First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

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Condominiums - The owner of a three level commercial condominium unit proposed to add floor space to his unit by extending the concrete slab that formed the floor of the mezzanine level. The condominium's Board of Managers refused to execute the unit owner's application for a building permit. The Appellate Division, First Department held that the unit owner could submit the application to the New York City's Building Department without Board approval. It found that the floor in question was located entirely within the unit and formed no part of the common elements of the condominium. Further, as the alteration was permitted by the By-Laws, and it would not impair the structural integrity of the building or affect the use of their units, the consent of the other unit owners was not required. Board of Managers of the Europa Condominium v. Orenstein, decided March 29, 2001, is reported at 722 NYS 2d 527.

Contract of Sale – The Civil Court, Kings County, upheld retaining of the contract deposit under a liquidated damages clause due to the purchasers' failure to make a diligent effort to obtain a mortgage commitment. The purchasers' attempted to cancel the contract and obtain the return of the down payment after the mortgage application was denied. However, only one of the purchasers had applied for the mortgage and that party's annual income was less than that amount represented as being the purchasers' gross annual income in the contract. No proof of actual damage to the sellers was required. McCalla v. Seto, decided by the Civil Court, Kings County, was reported in the New York Law Journal on April 25, 2001.

Joint Tenants – The conveyance of property to Helen, Charles and Barbara, his wife, as joint tenants with the right or survivorship was held to create a joint tenancy between Helen, as to a one-half interest, and Charles and Barbara, as tenants by the entirety, as to a one-half interest. Helen's later deed to Cynthia severed the joint tenancy and created a tenancy in common, with Charles and Barbara, as tenants by the entirety, holding a one-half interest. The claim of an oral agreement that Charles and Barbara would become sole owners on Helen's death was unenforceable under the statute of frauds. Pattelli v. Bell, decided on January 24, 2001 by the Supreme Court, Richmond County, is reported at 721 NYS 2d 734.

Lead Paint – The Supreme Court, Kings County, held that the lead paint abatement provisions of New York City's Local Law 1 of 1982 (now Administrative Code Sections 27-2056.1-2056.10), applicable by its terms to "a multiple dwelling erected

before 1960", were enforceable as to a building erected prior to 1960 that was converted to a multiple dwelling in 1991. The building need not have been used as a multiple dwelling prior to 1960. Morales v. Reyes, decided February 6, 2001, is reported at 2001 N.Y. Misc. LEXIS 59.

Lien Law - In an unreported, memorandum decision, the Supreme Court, Bronx County, ordered the discharge of a mechanics lien purporting to name an agent of the owner as owner of the property. Lien Law Sections 9 ("Contents of notice of lien") and 17 ('Duration of lien") require a notice of lien and an extension to a notice to recite the name of the owner of the real property against whose interest the lien is claimed. The court held that naming an agent as owner is a jurisdictional defect incapable of amendment *nunc pro tunc*. Long Industries Construction Corp. v. Appelaniz was decided April 9, 2001.

Lien Law – The Supreme Court, Westchester County, held that the assignee of a mechanics lien is required to provide on request a more detailed itemized statement of the labor and material constituting the amount for which the lien was claimed as required of a lienor under Section 38 of the Lien Law. The court noted that an owner cannot be deprived of the statutory right to an itemized statement by reason of an assignment of a lien. Matter of Harrison Summerfield Associates, L.P. was reported in the New York Law Journal on May 11, 2001.

Mortgage Electronic Filing System ("MERS") – MERS is a wholly owned subsidiary of MERSCORP, Inc., a Delaware corporation owned by companies within the mortgage and title industries. It has since 1997 provided a system for recording electronically in its database the transfer of ownership and servicing rights in mortgages that are first recorded in the public records. Each such mortgage, as recorded, recites that MERS is nominee for the Lender (and its successors and assigns) and that it is the mortgagee of record.

On April 5, 2001 the Office of the Attorney General, State of New York, responding to an inquiry from the Nassau County Attorney, issued Informal Opinion No. 2001-2, taking the position that Real Property Law Section 316 ("Indexes") prohibits the Nassau County Clerk from indexing a mortgage under the name of MERS as mortgagee when MERS holds no legal interest in the mortgage. The County Clerk for Suffolk County subsequently issued a directive that his office would not accept documents with MERS as the mortgagee or as the nominee for the mortgage when it has no legal interest in the mortgage. MERS was granted a Temporary Restraining Order, requiring the Suffolk County Clerk's office to record mortgages where MERS is listed as nominee, The TRO has, however, been lifted. Suffolk County is therefore not accepting MERS mortgages.

Mortgage Foreclosure – The mortgagor's letter to plaintiff's counsel denying the allegations in the complaint and raising affirmative defenses should have, according to the Appellate Division, Fourth Department, been deemed to be an answer or, at least, a notice of appearance, requiring notice to the defendant of the application to

seek a default judgment and of the foreclosure sale. The court therefore vacated the default judgment and the foreclosure sale. Dime Savings Bank of New York, FSB v. Higner, decided March 21, 2001, is reported at 772 NYS 2d 651.

Mortgage Foreclosure – Monetary sanctions, payable to the Lawyer's Fund for Client Protection, were imposed against the defendant for its "frivolous conduct" (under 22 NYCRR 130-1.1) in raising defenses on appeal "rife with speculation and innuendo". The alleged material alteration of an assignment of the note and mortgage was not, for example, a defense that could be raised by the mortgagor. Hypo Holdings, Inc. v. Chalasani, decided February 20, 2001, is reported at 721 NYS 2d 35.

Mortgage Foreclosure – A contract vendee, whose rights arose under a contract of sale entered into after entry of a judgment of foreclosure and sale, has a common law right to redeem the mortgage by paying the principal and interest due prior to the foreclosure sale, according to the Appellate Division, Second Department in Carvavalla v. Ferraro. This decision, issued March 12, 2001, overturning the ruling of the Supreme Court, Westchester County, is reported at 722 NYS 2d 47.

Notice of Pendency – A deed executed in connection with the sale of a residence was recorded after a notice of pendency was filed for an action to set aside the deed to the grantor. The court held that the grantees, even if bona fide purchasers, would be bound by the proceedings in the action. New York being a "race-notice" jurisdiction, a purchaser even without notice "must win the race to the recording office". Roth v. Porush, decided by the Appellate Division, Second Department on March 26, 2001, is reported at 722 NYS 2d 566.

Real Estate Taxes - The City of New York's Department of Finance corrected the real estate tax assessment of property that had been listed as exempt. It billed the petitioner for back taxes, and for interest and penalties back to the date on which the petitioner acquired title to the property. The Appellate Division, First Department, determined that interest and penalties could only be charged from the date on which the City corrected its assessment and billed the petitioner for the retroactive taxes. Application of American Pen Corporation v. Tax Commission of the City of New York, decided March 15, 2001, is reported at 722 NYS 2d 27.

Specific Performance – The Appellate Division, First Department affirmed the decision of the Supreme Court, New York County, denying on the basis of laches a motion for an order directing the Sheriff to convey property pursuant to a ten year old judgment for specific performance of a contract of sale. It found that the plaintiff's delay was "unreasonable and inexcusable" and the defendant, having made substantial improvements to the property, would be prejudiced by enforcement of the judgment. Noy v. 765 9th Avenue Corporation was decided March 13, 2001 and is reported at 721 NYS 2d 651.

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