

First American Title Insurance Company of New York
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CURRENT DEVELOPMENTS

This is another in a series of bulletins issued to clients of First American. Fax recipients are requested to send their email addresses to Michael J. Berey, Senior Underwriting Counsel, at mberey@firstam.com, for future issues of Current Developments. Contact your sales representative at 212-922-9700 for a copy of any item noted below.

Adverse Possession: The Appellate Division, Second Department has held that adverse possession can be maintained against a municipality, here the City of New York, as to property acquired through a tax lien foreclosure so long as the municipality did not formally dedicate the property for a public use or use it for a public purpose, and it was not prohibited by statute from alienating the property. The ten year adverse period was held to run from expiration of the three year presumption of public use under Administrative Code Section 11-420, which three year period commenced on the date of the final judgment of the in rem foreclosure. *Casini v. Sea Gate Association*, decided June 28, 1999, is reported at 692 NYS 2d 676.

Civil Procedure: For an action commenced prior to January 1, 1998, dismissed for the failure to file proof of service under CPLR Section 306-b, a new action was held properly brought within 120 days of the dismissal but after January 1, 1998, notwithstanding the amendment of CPLR Section 306-b effective January 1, 1998 which has no savings provision for time-barred actions. “New” Section 306-b, was held to apply to new actions first commenced on and after January 1, 1998. *Cannady v. Beth Israel Medical Center*, was decided by the Supreme Court, New York County and reported in the New York Law Journal on September 23, 1998. For further information contact Howard Oken at 212-922-9700.

Guarantees: The Second Circuit Court of Appeals has held that under New York law a guarantee agreement containing a general waiver of defenses prevents a guarantor from being discharged of its payment obligations upon the principal debtor’s release, notwithstanding the

general rule that the release of the debtor operates to discharge those who are secondarily liable. *C.F.C. v. Merrill Lynch*, was decided August 9, 1999 and is reported at 1999 WL 594901.

Mortgages: The Appellate Division, First Department, has held that a consolidated mortgage, which contained a correct description of the premises, could be foreclosed as an equitable mortgage for the entire unpaid principal balance even though the deed into the mortgagor of the last executed mortgage which was part of the consolidated lien contained an erroneous description of adjoining property. The court noted that absent its holding, the other mortgages forming part of the consolidated lien retained their liens and priority and could be foreclosed for their outstanding principal balances. *Federal Deposit Insurance Corporation v. Five Star Management*, was decided on June 17, 1999 and is reported at 692 NYS 2d 69.

Nassau County Transfer Tax: The Nassau County Clerk has advised that all County Transfer Tax forms must be on 8 and ½ by 14 sized paper and be signed in black ink by all parties. In addition, the failure of any party or attorney to sign the Exemption Affidavit will also result in rejection of the filing. As the County Clerk advises that it is not authorized to accept prepayments of either the County or New York State transfer taxes, prepayments of the County tax can be made only to the Nassau County Treasurer, Transfer Tax Division, 240 Old Country Road, Mineola, New York 11501. Note in addition that the requirement for the use of black ink is being extended to all recordings in Nassau County. For further information contact Amelia Kelly at 516-832-3200.

New York City Real Estate Taxes - The City Council has fixed the real property tax rates for fiscal year 2000 (July 1, 1999 - June 30, 2000). New tax bills reflecting the change in rates will be issued in November for payment on January 1 (or January 1 and April 1 for properties with quarterly payments). The rate on each dollar of assessed valuation has been changed for Class One from .10961 to .11167; for Class Two from .10739 to .10851; for Class Three from .08800 to .09398; and for Class Four from .10236 to .09989. Class One generally includes one-to-three family residential real property, (including condominiums of three stories or fewer which have always been condominiums). Class Two includes all other residential real

property. Class Three includes utility real property. Class Four includes all other real property.

New York City Real Property Transfer Tax: The Department of Finance has issued its Regulations on the application of the continuing lien deduction to the Real Property Transfer Tax. The Regulations have been reproduced and can be found at <http://www.titlelaw-newyork.com>

Section 1201(b) of the Tax Law and Section 11-2102 of the City's Administrative Code were amended by Chapter 314 of the Laws of 1997 effective August 28, 1997 to allow for the RPT a continuing lien deduction whereby the amount of pre-existing liens can be excluded from consideration. The exclusion of the outstanding amount of a lien existing prior to the transfer and continuing after the transfer is allowed on the transfer of a one-to-three family house, a residential cooperative or condominium unit, or an economic interest in such property. It is not allowed on a transfer to the mortgagee on its taking delivery of a referee's deed or a deed in lieu of foreclosure, or on a transfer to a REIT, or for a mortgage, lien or encumbrance "placed on the property or interest in connection with, or in anticipation of, the conveyance or transfer, or by reason of deferred payments of the purchase price whether represented by notes or otherwise".

The Regulations provide, in part, as follows:

1. No exclusion from consideration will be allowed for a mortgage, lien or encumbrance that is materially altered in connection with, or in anticipation of, the transfer. A mortgage will be considered to be materially altered in connection with, or in anticipation of the transfer if within six months prior to, or within three months after, the date of transfer, the identity of the holder of the mortgage has changed and there has been a change of ten percent (10%) or more in the interest rate or in the remaining repayment term.

However, any alteration in the mortgage terms made more than six months prior to or more than three months following delivery of the deed will be conclusively presumed not to have been made in connection with, or in anticipation of, the transfer.

An increases or a decrease in the principal amount of a mortgage will not in itself be deemed a material alteration in applying the rules to the pre-existing indebtedness.

A material alteration will be irrelevant if the transfer is a gift or is made pursuant to a separation agreement or a divorce decree. (The provisions governing new or increased mortgages, noted below, will, however, apply to gift and marital transfers).

2. No exclusion from consideration will be allowed for either a new mortgage or for the amount of the increase in the principal secured by a pre-existing mortgage made in either instance within six months prior to the date of transfer if the new or increased mortgage was placed on the property in anticipation of the transfer.

Illustrations in the Regulations indicate that a mortgage placed on the property even six years prior to the transfer may not be excluded from consideration if executed in anticipation of the transfer.

3. No exclusion from consideration will be allowed for a mortgage that is discharged or reduced in principal amount (to the extent of the reduction) within three months after the date of the transfer if the facts and circumstances indicate that the discharge or reduction was made in connection with the transfer. The discharge or reduction of a mortgage more than three months after the date of the transfer will result in disallowance of the exclusion (to the extent of the reduction) when the documents relating to the loan indicate that the mortgage was discharged or reduced in connection with the transfer.

4. There will be no exclusion for a mortgage placed on the property by reason of deferred payments of the purchase price, such as a purchase money mortgage executed at closing to the seller.

5. The above rules will apply to the allocable portion of the mortgage on the property of a cooperative corporation which is included in the original transfer of shares by the cooperative corporation or the sponsor.

REITS: The New York State and New York City transfer tax rates applicable to REITs have been extended by Chapter 407 of the Laws of 1999 to include REIT transfers occurring before September 1, 2002. The “sunset” provision had been September 1, 1999.

Theatre Subdistrict Development Rights: Section 81-74 was added to Article VIII of the New York City Zoning Resolution on August 6,

1998 to enable the transfer of unused development rights from a listed theatre to a non-adjacent site within a new Theatre Subdistrict, covering an area from 40th to 47th Streets between Sixth and Eighth Avenues. In *Fisher v. Giuliani*, an action brought by residents of the Special Clinton District, the Supreme Court, New York County, in a decision by Justice McCooe issued June 29, 1999, has annulled the adoption of the Theatre Subdistrict Zoning Map and Zoning Text Amendments and enjoined the City Planning Commission from certifying any transfer of development rights thereunder. The Court held that an Environmental Impact Statement should have been prepared prior to adoption of Section 81-74, and the CPC was directed to complete that process. This decision has been appealed. For further information contact Stephen Farber at 212-922-9700.

Water Charges: The City of New York's Department of Environmental Protection intends to impose for the tax year commencing July 1, 2000 a 100% surcharge on all water bills which are computed based on frontage for those properties which have not had meters installed. The owner can either have the meters installed by a DEP contractor at no cost or engage a licensed plumber to make the installation. DEP will reimburse the owner for the cost up to what it determines to be the market rate for a meter installation. Qualified residential multiple dwellings of six or more units will be able to continue annual flat rate billing after meter are installed until the owner elects to be billed on metered usage.

Yonkers Mortgage Recording Tax: The City of Yonkers has extended its mortgage recording tax of \$.50 for each \$100 of principal debt secured by a mortgage to mortgages recorded prior to August 31, 2001. The total mortgage tax rate in Yonkers will, therefore, continue to be \$1.50 for each \$100 of principal indebtedness.

Internet News: The Federal Deposit Insurance Corporation's "Institution Directory" with information regarding active and inactive lenders is located at <http://192.147.69.50/ID/>. The text of the New York City Zoning Resolution and zoning maps have been made available online by the Department of City Planning at <http://www.ci.nyc.ny.us/html/dcp/html/zone.html>

October 12, 1999