First American Title Insurance Company of New York

CURRENT DEVELOPMENTS

A continuing a series of bulletins issued by email to clients of First American

Acknowledgments – In an action seeking to vacate a deed as a forgery, the Supreme Court, Kings County, held plaintiffs did not overcome the presumption of due execution arising by reason of there being a certificate of acknowledgment annexed to the deed. Testimony of a handwriting expert that the signature on the deed was "probably" not genuine did not meet the burden of proof of "clear and convincing evidence". DeNicola v. DeNicola was reported in the New York Law Journal on July 2, 2002.

Bankruptcy – Although the Debtor's personal liability for a money judgment was terminated by the Debtor's discharge in bankruptcy, the judgment remained a lien on the Debtor's real property. The District Court, Nassau County therefore ordered the judgment marked on the docket as "qualified discharge". It was not established to the satisfaction of the court that "the lien was invalidated or surrendered in the bankruptcy proceedings or set aside in an action brought by the receiver or trustee" as required by Debtor and Creditor Law, Section 150(4). New York Building Products, Inc. v. Giglio was reported in the New York Law Journal on May 23, 2002.

Bankruptcy - Pursuant to a Bankruptcy Court Order, the Debtor sold a parcel of vacant land together with an easement over its adjoining land "free and clear of all mortgages, liens and encumbrances to which the vacant land is subject". Mortgages on the Debtor's adjoining land were not subordinated to the easement. The Appellate Division, Fourth Department, held that the easement could be foreclosed in enforcing the mortgages against the adjoining owner. In the Bankruptcy no request was made to compel the mortgagee to subordinate to the easement and the Bankruptcy Court Order did not subordinate the mortgages to the easement. The Appellate Division reinstated the complaint in the foreclosure and granted summary judgment foreclosing the easement. HSBC Bank USA v. Regional Specialty Food Marketing and Distributing Services, Inc., decided May 3, 2002, is reported at 2002 NY App. Div. LEXIS 4413.

Cooperative Conversions – The New York State Court of Appeals held that a complaint alleging that the sponsor of non-eviction plan breached its contracts with the tenant-owners and cooperative board to dispose of all of its shares within a reasonable time so as to enable creation of a viable cooperative pleaded a valid cause

of action which withstands the Sponsor's motion to dismiss. Without determining the merits of the claim, the Court noted that the Sponsor had retained 62% of the

shares of the stock of the cooperative corporation, corresponding to 41 of the 66 apartments in the building, had sold no shares since 1990, and had caused the Offering Plan to lapse. 511 West 232nd Owners Corp. v. Jennifer Realty Co., decided June 11, 2002, is reported at 2002 N.Y. LEXIS 1579.

Criminal Proceedings - The widow of a decedent appealed from an Order of the Surrogate's Court, Richmond County, granting the motion of the Public Administrator for a preliminary injunction restraining her from, inter alia, transferring, encumbering, leasing or otherwise interfering with the residence owned jointly by she and her late husband, for whose murder she had been indicted. The Appellate Division, Second Department, affirmed the Order of the Surrogate's Court. Although the widow would be entitled to retain her interest in the property if convicted of the murder, she would forfeit her right of survivorship if she was convicted or held responsible for the death in a civil proceeding. It was therefore appropriate to restrain her from taking any action that might affect the value of the property. In Re Kiejliches, decided March 18, 2002, is reported at 740 NYS 2d 85.

Indian Land Claims - In a case in the U.S. District Court, Western District of New York commenced in 1993, the Seneca Nation of Indians claimed title to certain lands in Erie and Niagara Counties, New York comprised of several islands located in the Niagara River including Grand Island, an Erie County Town with approximately 20,000 residents. The Seneca Nation asserted that a 1815 treaty by which the State of New York purportedly acquired title to the islands from the Indians was invalid because it violated The Trade and Intercourse Act, 25 U.S.C. 177. The Court granted summary judgment to the defendants and dismissed the case, holding that the 1815 treaty did not violate the Act. The Court, relying on certain earlier treaties by which the Seneca Nation ceded the lands in question to the British Crown prior to the Revolutionary War, found that any title to the Islands in the Seneca Nation was extinguished prior to the purported conveyance to New York State. The Seneca Nation of Indians v. The State of New York, decided June 21, 2002, is reported at 2002 U.S. Dist. LEXIS 12062.

Lien Law - The January 2, 2001 issue of "Current Developments" reported on a decision of the Supreme Court, Kings County, holding that the assignment to a building loan mortgagee of monies due under a contract between the NYC Housing Authority and its turnkey developer, and the reduction of the mortgage indebtedness prior to payment of subcontractors' claims, was a diversion of trust assets under the Lien Law requiring subordination of the mortgage to filed mechanics liens. The Appellate Division has affirmed that holding in Aspro Mechanical Contracting v. Fleet Bank. N.A., decided May 20, 2002, and reported at 742 NYS 2d 361. The Second Department indicated, as did the lower court, that the bank could have protected its position by filing a Notice of Lending under Lien Law Section 73.

Mechanic's Liens – RCM Corporation ("RCM)" commenced an action to foreclose its mechanic's lien. It named as a party defendant PR Painting Corp. ("PR") which had also filed a mechanic's lien. PR cross-claimed to foreclose its lien. (Naming PR as a party defendant continued the effectiveness of its mechanic's lien beyond one year under Lien Law Section 17, an extension of the PR lien having not been filed). RCM's complaint was dismissed and the tenant, for whom the work had been done, moved to cancel the undertaking filed under Lien Law Section 19(4) to bond PR's mechanics lien, contending that dismissal of the RCM's action terminated PR's lien. The Appellate Division, Second Department, reversing an order of the Supreme Court, Nassau County, held that filing of the cross-claim continued PR's lien although RCM's action was dismissed. Matter of Lindt & Sprungli USA, Inc. v. PR Painting Corp., decided March 25, 2002, is reported at 740 NYS 2d 369.

Mortgage Foreclosure – An action to foreclose a mortgage held by the Federal Farmers Home Administration was commenced nine years after the defendant and his spouse defaulted in making payments. The defendant contended that the action was barred by the six-year federal statute of limitations governing actions for money damages but the Appellate Division, Third Department, held 28 USC Section 2415(a) inapplicable to the action as the plaintiff agreed not to pursue a deficiency judgment. New York's six-year limitations period under CPLR 213(4) did not bar the action to foreclose; the federal government is not subject to state statutes of limitation. Nor is the federal government subject to a defense of laches. United States of America v. Lyons, decided March 7, 2002, is reported at 740 NYS 2d 145.

Mortgage Recording Tax – An Advisory Opinion (TSB-A-02(3)R) of the Technical Services Division of the New York State Department of Taxation and Finance issued June 11, 2002 concludes that mortgage tax is not imposed on the part of mortgage proceeds apportioned to a tax-exempt purpose. Petitioner, United Cerebral Palsy Associations of New York State ("UCP"), is the lessee of property in Brooklyn. At that location it operates a Diagnostic and Treatment Center and other programs. It mortgaged its leasehold to fund renovations to the Treatment Center and to space in the building that also benefited the other programs. UCP claimed exemption from tax as a voluntary non-profit hospital corporation under Tax Law Section 253(3). The Advisory Opinion found that UCP was a voluntary non-profit hospital corporation in relation to services provided by the Treatment Center and the mortgage was exempt to the extent of the mortgage proceeds disbursed for renovations to the Treatment Center and to the common space apportioned to the percentage of the building occupied by the Treatment Center. The mortgage was held taxable to the extent it secured funds to improve common space attributable to its other programs. TSB-A-02(3)R is on the Departments WEB Site at the address: http://www.tax.state.ny.us/pdf/Advisory_Opinions/Mortgage/A02_3r.pdf.

Mortgage Recording Tax – An Advisory Opinion of the Technical Services Division of the New York State Department of Taxation and Finance issued June 5, 2002 concerns mortgages on ground leases of remaining development parcels at Battery Park City. Each mortgage is to be executed by a ground lessee and the Battery Park City Authority. The Advisory Opinion concludes that the mortgages are exempt from tax since the Authority is co-mortgagor and will record the instruments. It cites a 1956 Informal Opinion of the State's Attorney General providing that "the party who records is the one upon whom tax is imposed". The mortgages being exempt, they may thereafter be assigned or modified without payment of mortgage tax so long as the principal amount secured is not increased under a recorded instrument to which the exempt entity is not a party. TSB-A-02(2)R is at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Mortgage/A02_2R.pdf.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance has indicated that the interest rate to be assessed or paid, as the case may be, for the third quarter of calendar year 2002 on late payments, underpayments, overpayments or refunds of Mortgage Recording Tax and the State's Real Estate Transfer Tax is 6% compounded daily. The interest rates are published at http://www.tax.state.ny.us/taxnews/int_curr.htm.

New York City Real Estate Taxes – The tax rates for the second half and the third and fourth quarters of fiscal year 2001 (January 1, 2002 – June 30, 2002), will remain in effect for current fiscal year 2002 (July 1, 2002 – June 30, 2003) unless adjusted in November for the second half/third and fourth quarters. The rate for each $100 of assessed valuation for Class One is 11.609; for Class Two the rate is 10.792; for Class Three the rate is 10.541; and for Class Four the rate is 9.712. Class One generally includes one-to-three family residential real property (including condominiums of three or less stories 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/Certificates of Occupancy - An Article 78 proceeding was commenced to annul a determination of the Board of Standards and Appeals ("BSA") upholding issuance of a certificate of occupancy for a building in Manhattan covered by the Loft Law (Article 7-C of the Multiple Dwelling Law). In 1987, the former owner of the building filed an Alternation Application with the Building Department ("DOB") and the Loft Board to legalize the building and the Petitioner's loft. In 1996, the purchaser of the building ("Purchaser") amended the Approved Plans without notice to the Petitioners or the Loft Board. The Purchaser's architect certified to the DOB that the building and loft complied with all fire and safety requirements, and a DOB inspector (since indicted for accepting bribes to issue false inspection reports for a different building) certified that the work required to issue a C of O was completed. However, the renovations required by the Approved Plans had not been done. Petitioners' request that the DOB revoke the C of O was denied and the BSA upheld the issuance of the C of O on the ground that the Purchaser was willing to remedy the violations under BSA supervision. The

Supreme Court, New York County, granted the petition, vacated the BSA ruling, and declared the C of O null and void. It held it was irrelevant that the Purchaser was willing to perform the work necessary for the C of O to be valid. Further, BSA monitoring of the repairs would interfere with the authority of the Loft Board to oversee loft conversions. Matter of Byrne v. The Board of Standards and Appeals of the City of New York was reported in the New York Law Journal on April 17, 2002. (The court noted that Section 301(5) of the Multiple Dwelling Law and Section 302(5) of the Multiple Residence Law prohibit revocation of a C of O as to a purchaser relying on an existing C of O, facts not pertinent to this case).

Notice of Pendency - The Appellate Division, Second Department, reversing the decision of the Supreme Court, Westchester County, held that a second notice of pendency in an action for specific performance could not be filed when a prior lis pendens had been canceled for the failure to serve the summons and complaint within thirty days of the filing of the notice of pendency as required by CPLR Section 6512. Weiner v. MKVII-Westchester, LLC, decided March 25, 2002, is reported at 739 NYS 2d 432.

Prejudgment Attachments – The August 6, 1999 issue of Current Developments reported on a decision by the United States Supreme Court reversing an Order of the Second Circuit Court of Appeals, which upheld an Order of the District Court of the Southern District of New York enjoining a defendant from transferring property not involved in litigation to prevent the dissipation of assets, a form of attachment known in England as a "Mareva" injunction. The Court, in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., reported at 527 US 308, concluded that the equitable powers of federal courts do not encompass interfering with the disposition of property at the instance of a non-judgment creditor. The Appellate Division, First Department, in a decision issued May 28, 2002, upheld an Order of the Supreme Court, New York County, enforcing a Mareva injunction issued by an English court during the pendency of proceedings to enforce English money judgments. The Appellate Division concluded that a Mareva injunction is merely a provisional remedy similar to an order of attachment against an out-of-jurisdiction defendant under CPLR Section 6201(1) which does not violate due process requirements in New York State. CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V. was reported in the New York Law Journal on June 3, 2002.

Recording Charges Increase - Chapter 83 of the Laws of 2002 has effective July 1, 2002 increased by $15.00 the per document recording charge statewide. By way of example, the base recording charge changes from 17.00 to $32.00 per document in New York City and from $13.00 to $28.00 per document in Westchester County. The recording charge for each page is not impacted by the increase in the base recording charge and must still be collected. The fees to file a notice of pendency and to commence an action were also increased statewide by $15.00.

Strict Foreclosure – The Supreme Court, New York County held that a strict foreclosure action can be brought under Real Property Actions and Proceedings

Law Section 1352 to foreclose the right of a tenant to possession. A judgment foreclosing the interest of the tenant had not been granted in the mortgage foreclosure, in which tenants were named only as "John Doe" defendants, since the mortgagor knew or should have known of the tenant's actual name. Athena-Liberty Lofts, L.P. v. Just Pies, Inc. was reported in the New York Law Journal on May 29, 2002.

Tax Lien Foreclosure - The owner of adjoining property benefited by a recorded easement over property being foreclosed petitioned for an order vacating the judgment of foreclosure on the grounds that it had not been named a party defendant or served in the action. The Supreme Court, Kings County, denied the petition, finding that as the petitioner was not named in the action its easement rights were not affected by the foreclosure sale. NYCTL 1982-2 Trust v. Cathedral Condo Associates was reported in the New York Law Journal on April 10, 2002.

Terrorism Insurance - The May 28, 2002 issue of "Current Developments" reported that the Supreme Court, New York County, had authorized the holders of a mortgage on 4 Times Square to draw from the lockbox into which rents from the building are deposited to purchase terrorism insurance. The mortgagor had been notified that the mortgage was in default because its "all risks" insurance policy did not cover acts of terrorism. In a decision reported in the New York Law Journal on June 25, 2002 in Four Times Square Associates, L.L.C. v. Cigna Investments, Inc., Justice Tompkins denied a request by Four Times Square Associates for an injunction preventing the defendants from holding it in default under the mortgage and preventing defendants from using funds in the lockbox. The Court concluded that Four Times Square Associates had not shown irreparable harm or a clear right to relief. A footnote to the decision suggests that the insurance premium may be recoverable from tenants of the building.

Transfer Tax – REITS: The New York State and New York City transfer tax rates applicable to conveyances of real property to existing REITS have been extended by Chapter 85 of the Laws of 2002 to occurring before September 1, 2005, The "sunset" provision had been September 1, 2002.

Michael J. Berey, Senior Underwriting Counsel
No. 44, July 17, 2002 (mberey@firstam.com)