



## ***First American Title Insurance Company of New York*** **CURRENT DEVELOPMENTS**

This is another in a series of bulletins issued by email to clients of First American.

**Adverse Possession** – Plaintiffs had acquired title to their land together with the benefits of an easement of ingress and egress over a strip of land twelve feet in width on property adjoining on the east. It was found that a concrete retaining wall, assumed to be the easterly boundary of their land, was located within the area of the easement. This action claimed adverse possession to the strip of land between the deed line and the retaining wall and a prescriptive easement over the defendants' property extending twelve feet east of the retaining wall. The Supreme Court, Rensselaer County, granted a motion to dismiss the complaint due to (i) a mutual mistake as to the true location of the boundary line, (ii) the retaining wall not being a substantial enclosure under RPAPL Section 522(2), and (iii) the plaintiffs not having sufficiently “cultivated or improved” the land in question under RPAPL Section 522(2). The Appellate Division, Third Department, reversed and remitted the case for a new trial. It held that the retaining wall was a sufficient enclosure and there was sufficient use of the property west of the wall to establish a prima facie case for a claim of adverse possession. According to the court, addressing the issue of mutual mistake, “possession of land either inadvertently or by mistake may form the basis of a claim of adverse possession”. The court also found there had been sufficient use east of the wall to establish a prima facie case for a prescriptive easement. *Fatone v. Vona* is reported at 731 NYS 2d 521.

**Bankruptcy** - The Debtor in a Chapter 7 liquidation while insolvent quitclaimed her interest in property owned by the entirety to her husband for a stated consideration of “one and no more dollars” to enable her husband to mortgage the property. The court held that the Trustee could void the deed and the mortgage would be avoided to the extent of the wife’s equity in the property. Accordingly, on liquidation of the property one-half of the net balance of the sale (after accounting for that lender’s payment of a pre-existing mortgage) would be deemed an asset of the bankruptcy estate. According to the court, the deed reciting nominal consideration put the lender on notice that it should have inquired about the wife’s solvency. Not having acquired its mortgage in good faith and without knowledge of the voidability of the deed, the lender could not claim protection for its lien under Bankruptcy Code Section 550(b). *Wallach v. Altmeyer*, decided October 11, 2001, is reported at 268 B.R. 349; 2001 Bankr. LEXIS 1603.

**Cooperative Units** – A shareholder/proprietary lessee of a cooperative apartment brought an action against the owner of the adjoining apartment alleging that he or his predecessor moved or caused to be moved the wall separating their apartments, thereby reducing the size of the plaintiff’s living room by approximately 135 square

feet. The plaintiff relied on the dimensions of typical units in the same line of apartments contained in the Offering Plan. The Supreme Court, Kings County, dismissed the action, finding that the prospectus had showed only typical apartments and had cautioned that apartment layouts had been modified. The court also held that the cooperative corporation and the plaintiff's co-lessee were necessary parties who should have been joined in the action. *Farnsworth v. Wells* was reported in the New York Law Journal on November 28, 2001.

Land Under Water - Reversing the determination of the Appellate Division which reversed an order of the Supreme Court, Nassau County, denying the Town of Oyster Bay's application for an injunction to prohibit the defendant's dredging of the harbor, the Court of Appeals held that a riparian owner may dredge public underwater lands if necessary to preserve its reasonable access to navigable water. The Town was not entitled to an injunction since it did not demonstrate that the defendant's dredging would seriously impair its rights as owner of the underwater land. The Court noted that there is no general right to dredge to maintain the original level of access to navigable water. *Town of Oyster Bay v. Commander Oil*, decided October 18, 2001, is reported at 2001 N.Y. LEXIS 3265.

Licensing – The Appellate Division, Second Department, held that an agreement to pay a person not licensed as a real estate broker or salesman a fee for negotiating a lower payoff figure for an existing mortgage loan, payable on satisfaction of the mortgage, is enforceable and does not violate Real Property Law Section 442-d which provides that “(n)o person [or entity] shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered, in any place in which this article is applicable, in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose”. *Kreuter v. Tsucalas* was reported in the New York Law Journal on January 2, 2002.

Limited Liability Companies – Section 206 of the Limited Liability Company Law requires each newly formed LLC to publish notice of its formation weekly for six successive weeks in two local newspapers selected by the County Clerk of the county in which the LLC has its principal office. Following publication, an affidavit of compliance with the publication requirement is to be filed in the Department of State. If this procedure is not completed within 120 days of the date on which an LLC is formed, the LLC cannot bring an action or special proceeding in any New York court until it complies with those requirements. The Supreme Court, New York County held that Section 206 violated the plaintiff's right to due process, to equal protection of the laws, and its right to access New York courts. It enjoined the defendant and the State of New York from enforcing Section 206. *Barklee Realty Co. v. Pataki* was reported in the New York Law Journal on December 3, 2001.

Mechanic's Liens – The Supreme Court, New York County, granted a motion to dismiss an action to foreclose a mechanic's lien filed after the recording of a

condominium declaration, the creation of tax lots for each of the condominium units, and the sale of units. The lien, for work done prior to the conversion, named the sponsor as owner and was filed against the single, former tax lot number. According to the court, the failure of the lien to properly describe the property and the names of the then unit owners resulted in an improper “blanket lien”. The lienor’s cross-motion to leave to amend its lien so as to attach to all rights of the sponsor on the date the lien was filed was denied. *Northeast Restoration Corp. v. K & J Construction Co.* was reported in the *New York Law Journal* on December 19, 2001.

Mortgages - The Appellate Division, First Department, reversing the decision of the Supreme Court, New York County, granted the defendant’s motion to dismiss the complaint in an action seeking a declaration that a six-month lease with an option to purchase was an equitable mortgage entitling the plaintiff to redeem the property. The defendant, the successful bidder at a bankruptcy auction, unable to close on the purchase, assigned the bid to the plaintiff, taking back the lease and option. The court found that the plaintiff was not providing funds to finance the defendant’s purchase of the property. *D&L Holdings LLC v. RCG Goldman Co. LLC* was reported in the *New York Law Journal* on December 12, 2001. [734 NYS 2d 25]

New York City Water Board – Section 1045-g of the Public Authorities Law was amended by Chapter 375 of the Laws of 2001 effective October 23, 2001 to provide that the Water Board may establish no less than a six-year statutes of limitations to challenge water and sewer bills issued by the Board. The allowed limitations period was reduced to four years by Chapter 467 of the Laws of 2001, effective October 23, 2001. The limitations period commences on issuance of the bill in question. The Board had adopted regulations establishing a two-year limitations period for bills issued after July 1, 1999.

New York State Division of Tax Appeals and Tax Appeals Tribunal – Tax Law Judge and Presiding Officer Determinations issued by the Division of Tax Appeals and Decisions issued by the Tax Appeals Tribunal issued over the preceding four months are now posted to the Internet at <http://www.nysdta.org/whatsnew.htm>.

Not-For-Profit Corporations – The Supreme Court, New York County, approved the sale of real property pursuant to the Not-For-Profit Corporation Law by the Bohemian Benevolent and Literary Association of the City of New York, notwithstanding there was an issue as to whether approval of the sale by its members complied with a By-Laws’ requirement that a major sale of real property be approved by the vote of three-quarters of the members. It was alleged that a number of the members were defunct organizations and should not have been allowed to vote. The court held that since there was compliance with Section 510 of the Not-For-Profit Corporation Law requiring a two-thirds vote, and arguably there was compliance with the By-Laws, the sale should not be prevented by the objection of one member organization. *Matter of Bohemian Benevolent and*

Literary Association of the City of New York was reported in the New York Law Journal on December 12, 2001.

Real Estate Taxes – Chapter 529 of the Laws of 2001 effective January 1, 2002 authorizes localities to provide a partial tax exemption for a period not to exceed five years for first-time homebuyers purchasing newly constructed homes. The maximum exemption would be 50% in the first year. It would be phased out by 10% each year thereafter. The exemption can be authorized for purchases made on or prior to December 31, 2005, and for purchases thereafter made pursuant to binding contracts executed prior to that date. The law contains maximum property price and income limitations.

Recording Act – The Supreme Court, Monroe County, held that mortgages executed by Richard A. Ranalletta had priority over an earlier recorded mortgage incorrectly identifying the mortgagor as Richard A. Ranaletta. The recording of the earlier mortgage did not constitute constructive notice to the second lender that had no actual knowledge of the other lien. The court would not permit application of the “community standard” for title examination in Monroe County which, given the county clerk’s computerized indexing system, would have reported the mortgagor’s name by either entry of the first five letters of the mortgagor’s last name or the use of a phonetic search. According to the court, the use of “community standards” for title examination is “irrelevant on the question of constructive notice”. *Coco v, Ranalletta*, decided November 16, 2001, is reported at 2001 N.Y. Misc. LEXIS 482.

Rule Against Perpetuities – The Appellate Division, First Department, held that an option to purchase a one-half interest in a property which was “binding on” the optionor and optionee “and our heirs and assigns” violated the rule against perpetuities and was void. *Reynolds v. Gagen*, decided October 30, 2001, is reported at 732 NYS 2d 4.

Soldiers’ and Sailors’ Civil Relief Act of 1940 – In a residential nonpayment proceeding, the Civil Court, New York County, denied a motion for an order requesting the court to the dispense with submission of an affidavit of non-military service under the federal Act and Section 309 of New York’s Military Law to obtain a default judgment and a warrant of eviction. The court found that an inadequate investigation was made as to whether the respondent was in the military. Denial of the motion was granted without prejudice to renew on proof of a proper investigation alleging sufficient facts as to the respondent’s non-military status. *Banabi Realty Management Co., LLC v. Vandoorne* was reported in the New York Law Journal on December 5, 2001.

The officers and employees of First American wish you health and prosperity in the New Year.

Michael J. Berey, Senior Underwriting Counsel  
January 4, 2002 (mberey@firstam.com)