First American Title Insurance Company of New York
CURRENT DEVELOPMENTS No. 50

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

Bankruptcy – Administering a Case under Chapter 13, the Bankruptcy Court for the Western District of New York found that the value of the Debtors' residence exceeded the outstanding balance of the first mortgage. The Court therefore held that the second mortgage on the property could not be avoided and the debt secured treated as unsecured under Code Section 506 ("Determination of secured status"). Section 506 provides, in part, that "(a)n allowed claim of a creditor secured by a lien on property in which the estate has an interest...is an unsecured claim to the extent that the value of such creditor's interest...is less than the amount of such allowed claim". The Debtors did not meet their burden of proving there was not even $1.00 of equity in the property above the outstanding amount of prior liens. In Re Fisher, decided January 29, 2003, is reported at 2003 Bankr. LEXIS 89.

Connecticut Transfer Tax – The Budget Bill passed in Connecticut will raise the local portion of the conveyance tax, payable to a Town Clerk, effective March 15, 2003, from .11% to .25%. Eighteen towns will have the option to increase their local conveyance tax from .25% to .50%. The increases are effective until July 1, 2004. There has been no change in the State's portion of the transfer tax.

Contracts of Sale – A title search disclosed that the seller-defendant had mistakenly conveyed the property to another person, also a defendant in this action. The seller-defendant attempted to cancel the contract on the ground she could not convey clear title, and claimed that the plaintiff's sole remedy under the contract was a return of the contract deposit and payment of expenses incurred for the title search. The plaintiff sued for specific performance or damages for breach of contract. The Appellate Division Second Department, reversing the decision of the Supreme Court, Suffolk County, reinstated the complaint. The seller had not made a good-faith effort to deliver title pursuant to the terms of the contract and could not therefore rely on its limiting provision for the purchaser's remedy. 9 Brothers Building Supply Corp. v. Buonamicia, decided November 25, 2002, is reported at 751 N.Y.S. 2d 35.

Foreclosure – The foreclosure of an assigned mortgage was commenced by the original mortgagee. The Supreme Court, Kings County, refused to amend the action to substitute the assignee as plaintiff and dismissed the action. Allowing a non-party to be plaintiff cannot be accomplished under CPLR Section 2001, which authorizes a correction to be made in an action if there has been a "mistake,

omission, defect or irregularity". Colony Mortgage Bankers v. Levell was reported in the New York Law Journal on January 22, 2003.

Forgery – Notwithstanding that Real Property Law Section 266 protects the title or lien of a bona fide purchaser or encumbrancer for value without notice of an alleged prior fraud affecting the title to real property, the Appellate Division, Second Department, reversed the order of the Supreme Court, Kings County, and reinstated the complaint in an action brought against the purchaser from the grantee of an allegedly forged deed, and the purchaser's mortgagee. It held that a person cannot be a bona fide purchaser or encumbrancer for value through a forged deed since such a deed is void and conveys no title. Public Administrator of Kings County v. Samerson, decided October 21, 2002, is reported at 750 N.Y.S. 2d 301.

Indexing – The County Clerk of Monroe County misindexed the recording of a mortgage assignment. Tax sale notices were therefore mailed to the prior mortgagee. The assignee brought an Article 78 proceeding to set aside the tax deed for lack of notice. The Supreme Court, Monroe County, converted the proceeding to an action for monetary damages against the County Clerk under Real Property Law Section 316. According to the Court, "(p)resentation of a proper document, evidenced by a receipt from the Clerk, is sufficient to cast responsibility on the recording officer". Matter of the Application of American Financial Corp. of Tampa, decided September 23, 2002, is reported at 2002 N.Y. Misc. LEXIS 1344.

Judgments – The Supreme Court, Westchester County, issued a Decision and Order granting a motion to vacate a default judgment, stating that the "default judgment is hereby vacated and the lien shall be removed forthwith. Submit Order on notice". The defendant in that action did not submit the Order on notice within 60 days after filing of the Decision under 22 N.Y.C.R.R 202.48. A conveyance of the judgment debtor's property and that purchaser's mortgage, executed after the docketing of the default judgment, was, therefore, according to the Supreme Court, Westchester County, subject to the judgment. Affirming that ruling, the Appellate Division, Second Department, held that the "Decision and Order" was merely a decision, and, since no Order was submitted and signed, the judgment remained in effect. Lesnick v. Carvalho, decided November 12, 2002, is reported at 749 N.Y.S. 2d 563; 2002 N.Y. App. Div. LEXIS 10683.

Limited Liability Companies and Limited Liability Partnerships – The New York State Department of Taxation and Finance has posted to its WEB site Publication 16, the "New York Tax Status of Limited Liability Companies and Limited Liability Partnerships". The Publication provides information on the formation of the entity, its tax treatment, the payment of annual filing fees, and obligations on termination. See http://www.tax.state.ny.us/pdf/publications/Multi/Pub16_103.pdf.

Limited Liability Companies – The managing member of an Limited Liability Company which owned a commercial building in Manhattan purchased the interest of the other member for a price based on a $80 Million valuation of the property. The Buy-Sell Agreement disclosed that the managing member had discussed the sale or lease of the property with specified third parties, and further provided that the selling member disclaimed all interest in profits received by on a future sale of the property. The selling member was afforded an opportunity to conduct its own due diligence with respect to any of the third parties listed. Two weeks after the closing of the Buy-Sell, the LLC entered into a contract to sell the property to a third party that was disclosed in the Agreement for $200 Million. The former member brought an action against the managing member and its principals for fraud and breach of fiduciary duty, seeking to recover the profit it would have realized if it held its interest when the property was sold. The Appellate Division, First Department, reversed the Supreme Court, New York County's grant of defendants' motion to dismiss. According to the Appellate Division, the managing member was a fiduciary to the selling member for all matters relating to the LLC until the buy-out closed and was obligated to fully disclose all material facts, including the prices the prospective purchasers were offering to pay. The disclaimers of the Buy-Out Agreement could not override that duty and were therefore ineffective. The Court also reinstated the complaint against the defendants' law firm. It was alleged that the law firm, which had advised the LLC prior to negotiation of the Buy-Out, aided and abetted the other defendants' alleged fraud and breach of fiduciary duty. It was further alleged that the law firm negligently advised the selling member as to the business of the LLC prior to commencement of the Buy-Out negotiations. Blue Chip Emerald LLC v. Allied Partners Inc. was reported in the New York Law Journal on January 22, 2003.

Mechanics Liens/Service – Lien Law Section 11 requires that a lienor serve a copy of a notice of lien on the owner within five days before or thirty days after filing of the notice. Service on a corporation may be made by "registered or certified mail addressed to its last known place of business" (Emphasis added). According to the Appellate Division First Department, the lienor could serve a copy of the lien to the owner's address on the property tax bill and it is not required that the recipient is actually located there. Service in care of another party (identified on a LEXIS search of property records) was not a fatal defect since the notice was mailed to the address on the tax bill. Infomart New York LLC v. Hugh O'Kane Electric Co., LLC was reported in the New York Law Journal on January 27, 2003.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance has reported that the interest rate on refunds for the period April 1 – June 30, 2003 will be 6% compounded daily. The interest rate on late payments and assessments will be 7% compounded daily. The interest rates are published at http://www.tax.state.ny.us/taxnews/int0203.htm.

Mortgages – An order was entered by the Supreme Court, Essex County, declaring a bond and mortgage void for usury and discharging the mortgage. During pendency of the application for leave to appeal the mortgagees redeemed the property from a pending tax lien sale. After the application for leave to appeal was denied, an action was commenced to recover the money the mortgagees paid to redeem the property on a theory of unjust enrichment. The Appellate Division, Third Department, affirmed the lower court's dismissal of the complaint, holding that no cause of action for unjust enrichment could be established since the mortgagees' motivation was to protect their own interests, even though the owner was benefited by the payment of the outstanding taxes. For a cause of unjust enrichment, it must be shown that services were performed "for" the defendant. Clark v. Daby, decided December 5, 2002, is reported at 751 N.Y.S. 2d 622.

Mortgages – Judge Markey of the Civil Court, Queens County, held that the Civil Court of the City of New York has jurisdiction to discharge an ancient mortgage which does not exceed $25,000, the jurisdictional limitation of that Court. Although RPAPL Section 1931(5) provides that a proceeding to discharge an ancient mortgage is to be commenced in the supreme court or a county court, Section 203(b) of the New York Civil Court Act states that the Court has jurisdiction "for the foreclosure, redemption or satisfaction of a mortgage" and Section 212 of the Act provides that "the court shall have all of the powers that the supreme court would have in like actions and proceedings". Risicato v. Lumberyard Supply Corp. was reported in the New York Law Journal on February 26, 2003.

NYC – Pending Legislation on Restrictive Covenants and Permits – The City Council is considering enacting a Local Law which would amend Section 26-103 of the City's Administrative Code to require the Building Department to maintain a registry of all deeds containing restrictive covenants that are filed with the Department. Int. No. 368 would allow a deed containing restrictive covenants to be filed in the registry "by any owner or homeowner association whose property is subject to a restrictive covenant and/or by or on behalf of a neighborhood association or civic association whose area of geographic concern…encompasses the property that is the subject of such restrictive covenant". Under the proposals, the Building Department could not issue a permit without a court order if there would be a violation of a restrictive covenant in a deed in the registry. Int. Nos. 358 and 368 are on the Council's WEB site at http://www.council.nyc.ny.us./ under "Legislation/Bill Intros" for 2003.

NYC- Pending Legislation on Lead Paint – The City Council is considering enacting a Local Law which would replace the current Lead Paint Law, Local Law 38 of 1999, with new requirements for the removal of lead-based paint in housing, schools, day care facilities and playgrounds. Int. No. 101, identified in the bill as the "New York City Childhood Lead Poisoning Prevention Act of 2002", is on the Internet at http://www.council.nyc.ny.us/ under "Legislation/Bill Intros" for 2002.

Notice of Pendency – As was reported in Current Developments issued July 17, 2002, the Appellate Division, Second Department, held in Weiner v. MKVII-Westchester, LLC (739 N.Y.S. 2d 432) that a second notice of pendency in an action for specific performance could not be properly filed when a lis pendens had previously been canceled for the failure to serve the summons and complaint within thirty days of the filing of the notice of pendency. In this case, an action was commenced against the purchaser to set aside the deed to him, and a third notice of pendency was filed. The Supreme Court, Westchester County, held that the filing of the second lis pendens, which it ordered canceled, violated the Second Department's holding that successive filings are not to be made against the same property relating to the same controversy. Weiner v. Casey was reported in the New York Law Journal on February 5, 2002.

Restrictive Covenants – The Estate of a person who had filed a subdivision map conveyed a lot on the map by a deed limiting the use of the property to "one residence". The deed provided that all other lots would be sold subject to the same restriction. The other lots were, however, sold only "subject to covenants and restrictions of record". In an action for a declaratory judgment brought by a subsequent owner of 19 of the 32 filed map lots to declare the restriction eliminated, the Supreme Court, Westchester County, held that the conveyance of the other lots "subject to covenants and restrictions of record" continued the one-residence restriction which are enforceable by the other, individual lot owners. Realis Development, LLC v. Neuberger was reported in the NYLJ on February 19, 2003.

Restrictive Covenants –Affirming the granting of a motion for summary judgment by the Supreme Court, Nassau County, the Appellate Division, Second Department, held that deeds in the chain of title to the developer of an apartment complex could not create an easement of access for the benefit of adjoining property. In New York a grantor of a deed cannot create in the deed an easement that benefits land the grantor does not own. Beachside Bungalow Preservation Association of Far Rockaway, Inc. v. Oceanside Associates, LLC, decided January 13, 2003, is reported at 753 N.Y.S. 2d 133.

Statute of Frauds – A commercial tenant brought an action against its landlord for specific performance and breach of an oral agreement to convert the building in which it leased space to condominium ownership and sell to it the space it occupied as a condominium unit. The Appellate Division, First Department, affirmed the decision of the Supreme Court, New York County, which denied the defendants' motion to dismiss the complaint for the failure to state of cause of action. That the defendants retained a lawyer, architect and real estate broker to prepare a conversion and that the plaintiff made a down payment for purchase of the unit was sufficient, absent rebuttal evidence, to show partial performance of an alleged oral agreement sufficient to take it out of the statute of frauds. Clark Construction Corporation v. BLF Realty Holding Corp., decided December 5, 2002, is reported at 751 N.Y.S. 2d 19.

Statute of Frauds – The Supreme Court, Bronx County, in Fordham Paradise, LLC v. ABI Property Partners, L.P. XXVI, held that a purported oral modification of a purchase option contained in a stipulation settling litigation over possession under a leasehold violated the statute of frauds. The Court refused to exercise its equitable powers to permit the plaintiffs to exercise the option, notwithstanding that substantial funds had been expended under the lease to renovate the premises. The time within which the option could be exercised under the stipulation was "of the essence", and the failure to timely exercise the option was not the result of a mistake, inadvertence or an excusable default. The optionee was simply unable to fund the purchase. The decision was reported in the New York Law Journal on January 10, 2003.

"The Stoler Report" – New York's only live weekly radio broadcast featuring real estate and business leaders, hosted by First American Vice-President Michael Stoler, is broadcast Wednesdays at 9PM on WSNR 620 AM. The topic on March 12 is "Commercial Office Buildings in Midtown Manhattan – An Owner's Perspective". Joining Michael Stoler will be Charles D. Cohen, President and CEO of Cohen Brothers Realty Corp. and Bruce Mosler, President-USA of Cushman & Wakefield, Inc. The program on March 19 will be on "The State of Residential Housing in Manhattan-An Owners and Developers Perspective" with Ofer Yardini, Principal, Stonehedge Partners, Jeffrey Levine, President, Levine Builders and Principal, Suna-Levine, Anthony Goldman, Chairman, Goldman Properties, Inc., David Lowenthal, President, World Wide Holdings, and Christopher Albanese, Executive Vice-President, Albanese Development Corp. The program on March 26 will cover "Developments North of 96th Street and in Harlem", with Robert Ezrapour, Principal, Artimus Construction, Charles Weiss, Law Office of Charles D. Weiss, and Ronald Moelis, Principal, L&M Equities and L& M Development Corp. For further program information contact Michael Stoler at mstoler@firstam.com.

Tax Sales – Real Property Tax Law Section 1125(1) provides, in part, that notice of a tax foreclosure proceeding is to be sent to each owner and to each other person with a right, title or interest in the property subject to the foreclosure as set forth in the public record. After the City of Troy acquired title in a tax sale, the plaintiff sought to assert a purchase option contained in its lease. It contended that its application for "Economic Development Zone" certification, on record with the City's Department of Planning and Community Development, made its interest a matter of public record, notwithstanding that its lease and purchase option were not recorded in the office of the Rensselaer County Clerk. The Appellate Division, Third Department, affirming the decision of the Supreme Court, Rensselaer County dismissing the complaint for the failure to state a cause of action, found that the term "public record' refers to the land records in the office of the County Clerk and records in the Surrogate Court, not to the files of every local agency of the City. Hudson Deepwater Development, Inc. v. City of Troy, decided November 27, 2002, is reported at 751 N.Y.S. 2d 615.

Uniform Commercial Code – Effective April 1, fees at New York's Department of State for filing, searches and copies will be increased. The new filing fee will be $40 for paper-based filings and $20 to file using electronic XML. An official search will cost $25, and the charge for an official search under seal will be $50. The statutory fee for a plain copy of a filing will be $5, and $10 will be charged for a certified copy. The Department of State will charge an additional $75 for "Expedited Service".

Michael J. Berey
Senior Underwriting Counsel
mberey@firstam.com

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