



First American Title Insurance Company of New York CURRENT DEVELOPMENTS

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

Adverse Possession/Prescriptive Easements - The Supreme Court, New York County, held that window air conditioners protruding into air space over the building on an adjoining parcel for more than ten years did not, in and of itself, establish a claim to adverse possession. The defendant had no legal right to encroach on the plaintiff's property and therefore it could not assert a claim of right. Further, adverse possession could not be based on RPAPL Section 522 ("Essentials of adverse possession under claim of title not written") as the defendant had not cultivated or improved the property encroached upon nor protected it by a substantial enclosure. The Court also held that there was no viable claim of a prescriptive easement. There was no evidence that the use of the air conditioners was hostile or adverse to the plaintiff's use of its property, and an easement of light and air cannot be established by prescription. Plaintiff had the exclusive right to the immediate use, possession and enjoyment of the air space above the building on its property. 1380 Madison Avenue, L.L.C. v. 17 East Owners Corp., was reported in the New York Law Journal on October 17, 2003. [2003 N.Y. Misc. LEXIS 1259]

Estimated Income Tax - Current Developments issued July 2, 2003 reported that the New York State Budget Bill amended Tax Law Section 658 to require a partnership, Subchapter K limited liability company or an S Corporation which has New York source income to pay estimated income tax on behalf of its partners, members or shareholders who are non-resident individuals or C corporations. A technical corrections Bill, delivered to the Governor for his signature on October 9, would exclude from this withholding requirement publicly traded partnerships under IRC Section 7704. It would also authorize the Commissioner of the State's Department of Taxation and Finance to waive the entity withholding requirement for partners, members or shareholders who are not subject to New York State income tax or who establish they are filing returns and paying estimated tax when due. It further authorizes the Commissioner to issue a waiver when it is determined that withholding is not necessary to ensure the collection of income tax on New York source income allocable to the non-resident or C corporation.

A lawsuit, *Roberts & Holland v. State of New York* (Index No. 112950/03), alleges that this withholding requirement unconstitutionally discriminates against non-resident taxpayers. In a decision issued September 16, Judge Lebedeff of the Supreme Court, New York County, denied the Plaintiff's request for an injunction

that would have barred the State from enforcing this law. Further argument on the constitutionality of the law is pending.

Estimated Personal Income Tax - Current Developments issued July 2, 2003 also reported that the New York State Budget Bill added Tax Law Section 663 which requires a non-resident individual, estate or trust conveying title to real property to pay estimated income tax to the State's Department of Taxation and Finance prior to recording of the deed. The technical corrections legislation pending signature by the Governor would authorize estimated tax to be paid directly to the recording officer. The legislation also provides that the recording of a deed will not be invalidated by reason of a deficiency in the payment of estimated personal income tax under Section 663.

Foreign Investment in Real Property Tax Act ("FIRPTA") – On August 5, 2003 the IRS issued new FIRPTA regulations that are published at 68 FR 46081. Effective November 3, 2003, if the transferor's taxpayer identification number ("TIN") is not provided (i) the IRS will not process an application for a withholding certificate, (ii) Form 8288-A ("Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests") will not be stamped to show receipt and will not be mailed to the taxpayer, and (iii) the transferor will be unable to obtain a credit for, or a refund of, tax withheld and paid. In addition, effective September 4, 2003, a transferor which is a domestic entity must include in its certification of non-foreign status a statement that it is not a disregarded entity, as defined in 26 CFR Section 1:1445-2(b)(2)(iii). A disregarded entity is "an entity separate from its owner under Section 301.7701.3 of [26 CFR] [a business entity with a single owner, such as an LLC with only one member]... a qualified REIT subsidiary as defined in [IRC] section 856(i), or a qualified subchapter S subsidiary under [IRC] section 1361(b)(3)(B)". If the transferor is a disregarded entity, its owner must certify non-foreign status to avoid FIRPTA withholding. The regulations are available at www.titlelaw-newyork.com/Mans/68FR46081.pdf.

The regulations also provide that the transferee in a Section 1031 tax-free exchange may not rely on a transferor's notice of non-recognition in a deferred exchange or when the transferor is receiving money or other property, i.e. boot.

Lien Law - Plaintiff filed a mechanics lien and a notice of pendency to foreclose, both of which (and the foreclosure complaint) named 32 AA Associates, LLC ("AA Associates") as the property owner. Before the lien and lis pendens were filed, AA Associates transferred title to 32 Sixth Avenue Company LLC ("32 Sixth"), in which AA Associates was the sole member. 32 Sixth and the fee mortgagee (whose lien would not be adversely affected by the mechanics lien) moved to dismiss the action and vacate the lis pendens. The plaintiff cross-moved to amend its mechanics lien to add 32 Sixth as the owner and also to amend its foreclosure complaint and its lis pendens to add 32 Sixth as a defendant. The Supreme Court, New York County, denied the motion to dismiss the action and granted the motions to amend the notice of lien nunc pro tunc and to amend the complaint and notice of pendency. Naming

AA Associates, the beneficial owner of the property, was only a "misdescription" of the name of the Owner of the property, and notice to 32 Associates constituted acceptable notice to 32 Sixth. (Both AA Associates and 32 Sixth had the same address and agent for receipt of service of process). Lien Law Section 7 provides that "failure to state the name of the true owner...or a misdescription of the true owner shall not affect the validity of the lien". Lien Law Section 12-a authorizes the court to permit an amendment of a notice of lien if it does not "prejudice an existing lienor, mortgagor or purchaser in good faith". Lien Law Section 32 states that the law relating to mechanics liens "is to be construed liberally" and "substantial compliance with its several provisions shall be sufficient for the validity of a lien". PM Contracting Co. Inc v. 32 AA Associates LLC was reported in the New York Law Journal on August 20, 2003.

Limited Liability Companies – Current Developments issued January 4, 2002 reported the decision of the Supreme Court, New York County, in Barklee Realty Co. v. Pataki. That case held that Section 206 of the Limited Liability Company Law, requiring publication of notice of its formation by a limited liability company, violated the plaintiff's rights to due process, equal protection of the law, and its right to access New York's courts. Under Section 206, absent compliance with the requirements for publication, an LLC cannot bring an action or special proceeding. The Supreme Court enjoined enforcement of the publication requirement. The Appellate Division, First Department, has reversed that decision, vacating the injunction issued by the lower court and holding Section 206 to be constitutional. According to the Court, "plaintiffs have not met their heavy burden of demonstrating unconstitutionality beyond a reasonable doubt". Barklee Realty Company LLC v. Pataki, decided by the Appellate Division on October 16, 2003, is reported at 2003 N.Y. App. Div. LEXIS 10678.

Mortgage Foreclosure – The Appellate Division, First Department, reversing the holding of the Supreme Court, Bronx County, held that a foreclosure sale was invalid since the terms of sale deviated from the judgment. The lower court had denied a motion by the assignees of the successful bidder at a foreclosure sale for an order compelling the referee to transfer the property to them without requiring that they pay outstanding real estate taxes and assessments prior to the transfer of title as required by the Terms of Sale. The Supreme Court also conditionally granted the plaintiff- bank's motion for an order declaring the assignees in default and their down payment forfeited. It afforded the assignees 10 days to either pay the taxes and close, or not pay the taxes and receive back their down payment. The judgment of foreclosure and sale provided, however, as required by RPAPL Section 1354(2), that unpaid real estate taxes were to be paid by the referee from the proceeds of the sale. The Appellate Division vacated the sale, ordered the down payment to be returned, and ordered a new auction held. According to the Appellate Division, "the terms of sale may not deviate from the judgment". Bank of New York v. Love, decided July 10, 2003, is reported at 763 N.Y.S. 2d 553.

Mortgage Recording Tax – The rate of mortgage recording tax on real property located, in whole or in part, in Allegany and Chautauqua Counties was increased to \$1.00 for each \$100.00 secured effective November 1, 2003.

New York City Real Estate Taxes - Pursuant to Chapter 63 of New York State's Laws of 2003 and New York City's Local Law 47 of 2003, a tax surcharge of 25%, computed on real estate taxes net of any abatements or exemptions, is being imposed on Class One real property owned by "absentee" landlords. Class One real property, under RPTL Section 1802, generally includes one-to-three family residential real property, and a condominium unit in property of three or less stories that has always been assessed as a condominium unit. It is expected that the surcharge, effective for the July 1, 2003-June 30, 2004 tax-year, will be first entered on the tax rolls in mid-November. The City's Department of Finance has issued an "Application to be Excluded From the Absentee Landlord Surcharge", which form can be downloaded at www.titlelaw-newyork.com/Forms/AbsenteeOwner.pdf. A property is exempt from the surcharge when the property is (i) the primary residence of the owner, (ii) occupied by the owner's parents or children, (iii) vacant or unoccupied, or (iv) occupied by someone other than the owner's parent or child but no rental income is received from the use of the property.

New York State Real Estate Transfer Tax – The address to which Form TP-584 ("Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Tax") and payment of the State Transfer Tax is to be mailed when the transfer does not require recording or recording will take place after the tax is paid has been changed to NYS Dept. of Tax & Finance, Misc. Tax InSourcing Unit, WA Harriman Campus, Building #8, Room 600, Albany, New York 12227.

Notice of Pendency – Current Developments issued November 15, 2002 reported on the Appellate Division, First Department, decision in *Campbell v. Smith* (747 NYS 2d 18). In that case, the Court reversed an Order of the Supreme Court, Bronx County, and granted the defendant's motion to dismiss the complaint in a mortgage foreclosure because the notice of pendency filed under CPLR Article 65 expired without being renewed. The Appellate Division has "recalled and vacated" its earlier determination. It has now held that the foreclosing plaintiff may file a RPAPL Section 1331 notice of pendency to complete the foreclosure even when the CPLR *lis pendens* has expired. The recent decision was reported in the New York Law Journal on October 16, 2003.

Recording Act – Current Developments issued January 4, 2002 reported the decision of the Supreme Court, Monroe County, in *Coco v. Ranalletta* (733 N.Y.S. 2d 849) holding that a mortgage executed by Richard A. Ranalletta had priority over an earlier recorded mortgage incorrectly identifying the mortgagor as Richard A. Ranaletta. The Court held that recording of the prior mortgage was not constructive notice to the second lender that had no actual knowledge of the other lien. The judgment of the lower court was unanimously affirmed by the Appellate

Division, Fourth Department in *Coco v. Ranalletta*, decided May 2, 2003 and reported at 759 N.Y.S. 2d 274.

Rights of First Refusal - A recorded lease surrender agreement granted the lessee a right of first refusal to purchase the property for \$75,000.00, which right would continue "until such time as Herbert R. Hermann [the property owner] divests himself" of the property. The sons of the late Mr. Hermann sought a Declaratory Judgment that the right of first refusal was unenforceable, which would enable them to sell the property for an agreed upon \$300,000.00. The Supreme Court, Westchester County, held the right of first refusal null and void. It did not bind successors and assigns and therefore expired on Mr. Hermann's death. Further, comparing the purchase price cap of \$75,000.00 against the purchase price of \$300,000.00 and the property's appraised value of \$275,000.00, the Court held that the right of first refusal was an unreasonable restraint on alienation. *Hermann v. AMD Realty, Inc.*, decided December 19, 2003, is reported at 765 N.Y.S. 2d 232.

"The Stoler Report" – New York's only television talk show on real estate trends in the tri-state region, hosted by First American Vice President Michael Stoler, is on CUNY TV, Channel 75. The program on October 27, "Commercial & Residential developments in Lower Manhattan, Two years After the Tragic Events of 9/11" will be re-broadcast on November 1st at 4 PM, November 2nd at 8:30 PM, November 5th at 11 PM, and November 11th at 12 Midnight. Michael Stoler's guests for this program are Caleb Koeppel, Principal, Koeppel Companies & President, KTR Newmark; William Rudin, President, Rudin Management; Tom Elghanayan, President, Rockrose Development Corporation; and Robert Ivanhoe, National Head, Real Estate Practice, Greenberg Traurig LLP. Live broadcasts and Webcasts of programs can be viewed at the www.stolerreport.com. Information can be obtained at the site, or by e-mail to mstoler@firstam.com.

Tax Sales – After entry of a judgment of foreclosure and sale of a tax lien, and three days before the auction sale, the property owner paid the amount due into the designated lockbox. The referee was not, however, notified of the payment until after the sale. The Appellate Division, Second Department, reversing the order of the Supreme Court, Kings County, reinstated the judgment of foreclosure and sale. Although the owner could have redeemed prior to the auction sale, it did not pay the amount due into court and obtain a stay of the sale as required under RPAPL Section 1341 ("Payment into court of amount due"). *NYCTL 1996-1 Trust v. LFJ Realty Corp.*, decided August 11, 2003, is reported at 763 NYS 2d 836.

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