



First American Title™
NATIONAL COMMERCIAL SERVICES

Current Developments

*By Michael J. Berey
Senior Vice President, Chief Underwriting Counsel – New York
First American National Commercial Services*

Adverse Possession

Robert E. Becker and others leased beachfront lots from the Town of Babylon. In the 1960's, they constructed wooden jetties to prevent beach erosion. On his parcel, Mr. Becker erected a dock using the jetty for support and extended the boardwalk to reach the dock. However, a 1984 survey done for the Defendant-lessee of an adjoining property disclosed that the jetties were misaligned, such that a portion of Mr. Becker's boardwalk and the entire dock he had constructed encroached on the property the Defendant leased. Mr. Becker commenced an Action for a judgment declaring that he had title by adverse possession to that portion of the adjoining lot on which the boardwalk and dock were located.

The Supreme Court, Suffolk County, granted the Estate of Robert E. Becker's motion for summary judgment; the Appellate Division, Second Department, reversed, holding that the Plaintiff had no rights in the disputed property. The Court of Appeals reversed, holding that Mr. Becker had "established title by adverse possession" under the laws as to adverse possession in effect prior to the effective date of Chapter 269 of the Laws of 2008, which amended Article 5 ("Adverse Possession") of the Real Property Actions and Proceedings Law. The Court also noted that the adverse possession claim had no bearing on the property interest of the Town of Babylon. *Estate of Becker v. Murtagh*, decided April 3, 2012, is reported at 2012 WL 1080325.

Cellular Towers

After an environmental consultant and an electrical engineer allegedly found high levels of radio frequency radiation in the Plaintiffs' apartment, the Plaintiffs commenced an Action seeking the removal of a cell phone tower from the rooftop of the Defendant's nearby building, and damages. The Plaintiffs alleged that the tower's radio frequency ("RF") emissions presented a danger to their health and were a nuisance. The Supreme Court, New York County, dismissed the Complaint for the failure to join as a Defendant the owner of the radio tower. The Appellate Division, First Department, affirmed, but on

the ground that the Plaintiffs' claims were preempted by the federal Telecommunications Act of 1996, which restricts the ability of states to regulate cellular towers. The levels of RF emissions in the Plaintiffs' apartment were within the Federal Communications Commission's Maximum Permissible Exposure limits for RF radiation, and they were therefore permissible under federal law. *Stanley v. Amalithone Realty, Inc.*, decided March 13, 2012, is reported at 840 N.Y.S. 2d 65.

Laches

Beulah Jones, who died in 1993, owned real property in Kings County. Under her Will, executed in 1961, the property was left to her sister, the Plaintiff, subject to a life estate benefitting Ms. Jones' husband. In 1999, her husband deeded the property to his niece and nephew, the Defendants, who executed a mortgage on the property in 2003. In 2004, the Plaintiff commenced an action to quiet title, alleging that she owned the property and that the mortgage should be discharged. The Plaintiff also brought a proceeding in Surrogate's Court in 2004 to probate a copy of the 1961 Will. The Will was only admitted to probate in 2008.

The Supreme Court, Kings County, held that the Plaintiff owned the property, subject to the rights of the holder of the aforesaid mortgage since the Plaintiff's claims as to the mortgage were barred by laches. The Appellate Division, Second Department, affirmed. According to the Appellate Division, "[t]he plaintiff's delay in asserting her interest in the property was inexcusable under these circumstances. Further, her delay in probating Beulah Jones's will and in asserting any interest in the property, despite the opportunity to do so, prejudiced the mortgagee, which did not know and could not have known at the time that it took the mortgage on the property that the plaintiff would challenge [the mortgagors'] ownership interest." *Wilds v. Heckstall*, decided March 6, 2012, is reported at 939 N.Y.S. 2d 543.

Laches/Statute of Limitations

In 1955 and 1964 the Power Authority of the State of New York ("NYPA") appropriated five parcels of land for use in connection with a project to develop a section of the St. Lawrence River. In 2006 and 2007, having determined that it no longer needed a fee interest in those parcels, NYPA offered the Plaintiffs, the successors-in-interest to the former owners, an opportunity to re-purchase the parcels for their fair market value, subject to NYPA's retention of a flowage easement. The Plaintiffs commenced an Action in 2009 alleging that the original takings were excessive and therefore unconstitutional, asserting that the statute of limitations to bring the Action commenced when they first discovered the illegal taking, which was when they received notice that they could re-purchase the parcels.

The Supreme Court, St. Lawrence County, dismissed the Action as time-barred. The Appellate Division, Third Department, affirmed, holding that the statute of limitations for a challenge to the appropriation commenced to run when title vested in NYPA. Further, the Plaintiffs' action was subject to the defense of laches, given "the lapse of time between the appropriations and the commencement of the action." In addition, a challenge to the present fair market value of the parcels was not brought within four months from the date on which the offer was made, as required by CPLR Section 217(1) ("Proceeding against body or officer"). *Putney v. People*, decided April 5, 2012, is reported at 2012 WL 1123757.

Mechanic's Liens

A mechanic's lienor engaged by a tenant brought an Action to foreclose a mechanic's lien against the fee

estate. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment, and the Appellate Division, First Department, affirmed. The Appellate Division found that the work was done with the fee Owner's consent. In particular, the lease to the tenant specifically contemplated the improvements, and the fee Owner (a) approved hiring the Plaintiff and the construction plans; (b) obtained the work permits; (c) was actively involved in the project; (d) e-mailed the Plaintiff inquiring as to what the fee owner could do to start the construction process; and (e) received the benefits of the improvements since it re-entered the space. *American Construction Inc. v. Radu Physical Culture, LLC*, decided March 27, 2012, is reported at 2012 WL 996961.

Mechanic's Liens

An "improvement", as to which a mechanic's lien may be filed, includes, is defined in Lien Law Section 2 to include "the performance of real estate brokerage services in obtaining a lessee for a term of more than three years of all or any part of real property to be used for other than residential purposes pursuant to a written contract of brokerage employment or compensation." Petitioner, the owner of real property against which a broker's mechanic's lien was filed, brought a proceeding under Lien Law Section 19 ("Discharge of lien for private improvement") for an Order vacating the lien. The Supreme Court, New York County, issued an Order discharging the mechanic's lien and directing the County Clerk to mark the docket accordingly.

The brokerage agreement under which the lien was filed was between the broker and a lessee for the purpose of negotiating a lease at the Petitioner's property. Petitioner was a party to the agreement only for the limited purpose of agreeing to deliver checks to the broker on receipt of the checks from the tenant. According to the Court, "[h]ad the Legislature intended the term 'improvement' to include services provided to a lessee in acquiring a lease as well as those provided to an owner/lessor, it would have used the word 'lease' rather than 'lessee.'" *Matter of 1564 Second Realty LLC v. L.D. Banks & Assoc. Inc.*, decided March 6, 2012, is posted at http://www.courts.state.ny.us/reporter/pdfs/2012/2012_30581.pdf

Mortgage Foreclosures/Deficiency Judgments

Under Real Property Actions and Proceedings Law Section 1371 ("Deficiency judgment"), if no motion for a deficiency judgment is made, the proceeds of the [foreclosure] sale shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist." Although a foreclosing mortgagee's successful bid was for an amount less than the amount of the judgment of foreclosure it did not seek a deficiency judgment. The Appellate Division, First Department, reversing the Supreme Court, New York County, and granting the Defendants' motion to dismiss, held that due to the mortgagee's failure to move for a deficiency judgment it could not sue to recover fire insurance proceeds which the prior owners of the property had not applied to repair fire damage. "Plaintiff's failure to obtain a deficiency judgment...defeats any right of recovery [it] may have had as mortgagee." (Citation omitted). *Option One Mortgage Corp. v. J.P. Morgan Chase & Co.*, decided March 13, 2012, is reported at 2012 WL 787506.

Mortgage Foreclosures/MERS

Current Developments dated March 27, 2011 reported on the case of *In Re Agard*, a decision of the United States Bankruptcy Court for the Eastern District of New York reported at 444 B.R. 231 and 2011 WL 499959. In that matter, a mortgage servicer brought a motion to lift the automatic stay so that a mortgage on property owned by the Debtor, assigned by MERS as nominee for the original lender, could be foreclosed. Because a judgment of foreclosure had been entered by the Supreme Court, Nassau County, and, under the so-called

Rooker-Feldman doctrine and res judicata, the Court could not look behind the foreclosure judgment to question the foreclosing mortgagee's standing, it lifted the stay. However, the Bankruptcy Court Judge also stated that "in all future cases which involve MERS, the moving party must show that it validly holds both the mortgage and the underlying note in order to prove standing"; naming MERS as "nominee" and/or "mortgagee of record" in the original mortgage did not, in itself, authorize MERS to assign the mortgage.

MERS appealed the Court's denial of its motion for reconsideration. The United States District Court for the Eastern District of New York granted MERS' appeal and vacated the portion of the Bankruptcy Court's Order addressing the "hypothetical question of whether [the mortgagee] would have had standing absent the Judgment of Foreclosure." The Bankruptcy Court ruling was held to be an "improper advisory opinion"; under Rooker-Feldman, whether or not MERS had the authority to assign the mortgage "had no effect on the parties or the bankruptcy." *Agard v. Select Portfolio Servicing, Inc.*, dated March 28, 2012, is reported at 2012 WL 1043690.

Mortgage Foreclosures/MERS

Current Developments dated March 8, 2012 reported that New York State had commenced an Action in the Supreme Court, Kings County, against a number of lenders, Merscorp, Inc. and MERS, the Mortgage Electronic Registration Systems, Inc. The State alleges that the Defendants, by failing to record transfers of mortgages in the public records and in their handling of foreclosures, engaged in repeated fraudulent or illegal acts in violation of Executive Law Section 63 ("Department of Law; General Duties") and 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, representations that MERS held the promissory notes secured by the mortgages being foreclosed "were often false and deceptive," and the creation and use of MERS has "resulted in a myriad of fraudulent, deceptive and illegal acts and practices." The Complaint seeks declaratory and injunctive relief, 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.

It has since been reported on the Firedoglake and HousingWire websites that Bank of America, Citigroup, J.P. Morgan Chase, Wells Fargo and Ally Financial have settled certain of the claims in the lawsuit in exchange for their collectively paying \$25,000,000 to the State of New York.

See <http://news.firedoglake.com/2012/03/14/schneidermans-office-responds-on-mers-lawsuit-partial-settlement/> and <http://www.housingwire.com/news/schneiderman-banks-agree-25-million-mers-deal>

Mortgage Foreclosures/Standing

In an Action to foreclose a mortgage commenced on April 25, 2006, the Complaint asserted that the assignment of the mortgage to the foreclosing lender, dated April 11, 2006, had been recorded in the County Clerk's Office. However, the assignment had not been recorded. While the Defendant's motions to dismiss the Action for the Plaintiff's lack of standing and to vacate the default judgment were pending, a Corrective Assignment of Mortgage, reciting that the earlier assignment sent for recording was lost by the County Clerk's Office, was recorded. The Supreme Court, Rockland County, vacated the default judgment but denied the motion to dismiss. The Appellate Division, Second Department, reversed the Order of the lower court, granting the motion to dismiss for lack of standing.

According to the Appellate Division, not only did the Complaint incorrectly assert that the April 11, 2006, assignment had been recorded, it also did not include an allegation that the note or mortgage was physically delivered to the Plaintiff before the Action was commenced. Absent such a statement in the Complaint, the corrective assignment would not be given retroactive effect. *U.S. Bank National Association v. Dellarmo*, decided April 3, 2012, is reported at 2012 WL 1109173.

Mortgage Foreclosures/Standing

The Defendants in an Action to foreclose mortgages moved for the Supreme Court, New York County, to reconsider its earlier Order granting summary judgment to the Plaintiff and to stay the proceeding. They asserted that because the Plaintiff had assigned the mortgages after the Action was commenced it no longer had standing. The Court granted the motion to renew, but adhered to its prior determination to grant summary judgment and granted the Plaintiff's cross-motion to substitute its assignee as the Plaintiff. According to the Court, if the "assignment of the mortgages is valid then [the] proposed plaintiff [the assignee] is permitted to continue this action in BOA's stead. But even if this court were to hold that the assignments were void, the movants would not be entitled to a reversal of summary judgment against them since BOA would continue to be the holder of the mortgages and the movants' argument as to BOA's standing would fail as a result." *Bank of America, N.A. v. Oliver, LLC*, decided February 7, 2012, is reported at http://www.courts.state.ny.us/reporter/pdfs/2012/2012_30335.pdf.

Mortgage Recording Tax

New York State's Department of Taxation and Finance issued an Advisory Opinion dated March 6, 2012, taking the position that a mortgage executed as collateral for a bail bond is subject to mortgage recording tax, notwithstanding that on the forfeiture of the related bail bond the proceeds of the bond are payable by the bail bond insurance company-mortgagee to the People of the State of New York. "The fact that proceeds of the mortgage may be transmitted to another party is not relevant to the determination of tax liability here." TSB-A-12(2)R is posted at http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a12_2r.pdf.

New York City Real Property Transfer Tax/Penalties and Interest

New York City's Department of Finance has been imposing a penalty for the late filing of a Real Property Transfer Tax Return notwithstanding that the Transfer Tax was timely paid. Due to the efforts of the New York State Land Title Association, the Department has changed its position. The City Register has advised the Association as follows:

"The agency recently determined that the law as currently written, does not support that imposition of a late filing penalty if the tax shown on the return as due and owing was paid in full by the due date if the NYC Real Property return is filed late."

"The computer system was adjusted to eliminate billing of the late penalty when the tax due was paid in full and on time. The agency has canceled and adjusted our records for accounts that received a Notice of Penalty and Interest due for RPTT where Finance imposed a penalty for the late filing but the RPTT was paid timely. The agency will send notices to the accounts [when] a payment was made for the late filing penalty and the account now reflects a credit. The party/parties who made the payment will need to apply for a refund and include the proof of payment."

Private Transfer Fees

Current Developments dated September 27, 2011, reporting on the enactment in New York of legislation banning private transfer fee obligations imposed prior to September 23, 2011, also advised that the Federal Housing Finance Agency had issued a proposed rule that would prevent Fannie Mae, Freddie Mac and Federal Home Loan Banks from investing in mortgages on properties subject to such fees. On March 12, 2012, the Agency announced that it was issuing a final rule to restrict those regulated entities "from dealing in mortgages on properties encumbered by certain types of private transfer fee covenants and in certain related securities." The final rule was published in the Federal Register on March 16, 2012, at 77 FR 15566-01 (12 CFR Part 1228). The final rule is effective July 16, 2012. The rule allows the regulated entities "to trade in mortgages encumbered by otherwise disqualifying covenants if the covenants were created" before February 8, 2011, the date on which the rule was proposed.

Real Estate Tax Exemptions/"STAR" Exemption

Real Property Tax Law Section 425 ("School tax relief (STAR) exemption") affords a partial real estate tax exemption known as the STAR exemption to the owner of a one-to-three family residence, a farm dwelling, or a residential condominium or cooperative unit used as the owner's primary residence, if the owner meets certain maximum income requirements. An "enhanced STAR" may be available to such owners who are at least 65 years of age.

New York State's Department of Taxation and Finance has issued a "Summary of Tax Provisions in State Fiscal Year 2012-2013 Budget". According to the Summary, "Part B of Chapter 59 of the Laws of 2012 [the State Budget Bill signed into law on March 30, 2012] provides for the suspension, beginning in the 2013-2014 school year, of STAR benefits to homeowners who have past-due state tax obligations. Taxpayers who have outstanding tax liabilities will receive at least 45 days notice from the Department that their STAR exemption may be suspended if no action is taken to satisfy such liability." The provision for the suspension of STAR benefits expires at the end of the 2015-2016 school year.

Part B of Chapter 59 amends Real Property Tax Law Section 425 ("School tax relief (STAR) exemption") and adds Section 171-y ("Enforcement of delinquent state tax liabilities through the suspension of eligibility for STAR exemption") to the Tax Law. Under new paragraph (f) of Subdivision 3 of Tax Law Section 425:

"The property [afforded a STAR exemption] shall be ineligible for a basic or enhanced STAR exemption effective with the next school year commencing after the issuance of notice by the department of the suspension of its eligibility for the STAR exemption, even if the notice was issued after the application taxable status date. If a STAR exemption has been granted to such a property on a tentative or final assessment roll, the assessor or other person having custody of that roll is hereby authorized and directed [on receipt of notice from the Department of the suspension of eligibility for the STAR exemption] to immediately remove that STAR exemption from the roll."

The Summary is posted on the Department's website at http://www.tax.ny.gov/pdf/stats/sumprovisions/summary_of_2012_13_tax_provisions.pdf.

Riparian Rights

The common grantor of lots bordering a lake in Warren County imposed a restrictive covenant that “[a]ny dock, pier or land projection constructed in and over the lake shall be no closer than [15] feet from the adjoining property line, and no such structure shall be built with sides.” An adjoining owner commenced an Action to enjoin the Defendant’s construction of a boathouse on a part of the lake adjoining the Defendant’s parcel. The Defendant asserted the restriction was unenforceable since the common grantor did not own the underwater land. The Appellate Division, Third Department, affirming the decision of the Supreme Court, Warren County, held that “regardless of the ownership status of the underwater land, defendants’ riparian right to access the water adjoining their lot is part and parcel of their use of their land and is therefore subject to the restrictions...” *Ford v. Rifenburg*, decided April 12, 2012, is reported at 2012 WL 1205715.

Statute of Frauds – Under an agreement extending the closing date under a contract of sale for a residential unit under construction the Plaintiff-Buyer (“Sparks”), intending to assign the contract, would be able to show the unit to prospective purchasers. Sparks and the Defendant-Seller (“North Hills”) negotiated a further agreement extending the closing date for an additional five months; however, only Sparks executed that agreement. Sparks tendered five monthly payments to North Hills as required by the second extension agreement but North Hills did not provide access to the unit. Sparks did not appear at the scheduled closing, asserting that North Hills breached the extension agreement. The Supreme Court, Nassau County, ruled that the second extension agreement was enforceable under the Statute of Frauds, General Obligations Law Section 5-703, because Sparks had partially performed its obligations under the agreement and North Hills had ratified the agreement by being willing to close.

The Appellate Division, Second Department, reversed and granted North Hill’s motion to set aside the decision and direct entry of a judgment in its favor. Part performance may be sufficient to overcome the application of the statute of frauds, but only when there is an action for specific performance; Sparks had withdrawn its claim for specific performance before trial. Further, the Seller had not ratified the agreement. According to the Appellate Division, “[t]he prior agreement ...provided that it could not be modified except through a signed writing. Therefore, Sparks was not justified in relying on the extension agreement absent North Hills’s execution of it...North Hills did not breach any enforceable contract by denying Sparks access to the unit.” *Sparks Associates, LLC v. North Hills Holding Company II, LLC*, decided April 10, 2012, is reported at 2012 WL 1194098.

First American News

“Continuation of Insurance Under an Owner’s Title Policy”, by Michael J. Berey, was published in the New York Law Journal on April 6, 2012.

Michael J. Berey

Senior Vice President

Chief Underwriting Counsel - New York

First American National Commercial Services

mberey@firstam.com