



First American Title Insurance Company of New York CURRENT DEVELOPMENTS

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

Bankruptcy – Under Code Section 1146(c) the making or delivery of an instrument of transfer under a confirmed plan of reorganization is not subject to a stamp or similar tax. The United States Bankruptcy Court for the District of Delaware held that transfers by the Debtor were exempt from Maryland state and county transfer and recording taxes so long as a Chapter 11 plan was eventually confirmed, and funds were escrowed to pay the taxes if a plan was not confirmed. This holding was affirmed by the United States District Court for the District of Delaware but it was reversed by the United States Court of Appeals for the Third Circuit. The Circuit Court held that a transfer is exempt under Section 1146(c) only if it occurs after confirmation of a plan. *Baltimore County, Maryland v. Hechinger Liquidation Trust*, filed July 18, 2003, is reported at 335 F. 3d 243 and at 2003 U.S. App. LEXIS 14449. This decision, impacting cases administered in Delaware, New Jersey, Pennsylvania, and the Virgin Islands, is consistent with the holding of the United States District Court for the Southern District of New York in *New York City Department of Finance v. 310 Associates, L.P.*, decided in 2002 and reported at 2002 U.S. Dist. LEXIS 15701. In that case, the Court held that a deed pursuant to a Bankruptcy Court Order was not exempt from the City's transfer tax as the transfer took place prior to drafting a plan of reorganization.

Bankruptcy/Automatic Stay – The United States Bankruptcy Court for the Western District of New York held that an In Rem tax foreclosure and the sale of the subject property were void for violating the automatic stay under Bankruptcy Code Section 362 when the daughter of the property owner of record, who was the residuary devisee under her mother's Will, filed a bankruptcy petition. Although there was no deed out of the Estate of the property owner and the daughter changed her last name, the City of Buffalo was on notice of the Debtor's interest. The City was listed as a secured creditor in the bankruptcy by reason of unpaid real property taxes and the Debtor's attorney had advised the City of his client's interest in the property and of the bankruptcy prior to execution of the tax sale deed. The Court also held that the daughter, as Executrix of her mother's Estate, had the benefit of the automatic stay deriving from the filing of her personal bankruptcy petition. *Burg v. The City of Buffalo*, decided July 11, 2003, is reported at 2003 Bankr. LEXIS 822.

Bankruptcy/Automatic Stay/Right of Redemption – The United States Court of Appeals for the Second Circuit, affirming the determinations of the Bankruptcy

Court and United States District Court for the Western District, held that the delivery and recording of a tax sale deed is not subject to the automatic stay when a petition for relief under Chapter 13 of the Bankruptcy Code was filed by the former owner of the property after the tax sale auction but before delivery of the tax sale deed. Under New York law applicable to foreclosures, the right to redeem property in a foreclosure is extinguished when the property is “struck down” at auction, not when the foreclosure deed is delivered. Further, the Monroe County In Rem Tax Foreclosure Act, applicable to this case, provides that the right of redemption ceases on noon of the day preceding the date of commencement of the public auction. Accordingly, the foreclosed property was not part of the Debtor’s Estate when the petition was filed. *Rogers v. County of Monroe*, decided June 16, 2003, is reported at 333 F. 3d 64 and 2003 U.S. App. LEXIS 11814.

City of Yonkers Mortgage Recording Tax – Chapter 237 of the Laws of 2003 authorizes the City of Yonkers to extend its mortgage recording tax of \$.50 for each \$100 of principal debt secured by a mortgage to apply to mortgages recorded through August 31, 2005. The total mortgage tax rate in Yonkers will continue to be \$1.50 for each \$100 of principal indebtedness.

Condominiums and Cooperatives – Current Developments issued July 17, 2002 reported the Court of Appeals decision in *511 West 232nd Owners Corp. v. Jennifer Realty Co.* (98 N.Y. 2d 144) holding that a complaint, alleging that the sponsor of a non-eviction plan breached its contracts with tenant-owners and the cooperative board to dispose of all shares within a reasonable time to enable there to be a viable cooperative, stated a cause of action. In response to that decision, the New York State Department of Law has found that “explicit disclosure of the Sponsor’s intent to sell or withhold from sale units included in an offering plan and the ramifications of the sponsor’s retention of a substantial number of units are material terms of the offering” of condominium and cooperative units for sale. Accordingly, the Attorney General has issued proposed regulations amending 13 NYCRR parts 18, 20, 21 and 23 which would, if adopted, require sponsors to disclose whether they intend to sell all condominium or cooperative units and, if not, to specify the percentage and number they intend to withhold. The proposed regulations would also require disclosure of the consequences of a sponsor’s holding a significant number of units over a prolonged period of time. The proposed regulations are on the Internet at http://www.oag.state.ny.us/realstate/documents/proposed_amend.html.

Contracts of Sale – Purchasers defaulted in purchasing four condominium units. Under the contract of sale, the sponsor retained down payments aggregating 25% of the purchase price. The defendants sued to recover those amounts, claiming the contract provided for an unenforceable penalty. The Supreme Court, New York County, held that the contract provision by which the sponsor retained the down payments was for liquidated damages, and it granted the sponsor’s motion for partial summary judgment on the initial, 10% down payment. It withheld decision, however, on the balance to determine at trial if retaining the additional down payments was reasonably related to the sponsor’s actual or probable loss. To

enforce the liquidated damages provision for the additional 15%, it would be determined at trial if retaining that amount was “plainly or grossly disproportionate to the probable loss” and thus an unenforceable penalty. *Uzan v. 845 UN LP* was reported in the New York Law Journal on July 23, 2003.

Election of Remedies – A borrower’s filing of a voluntary petition in bankruptcy stayed foreclosure proceedings in Maine and New Mexico. The plaintiff then commenced an action in New York to enforce the defendants’ guarantee of payment. Defendants moved to dismiss on the ground that the plaintiff failed to obtain leave from the Maine and New Mexico courts prior to commencing the action as required by RPAPL Section 1301(3). Under that Section, “no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action [to recover any part of the debt] was brought”. The Supreme Court, New York County, dismissed the motion, holding that the election of remedies does not apply where the debt is secured by a mortgage on real property outside of New York. *Wells Fargo Bank Minnesota, N.A. v. Cohn* was reported in the New York Law Journal on July 23, 2003.

Lead Paint – The New York State Court of Appeals, in a unanimous decision, held that the New York City Council failed to comply with the State Environmental Quality Review Act (“SEQRA”) when it enacted Local Law 38 of 1999 requiring the abatement of lead paint in multiple dwelling units. It found that the Council’s negative declaration under SEQRA that there would be no significant environmental impacts resulting from enactment of the Local Law did not adequately set forth the basis for its determination. This decision struck down Local Law 38, effectively reinstating the prior Lead Paint Law, Local Law 1 of 1982. *Matter of New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, decided July 1, 2003, is reported at 2003 N.Y. LEXIS 1744. The decision is also available at <http://www.courts.state.ny.us/ctapps/decisions/80opn03.pdf>.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance has reported that the interest rate to be charged for the fourth quarter of calendar year 2003 on late payments and assessments of mortgage recording tax and real estate transfer tax will be 6% per annum compounded daily. The interest rate to be paid on refunds of these taxes will be 3% per annum compounded daily. The interest rates are published on the Internet at <http://www.tax.state.ny.us/taxnews/2003/int0803.htm>

New Rochelle Real Estate Taxes – Changes have been made to real estate tax payment dates for property located within the City of New Rochelle, Westchester County. The City Tax for the period January 1 through December 31 is now due in one annual payment on January 1, payable without penalty until January 31. Payment had been due semi-annually on January 1 and July 1. The School Tax, for the period July 1 through June 30 is now payable in three installments of 60%, 20%, and 20%, due, respectively, on September 1, March 1, and June 1, with a grace period ending on the last day of the month that payment is due. Semi-annual

payments had been required, on October 1 and April 1. There is no change in the County real estate tax which continues to be due in New Rochelle on March 1, payable by March 31, for a January 1 through December 31 tax year.

New York State 2003-2004 Budget Bill – Current Developments issued July 2, 2003 reported that Tax Law Section 658 had been amended to require partnerships (including LLCs and LLPs that are treated as partnerships for federal income tax purposes) and New York S Corporations, that have income derived from New York sources, to make estimated personal income tax and corporate tax payments on behalf of partners or shareholders that are C corporations or non-resident individuals. Forms and instructions have been posted to the WEB at address http://www.tax.state.ny.us/pdf/2003/corp/ct2658_it2658_packet_2003.pdf. The first payment of estimated tax by partnerships and S corporations is due September 15.

Notice of Pendency – Plaintiff sued its adjoining landowner for damages and to require it to remove underground construction that encroached upon plaintiff's property, causing a building on plaintiff's property to shift and resulting in the New York City Building Department issuing an order that it be demolished. The Supreme Court, New York County, denied the defendant's motion for an order canceling the notice of pendency filed in the action. It held that a claim for restoration of lateral support is a proper ground in New York City for the filing of a notice of pendency. First, CPLR Section 6501 authorizes the filing of a lis pendens when "the judgment demanded would affect the title to, or the possession, use or enjoyment of real property". Second, the common law rule that there is no duty of lateral support was modified by sections of the City's Administrative Code requiring a duty of lateral support for adjacent property improved with buildings. *Jenmat Realty Corp. v. 37 E. 63 St. Park and Madison, LLC* was reported in the New York Law Journal on August 6, 2003.

Partition – Each of two couples held title to property as tenants by the entirety as to an undivided half-interest. Although case law in New York holds that a tenant by the entirety cannot maintain an action for partition, the Supreme Court, Westchester County, held that the plaintiff husband and wife, holding an entireties interest as tenants in common, had standing to seek partition under RPAPL Section 901. The court would not, however, order a sale of the property. The defendant-wife was in the midst of a divorce and requiring a sale prior to the divorce action would be inequitable to her. Section 901(1) of RPAPL Article 9 ("Action For Partition") provides that the court can order a sale in an action for a partition "if it appears that a partition cannot be made without great prejudice to the owners". *Sciavillo v. Sciavillo* was reported in the New York Law Journal on July 25, 2003.

Priority of Judgments – A confession of judgment against the Petitioner's former husband was docketed in 1991. In 1999, Petitioner obtained a judgment for fees in a divorce proceeding, and the Suffolk County Sheriff executed to her a deed to the marital residence. In 2001, *after* expiration of ten years from the docketing of the confession of judgment, the holder of the confession of judgment obtained an order

extending its judgment lien pursuant to CPLR Section 5203(b). Petitioner sought a determination that the lien of the confession of judgment, having expired, was not properly extended and, therefore, her judgment had priority to the proceeds of the sheriff sale to enforce the confession of judgment. The Supreme Court, Suffolk County, dismissed the petition. It held that the confession of judgment was duly extended. Further, since Petitioner knew of the confession of judgment it had priority over her judgment lien to the proceeds of the sale. *Gaglione v. Mahoney*, an unreported case, was decided March 7, 2002 and affirmed by the Appellate Division, Second Department, on June 2, 2003, in a Memorandum Decision reported at 2003 WL 21278032.

Real Estate Transfer Tax – The Ministry of Foreign Affairs of the Arab Republic of Egypt sold its diplomatic mission in Manhattan. As required by the contract of sale, to record its deed it paid the New York State Real Property Transfer Tax under protest. The Division of Tax Appeals sustained the decision of an Administrative Law Judge denying the Ministry’s application for the refund of the tax. Although the Petitioner is exempt from the payment of the transfer tax under the 1961 Vienna Convention on Diplomatic Relations, under Tax Law Section 1404(a) the grantee is required to pay the tax if the grantor is exempt. Petitioner voluntarily assumed the buyer’s obligation to pay the tax and its recourse, if any, is to the buyer. In *The Matter of the Petition of The Ministry of Foreign Affairs of the Arab Republic of Egypt*, DTA No. 818737, issued June 26, 2003, is on the Internet at <http://www.nysdta.org/Determinations/818737.det.htm>.

Restrictive Covenants – To obtain a rezoning, the prior owner of property used as a gas station executed a restrictive covenant prohibiting the sale of alcoholic beverages. Subsequently, the New York State Liquor Authority issued a liquor license for the premises to the defendant. Defendant was criminally charged with violating the Building Zone Ordinance of the Town of Hempstead by selling alcoholic beverages on the property. The Nassau County District Court found the defendant not guilty. It held that the covenant against selling alcoholic beverages was an unenforceable attempt (tantamount to an ordinance) by the Town to regulate the operation of a business in an area pre-empted by New York State law. Therefore, it cannot be used as a basis for criminal prosecution. *People v. Amerada Hess Corporation* was reported in the New York Law Journal on July 15, 2003.

Rockland County – Pursuant to the authority of Chapter 193 of New York State’s Laws of 2003, the Rockland County Legislature has enacted a Local Law imposing a tax on the recording of a mortgage on real property within Rockland County. The tax is to be imposed at the rate of 25 cents for each \$100 and “each remaining major fraction thereof of principal debt or obligation which is or under any contingency may be secured at the date of execution thereof, or at any time thereafter, by a mortgage on real property situated within” Rockland County recorded on or after October 1, 2003. This tax is in addition to the mortgage taxes imposed under Tax Law Section 253. Therefore, the total mortgage recording tax in Rockland County as of October 1 will be 1 ¼%. Rockland County’s local mortgage recording tax is to

be in effect until September 30, 2006. However, under the authority of Chapter 193, a Local Law later enacted may extend it.

“The Stoler Report” – New York’s only talk show on real estate trends in the tri-state region, hosted by First American Vice-President Michael Stoler, returns for its third season on CUNY TV, Channel 75. Each program will be broadcast the last Monday of every month at 10 AM, and re-broadcast the same day at 4 PM and 10 PM. Among those joining Michael Stoler on September 29, to discuss “Commercial, Residential & Mixed Use Developments on the West Side and Hudson Yards”, will be Jeffrey Levine, President, Levine Builders, and Principal, Suna Levine, Hal Fetner, President, Sidney Fetner Associates, and James Kuhn, President, Newmark & Company Real Estate. Discussing “Commercial & Residential Developments in Lower Manhattan” on October 27 will be Robert Ivanhoe, Chair, National Real Estate Practice, Greenberg Traurig LLP, Marc Warren, Executive Director, UBS Investment Bank, Caleb Koeppel, Principal, Koeppel Companies, and President, KRT Nemark, and Stephen B. Siegel, Chairman, Global Brokerage Operations, CB Richard Ellis. Live broadcasts, and Web casts of prior programs, can be found at <http://www.stolerreport.com>. Information can be obtained at that site or by email to mstoler@firstam.com

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