reforeclosure

A Defendant, the holder of a subordinate mortgage, failed to appear or to answer the complaint in an Action to re-foreclose the Plaintiff's mortgage. The Defendant sought an Order vacating its default and extending the time for it to submit an answer. It claimed that it tendered its defense and forwarded the pleadings to another bank in accordance with a pooling and servicing agreement; that bank forwarded the papers to one of its departments in California which, in turn, forwarded them to another department in Florida where the papers were misplaced. The Defendant also claimed that the statute of limitations on the enforcement of the Plaintiff's mortgage had expired. The Supreme Court, Queens County, entered a default judgment and denied the Defendant's motion, giving the Defendant 60 days to redeem the property or be foreclosed. The Appellate Division, Second Department, affirmed, stating that the Defendant did not have a reasonable excuse for its default or a meritorious defense. Further, the re-foreclosure was properly maintainable, "even if the applicable statute of limitations barred an action against it to foreclose on the" Plaintiff's mortgage. Targee Street Internal Medicine Group, P.C. v. Deutsche Bank National Trust Company, decided February 14, 2012, is reported at 2012 WL 502601.

Mortgage Foreclosures/Religious Corporations

The foreclosing mortgagee sought, inter alia, an Order confirming the Referee's Report of Sale of property owned by the Defendant religious corporation. The Defendant moved for an Order setting aside the Judgment of Foreclosure and Sale and dismissing the Action because of the failure of the Plaintiff to join New York State's Attorney General as a necessary party. The Supreme Court, Nassau County, issued an Order confirming the Report of Sale and denying the Defendant's motion. According to the Court, "[w]hile it is clear from [Religious Corporation Law Section 12 and Not-for-Profit Corporation Law Section 511] that the Attorney General has oversight authority with respect to the encumbrance of real property by a religious corporation, once approved, the Attorney General's role in the transaction ceases, an there is no obligation to involve or notify the Attorney General of an action to foreclose on a mortgage held by the religious corporation." Valley National Bank v. Congregation Shira Chadasha, Inc., decided January 9, 2012, is posted at http://www.nycourts.gov/reporter/pdfs/2012/2012_30131.pdf.

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 April 1, 2012 – June 30, 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.

Current Developments

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.

Nassau County/Recordings

Information has been received that the Nassau County Clerk requires that a Form TP-584 ("Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Personal Income Tax") accompanying a referee's deed list the Defendant-Mortgagors as the Grantors. If the Social Security Number(s) or Employer Identification Number(s) ("EIN") of such persons or entities cannot be obtained, a signed statement to that effect is to be submitted with the form.

Not-For-Profit Corporations

Under Not-For-Profit Corporation Law ("NPCL") Sections 201 ("Purposes") and 510 ("Disposition of all or substantially all assets"), the sale of all or substantially all of the assets of a Type "B" or "C" corporation requires court approval. A Type "D" entity may be treated as a "Type B" corporation. A court may authorize the sale if, as required by NPCL Section 511("Petition for leave of court"), the sale is "fair and reasonable to the corporation and…the purposes of the corporation or the interests of the members will be promoted."

Petitioner, a Type D corporation formed under New York's Private Housing Finance Law to provide low income housing, moved for approval of a contract to sell its real property to a private purchaser, and for an Order restraining and enjoining New York City's Departments of Housing Preservation ("HPD") and Finance from transferring the property out of an In Rem foreclosure to a qualified third party until its application was determined. Petitioner had not redeemed the property during the foreclosure processes' mandatory redemption period. HPD and the Office of New York State's Attorney General objected to the sale.

The Court denied the Petitioner's motion to approve its proposed sale and its request for an injunction. The Court found that the sale would benefit the proposed purchaser and the Petitioner's vendors, who would be paid from the proceeds of the sale amounts allegedly owed to them, rather than the interests of Petitioner and its members. Further, according to the Court, the sale would contravene the purpose for which Petitioner was formed, which was to use the property for low-income housing. "[T]here is a strong public policy in favor of keeping the subject premises as low-income housing." However, the Court stayed the City's transfer of the property to a qualified third party to allow Petitioner to file a Notice of Appeal and seek leave for a stay. Matter of 51-53 W. 129th St. HDFC v. Attorney General of the State of New York, decided November 29, 2011, is reported at http://www.courts.state.ny.us/reporter/pdfs/2011/2011_33096.pdf.

Restrictive Covenants

A deed to the Plaintiffs' property included a restrictive covenant limiting improvements on certain adjacent parcels in the same tax block owned by the Plaintiffs' grantor to a height of 280 feet above sea level. The Plaintiffs' property had an unobstructed view of a golf course and the surrounding area. In 2003, an adjoining property, claimed in this litigation to be subject to the restrictions in the aforesaid deed, was conveyed. That deed, and the subsequent conveyances of that property, did not include any height restriction or reference the restriction in the deed to the Plaintiffs. The

Current Developments

Defendant began building a single family home with a height of about 285 feet above sea level and the Plaintiffs brought an Action to compel the Defendant to comply with the height restriction.

The Supreme Court, Richmond County, found that the grantee of the adjoining property and her husband, who were prior grantees of the adjoining property before the property was deeded to the Defendant, did not have actual notice of the restrictive covenant when they took title. However, while "[a] purchaser is not normally required to search outside the chain of title…,and is not chargeable with constructive notice of conveyances recorded outside of that purchaser's direct chain of title [citations omitted]", in counties using a block and lot indexing system a purchaser may be charged with record notice of conveyances in the same tax block. Notwithstanding, the Court denied the Plaintiff's motion for a permanent injunction and dismissed the complaint for failure to state a cause of action. According to the Court, "injunctive relief being equitable in nature, the Court would be loathe to invoke it here, where the cost to cure would be great, the deviation minimal, and the interference with the plaintiff' supposed 'view' has been demonstrated to apply only to a single location in plaintiffs' backyard." Petrouleas v. Noce Management, Inc., decided February 14, 2012, is posted at http://www.nycourts.gov/reporter/3dseries/2012/2012_50354.htm.

Subrogation

Proceeds from the Plaintiff's mortgage loan satisfied an existing mortgage. The borrower then obtained an additional mortgage loan from Zeg Enterprises, Inc. ("Zeg") and Zeg's mortgage was recorded before the Plaintiff's mortgage. The Plaintiff, in an Action to foreclose its mortgage, sought a judgment declaring that its mortgage had priority. The Supreme Court, Kings County, denied the motion, holding that Zeg was a bona fide encumbrancer for value with no actual or constructive notice of the Plaintiff's mortgage when Zeg's mortgage was recorded. The Appellate Division, Second Department, modified the Order of the lower court, holding that the Plaintiff's mortgage should be equitably subrogated to the rights of the mortgagee that was paid off. It therefore remitted the matter for entry of a judgment declaring that the Plaintiff's mortgage had priority to the extent of its loan amount applied to pay off the prior lien, and interest on that amount. The mortgage held by Zeg was otherwise superior to the mortgage being foreclosed. Rite Capital Group, LLC v. LMAG, LLC, decided January 17, 2012, is reported at 935 N.Y.S. 2d 280.

Suffolk County Recordings/Fee Increase

The Suffolk County Clerk's Office is issuing the following notice:

> "Due to the passing of a Resolution [No. 1222-2011] by the Suffolk County Legislature effective April 2, 2012 the Real Property Verification fees will increase to $60.00 per lot for each lot verified and there will no longer be a maximum fee limit of $1400.00."

The notice further states, as to rejected documents:

> "At this time your document is being rejected for various recording issues. The document(s) must be returned to us in a timely fashion (within one month) or we will be forced to return it again to you to accommodate the fee increase."

First American Title National Commercial Services

Current Developments

Tax Sales/Due Process

The Appellate Division, Fourth Department, affirmed the decision of the Supreme Court, Monroe County, upholding the tax sale and sale of property when notice of the delinquent taxes and of the tax sale was sent by ordinary mail to the property owner. The former owner alleged that the taxing authority knew of his illiteracy and therefore should have provided an alternative form of notice to meet due process requirements. According to the Appellate Division, "[i]t was reasonable for respondent to believe that petitioner had someone read his mail to him. To hold that a municipality must provide notice other than by ordinary mail to persons it knows to be illiterate, or who it knows cannot read English, would place an unreasonable burden on the municipality." In re City of Rochester, decided on February 17, 2012, is reported at 2012 WL 517185.

Westchester County/Recordings

The following communication dated February 10, 2012, concerning the PREP [Property Records Electronic Portal] System used to submit real property related instruments for recording, was received from the Office of the Westchester County Clerk.

"Notice: Financial Rejection Email Alert Added"

"Beginning today, customers will receive an email notification when their package is rejected for a financial reason only. In addition, the package will return to your PREP package grid where you can view and print the rejection letter if necessary. In an effort to save paper and postage, we will no longer be mailing out financial rejection letters when there is no need to mail back a rejected payment (such as an unsigned check)."

"Eliminate Financial Rejections and Refund Applications by Authorizing ACH Debit"

"By simply filling out a form authorizing us to debit funds for land records from your bank account, you will never get a financial rejection letter or need to apply for a refund again. Once your package has moved through our system and been approved, you will get an email with the list of packages and amounts we intend to debit. You are given two business days to be sure these amounts are correct and you have the funds available. In the meantime, your package is recorded. In addition to the daily email, our ACH customers can login to PREP at any time and run Excel spreadsheets of financial activity. For more information, visit WestchesterClerk.com and choose "Services" and then "ACH Debit Accounts" or call our Finance Unit at (914)995-2140."

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