First American Title Insurance Company of New York

CURRENT DEVELOPMENTS

This is another in a series of bulletins issued to clients of First American. As they are now being sent by email only, other readers are requested to send their email addresses to Michael J. Berey, Senior Underwriting Counsel, at mberey@firstam.com. Issues of "Current Developments" are on the Internet at www.titlelaw-newyork.com.

Adverse Possession – The Appellate Division, Fourth Department, held that title to a parcel of land acquired by adverse possession cannot thereafter be transferred by an affidavit disclaiming title. Once title passes by adverse possession, it can only be transferred by execution of a deed or another legally effective means of conveying title. The affidavit in question (a "fence affidavit" stating there was no claim of entitlement to a strip of land lying between a fence and the actual record boundary line) was not a transfer of title and it did not divest title obtained by adverse possession. Ahl v. Jackson, decided May 10, 2000, is reported at 708 NYS 2d 778.

Bankruptcy – The United States District Court for the Southern District of New York, reversing a decision of the United States Bankruptcy Court, held that the purchaser of a building pursuant to a plan of reorganization free and clear pursuant to Code Section 363(f) took title without being subject to leasehold interests at the premises. Thus, any rights that tenants may have had to obtain leases under the New York City's Rent Stabilization Law were extinguished. The discharge of the Debtor without the sale of the property would not have affected its rent stabilization obligations. Downtown Athletic Club of New York City, Inc. v. Kremer, decided June 9, 2000, is reported at 2000 WL 744126.

Bankruptcy – The United States District Court for the Eastern District of New York reversed a decision of the bankruptcy court that set aside the sale of the Debtor's residence as an unauthorized post – petition transfer and declared the purchaser's mortgage void. The district court found that the appellants were good faith purchasers without actual notice of the bankruptcy proceeding who paid fair consideration, and there was no damage to the bankruptcy estate. Finding that the action brought by the Chapter 7 trustee would not financially benefit the estate and was only punitive, the court advised the bankruptcy court against compensating the trustee and its counsel for their services in the litigation. In Re Ainsley H. Bean was reported in the New York Law Journal on July 24, 2000 at page 39.

Constructive Trusts – On receiving a loan from her father to satisfy a mortgage on her property, a daughter orally promised to either make him a co-owner or to execute a mortgage to secure the loan. In a suit for specific performance of the alleged promise to deliver the mortgage, the Appellate Division, Third Department, affirmed the lower court's order denying a motion to dismiss for failure to state a cause of action. It held that the elements of a constructive trust were established, there having been a confidential or fiduciary relationship, a transfer in reliance on a promise, and unjust

enrichment. While there was no transfer of an interest in property, the transfer of funds in reliance on the promise of an interest in the property was sufficient to allow the plaintiff to allege a claim of a constructive trust. Henness v. Hunt, decided May 18, 2000, is reported at 708 NYS 2d 180.

Consumer Protection – The Supreme Court, New York County, held that the New York City Consumer Protection Law (Administrative Code Section 20-700 et seq.) can apply to real estate transactions affecting the public at large. The Law prohibits "any deceptive or unconscionable trade practice in the sale, lease, rental or loan or in the offering for sale, lease, rental or loan of any consumer goods or services". The defendant acquired residential property, usually at foreclosure sales, and then resold them to consumers. Alleged acts, found to be within the scope of the Consumer Protection Law, were included selling at greatly inflated prices, the failure to make promised repairs prior to closing, making false representations as to financing, referring purchasers to unlicensed home improvement contractors, and steering buyers to attorneys pre-selected by the seller. Polonetsky v. Better Homes Depot Inc. was reported in the New York Law Journal on August 9, 2000 at page 23.

Easements - The Appellate Division, Third Department, held that the owner of land burdened by a utility easement was not responsible for personal injuries sustained within the easement area since the entity benefited by the easement had exclusive control of the easement and the responsibility for maintenance of the easement. Tagle v. Jakob, decided April 24, 2000, is reported as 2000 WL 1160943.

Easements – The Appellate Division, Fourth Department, held that an owner's use of a driveway used in common by the public, straddling the common boundary line of its property and the adjoining parcel, did not establish a prescriptive easement. When use is by the public generally, an act asserting an exclusive right of use is required. The assertion of a hostile right was also, in this instance, necessary to assert a claim of adverse use since the use of the driveway was initially permissive. Northtown, Inc. v. Vivacqua, decided May 10, 2000, is reported at 708 NYS 2d 221.

Mortgage Recording Tax – An Administrative Law Judge for the New York State Division of Tax Appeals held that no credit for mortgage tax paid on a prior, recorded credit line mortgage would be afforded for a subsequent credit line mortgage on the same property the proceeds of which were used, in part, to satisfy the first lien. The first mortgage debt was extinguished and an entirely new indebtedness was created. The second mortgage was therefore neither an increase in the principal amount of a credit line mortgage under Tax Law Section 253-b nor a Supplemental Instrument under Tax Law Section 255. Matter of Jirina Emerson, DTA No. 817153, was decided August 3, 2000. (Note – TSB-D-01(02)R; 2001N.Y. Tax LEXIS 113)

Mortgage Recording Tax – Advisory Opinion TSB-A-00(3)R of the Technical Services Division of the New York State Department of Taxation and Finance, issued May 21, 2000, confirms that a mortgage made to the New York State Urban Development Corporation d/b/a Empire State Development Corp. ("ESDC") is exempt from mortgage tax if the ESDC or its subsidiary entity is named mortgagee and presents the mortgage for recording. An assignment or modification of such mortgage remains exempt except to the extent there is new taxable indebtedness. The Opinion can be found at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Mortgage/A00_3r.pdf

New York City, Department of Housing Preservation and Development Liens – The Appellate Division, First Department, held that under Real Property Actions and Proceedings Law Section 778, monies expended for repairs by HPD during an Article 7A administration are a lien against the premises, enforceable against a subsequent purchaser, notwithstanding that notice of the amount due was not filed in the office of the City Collector until after the purchase, if the purchaser was aware of the expenditure of the funds. Administrative Code Section 27-2144(b) provides that such a lien is enforceable "against a subsequent purchaser who does not qualify as a good faith buyer". Rosenbaum v. City of New York , decided May 9, 2000, is reported at 707 NYS 2d 410.

New York City Water Charges – A credit for the payment of water charges was mistakenly posted to the official records of the New York City Water Board to the account of a property being conveyed. Adjustments at closing relied on that information. An action was commenced to have the credit restored. The Appellate Division, Second Department, reversing the decision of the Supreme Court, Queens County, held that the Water Board was not estopped from restoring the credit since the credit (in the amount of $22,917.42) was "extremely irregular" and reasonable diligence by the purchaser would have discovered the true facts. 333 E. 89 Realty LLC v. New York City Water Board, decided on May 22, 2000, is reported at 708 NYS 2d 155.

Tax Lien Foreclosures – The presumption that notices of delinquent taxes and of the foreclosure of tax liens were received by the taxpayers affected was held by the Appellate Division, Fourth Department, to have been established by affidavits of the Treasurer of the City of Rochester detailing the steps taken to effectuate the mailing of the notices. The taxpayers' assertion that the notices were not received did not rebut that presumption. City of Rochester v. Di Filippo, decided March 29, 2000, is reported at 708 NYS 2d 207.

Tax Lien Foreclosures – On August 16, 2000, the Governor signed into law Chapter 203 of the Laws of 2000 amending the Public Authorities Law and adding Title 5 ("Sale of Delinquent Tax Liens") to Article 11 of the Real Property Tax Law ("Procedures for Enforcement of Collection of Delinquent Taxes"). The law enables municipalities to sell liens for unpaid real estate taxes to the State of New York Municipal Bond Bank Agency, or one or more of its tax lien entities. The Bond Bank will in turn issue and sell, by either private or public sales, Tax Lien Collateralized Securities, the proceeds of which will be used to purchase the tax liens. Chapter 203 is on the Internet at http://assembly.state.ny.us/cgi-bin/showtext?billnum=S04692

Transfer Tax – An Administrative Law Judge of the New York Division of Tax Appeals canceled a Notice of Determination of Tax Due issued by the State Tax Commission's Audit Division under the now repealed Transfer Gains Tax in connection with the forfeiture of petitioner's real property to the United States under 18 USC Section 591. Although the forfeiture to the government constituted a taxable transfer, there was no consideration for the transfer and therefore no tax was due. Matter of the Petition of John McNamnara, DTA No. 816990 was decided June 29, 2000.

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