



First American Title Insurance Company of New York CURRENT DEVELOPMENTS

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

ACRIS – The offices of the New York City Register have, since January 3, 2003, accepted for recording only documents for which a Cover Page and Payment Sheet have been generated in the City’s new Internet based Automated City Register Information System (“ACRIS”). The Register’s office has advised that Phase II of ACRIS will take effect in September 2003. Phase II will require the New York State (TP-584) and New York City (RPTT) transfer tax forms, the Real Property Transfer Report (RP-5217NYC), the Smoke Alarm Detector affidavit, the Property Owner’s Registration Form, and the Customer Registration Form for Water and Sewer Billing, as applicable to the document being recorded, to be completed in ACRIS. The signed forms, printed from ACRIS, each with an imprinted Tax Transaction ID, will be the only forms accepted. Only forms that have been completed as required by ACRIS will be printed. Editing any completed form, such as changing the purchase price, must be done in ACRIS for the form to be accepted. Phase III, targeted for December 2003, will require forms for controlling interest transfers and cooperative units to be completed in ACRIS.

Adverse Possession – Defendant, a not-for-profit corporation, took title in 1987 to a railroad right-of way under state legislation authorizing the conveyance. The legislation provided that once the land was no longer used for recreation for the use and benefit of the public title would revert to towns that were members of the Catskill Rail Committee. The deed to the defendant also provided that the conveyance was conditioned on the land being used for the benefit of the public. In this case, an adjoining landowner brought an action claiming adverse possession between 1987 and 1997 to a strip of land within the right-of-way. The Appellate Division, Third Department, reversing the order of the Supreme Court, Delaware County, granted the defendant’s motion for summary judgment and dismissed the complaint. It held that the land was the subject of a public trust and therefore not subject to a claim of adverse possession. *Rodrigues v. Catskill Revitalization Corporation, Inc.*, decided February 20, 2003, is reported at 755 N.Y.S. 2d 743.

Bankruptcy – Notwithstanding the protection afforded a lessee under Bankruptcy Code Section 365 (“Executory contracts and unexpired leases”) in the event of its landlord’s bankruptcy, the United States Court of Appeals for the Seventh Circuit held that the lessee’s possessory rights were extinguished by a sale of its landlord-debtor’s fee estate “free and clear of any interest” in the property under Code

Section 363 (“Use, sale or lease of property”). Precision Industries, Inc. v. Qualitech Steel SBQ, LLC, decided April 23, 2003, is reported at 2003 U.S. App. LEXIS 7612.

Continuing Legal Education – First American’s status as an Accredited Provider of Continuing Legal Education in New York State has been extended to May 10, 2005.

Mechanics Liens – Current Developments issued January 4, 2002 reported a decision of the Supreme Court, New York County, granting a motion to dismiss an action to foreclose a mechanics lien filed after recording a declaration of condominium, the creation of tax lots for each of the condominium units, and the sale of units. The lien was filed against the single, former tax lot number. Leave to amend the lien so as to attach to all of the units still owned by the sponsor on the date the lien was filed was denied. The Appellate Division, First Department affirmed in Northeast Restoration Corp. v. K & J Construction Co., L.P., decided April 1, 2003, and reported at 757 N.Y.S. 2d 542.

Mortgages – The United States Department of Housing and Urban Development has published a Final Rule addressing property “flipping”, the practice whereby a property recently acquired is resold with an artificially inflated value. The new requirements make flipped property ineligible for FHA-insured mortgage financing, thereby precluding FHA home purchasers from becoming victims of predatory flipping. The Final Rule, at 68 Federal Register 84 (May 1, 2003), adds Section 203.37a to 24 CFR Part 203 effective June 2, 2003.

Mortgage Recording Tax – The rate of mortgage recording tax on real property located, in whole or in part, in Orleans County was increased to \$1.00 for each \$100.00 secured effective July 1, 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 July 1 – September 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/2003/int0303.htm>.

New York City Real Estate Taxes – The real property tax rates for each \$100 of assessed valuation for July 1, 2003 – December 31, 2003 are the same as the rates for the second half of the 2002-2003 tax year: 14.160 for Class One property, 12.517 for Class Two property, 12.565 for Class Three property, and 11.580 for Class Four property. Adjustments to the tax rate under the new City Budget will be applied in the tax period January 1, 2004-June 30, 2004. Class One generally includes one-to-three family residential real property, including condominiums of three or fewer 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 State Budget Bill – The Budget Bill, enacted over the Governor’s veto on May 15, 2003, includes new Section 663 of the Tax Law which requires a non-resident taxpayer to pay estimated income tax due as the result of a sale or transfer of real estate. This will not include a sale or transfer involving a principal residence, a foreclosure deed or a deed in lieu of foreclosure, or a transfer by a governmental agency or a private mortgage insurance company. A deed executed by a non-resident taxpayer will be recorded on submitting to the county recorder either a certification from the State Department of Taxation and Finance that tax was paid or a certification from the seller that the requirement does not apply to the sale or transfer. The Department is to issue regulations and forms prior to the law becoming effective on September 1, 2003.

The Budget Bill also amended Tax Law Section 658 to require an entity which is a partnership, Subchapter K limited liability company or an S Corporation which has partners, members or shareholders who are non-resident individuals, or C corporations, which has any income derived from New York sources, to pay estimated tax on such income on behalf of such partners, members or shareholders.

In addition, the Budget Bill amended Real Property Law Section 333 to increase the fee to file the State Board of Real Property Services Real Property Transfer Forms, known generally as the Equalization and Assessment Forms (RP-5217 and RP-5217NYC), from \$25.00 to \$50.00.

Notice of Pendency – The Supreme Court, St. Lawrence County, pursuant to CPLR Section 2004 (“Extension of time generally”), granted a motion to extend an expired notice of pendency to foreclose a mechanics lien nunc pro tunc. It distinguished the case of Matter of Sakow (97 N.Y. 2d 436), in which the Court of Appeals held that “an expired or canceled notice of pendency may not be refilled on the same cause of action or claim”. According to the Supreme Court, the Court of Appeals “did not have the occasion to address the uniqueness of a foreclosure scenario”. MCK Building Associates, Inc. v. St. Lawrence University, decided April 2, 2003, is reported at 759 N.Y.S. 2d 309.

Recording Act – The Southold Town Planning Board denied a subdivision application due to a condition imposed on a prior owner not to further subdivide the property. The Supreme Court, Suffolk County, granted a petition to annual the determination of the Planning Board and the Appellate Division, Second Department affirmed. Since the condition was only filed in the office of the Planning Board and not in the real property records it did not bind the petitioner. A purchaser is not chargeable with constructive notice of conveyances recorded outside of the chain of title to the property. Ioannou v. Southold Town Planning Board, decided April 7, 2003, is reported at 758 N.Y.S. 2d 358.

Restrictive Covenants – The Appellate Division, Second Department, affirmed an order of the Supreme Court, Westchester County, directing the removal of a wireless telecommunications service facility and enjoining the defendants from violating a restrictive covenants prohibiting “any building except detached residential dwelling houses” for single-family use. According to the Appellate Division, the Telecommunications Act of 1996 does not preempt the enforcement of privately imposed restrictive covenants. *Chambers v. Old Stone Hill Road Associates*, decided May 17, 2003, is reported at 757 N.Y.S. 2d 70.

Right of First Refusal – The Supreme Court, Kings County, held that the right of first refusal to a tenant under its lease, exercisable in the event of a sale of the property, was not triggered by a transfer to a limited liability company in which the transferor held a 60% interest and retained management control. *New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp.* was reported in the New York Law Journal on June 4, 2003.

Statute of Frauds - A written option agreement provided for monthly payments to the optionor, the amount of each payment to increase if the option was extended on notice by the optionee within six months. The option was not formally extended but increased monthly payments were made under a purported oral agreement to extend the option period. The Appellate Division, First Department, affirming the decision of the Supreme Court, Bronx County, granting the seller’s motion for summary judgment dismissing the complaint, held that an alleged oral agreement to extend the option was unenforceable under the Statute of Frauds (General Obligations Law Section 5-703(2)) notwithstanding that increased monthly payments were made. *Peartree Associates, LLC v. Naclerio*, decided March 11, 2003, is reported at 756 N.Y.S. 2d 551.

Tax Sales – The Supreme Court, Kings County, granted a motion to vacate a judgment of foreclosure of a tax lien certificate and set aside the foreclosure sale and referee’s deed. The Appellate Division, Second Department, reversed that order, and reinstated the judgment, sale and conveyance. Although the former owner of the real property in question may have not been properly served with notice of the tax liens sale, she had conveyed the property before moving to vacate the judgment and therefore lacked standing to contest the judgment and foreclosure sale. A bank which held a mortgage made by the purchaser at the foreclosure sale was also denied relief because it did not move to intervene in the action as an interested person pursuant to CPLR Sections 1013 (“Intervention by permission”) and 5015(a)(4) (“Relief from judgment or order”). *NYCTL 1996-1 Trust v. King*, decided April 14, 2003, is reported at 758 N.Y.S. 2d 374.

Title Insurance – An action was brought by a title insurer against the sellers’ attorneys to recover money it paid to satisfy a mortgage on property it insured. The defendants held money in escrow to pay off the mortgage and were to deliver a satisfaction to the insurer. The escrow was not sufficient to satisfy the mortgage and

the insurer paid the balance due. The Appellate Division, First Department, affirming the decision of the Supreme Court, New York County, held that the defendants were liable to the title insurer. Having undertaken to satisfy the mortgage, their obligation was not limited to the amount escrowed. *Old Republic Title Insurance Company v. Santangelo & Cohen*, decided November 12, 2002, is reported at 750 N.Y.S. 2d 16.

Usury – The National Bank Act, 12 U.S.C.S. Sections 85 and 86, sets forth the elements of a usury claim against a nationally-chartered bank, prescribes a two-year statute of limitations for such a claim, and prescribes the remedies for borrowers charged higher rates. The United States Supreme Court, reversing the Eleventh Circuit Court of Appeals, has held that those provisions are exclusive and preempt state usury laws. *Beneficial National Bank v. Anderson*, decided June 2, 2003, is reported at 123 S. Ct. 2058; 2003 U.S. LEXIS 4277.

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