



First American Title Insurance Company of New York CURRENT DEVELOPMENTS

Bankruptcy – Plaintiff entered into a contract with a Trustee in Bankruptcy to purchase certain real property, subject to “higher and better offers”. The contract provided that the Plaintiff would be paid a break-up fee upon the closing pursuant to a third-party offer. In the Order approving the sale to the highest bidder at the first auction sale, the Bankruptcy Court approved the fee payable “upon the closing of the transactions contemplated by the Order”. The successful bidder defaulted, and the property was sold at a second auction sale in which the Plaintiff did not participate. The Bankruptcy Court, Southern District of New York, denied the Plaintiff’s motion for an order directing the Trustee to pay it the break-up fee, and the United State District Court affirmed. The District Court held that the Bankruptcy Court Order authorized payment of the breakup fee only in connection with a closing resulting from the first auction sale. *Specialty Malls of Tampa Inc. v. Riverbank Landscape Ltd.*, decided July 14, 2004, is reported at 2004 U.S. Dist. LEXIS 13572.

Entities – Chapter 344 of the Laws of 2004 amends the Limited Liability Company Law, Business Corporation Law, Partnership Law, and Not-for-Profit Corporation Law to require, effective August 10, 2004, that the name of any domestic or authorized foreign limited liability company, business corporation, not-for-profit corporation or limited partnership be such as to distinguish it from the name of any other domestic or authorized foreign limited liability company, corporation, or limited partnership on file with the New York Department of State. The names of existing entities are “grandfathered”. The Chapter can be found on the Internet at <http://assembly.state.ny.us/leg/?bn=S05937&sh=t>.

Joint Tenants – Title was held by a brother and his sister as joint tenants. The brother conveyed his joint tenancy interest to himself as a tenant in common by a deed recorded on July 8, 1994. On his death an action was brought by his daughter claiming that she succeeded to his tenancy in common interest. The Supreme Court, Kings County, dismissing the action for the failure to state a claim on which relief may be granted, held that the brother’s deed to himself did not validly sever the joint tenancy and the sister had title to the entire property as the surviving joint tenant. Prior to August 19, 1994, the effective date of Real Property Law Section 240-c (“Joint Tenancy Severance”), to unilaterally convert a joint tenancy to a tenancy in common, a joint tenant had to convey his interest to a straw man who would convey back to that person a tenancy in common interest. The Court would

not retroactively apply the statute. *Hardin v. Rubin* was reported in the New York Law Journal on July 28, 2004.

Medicaid – The Appellate Division, First Department, reversing the Order of the Supreme Court, New York County, held that the value of the defendant’s home could be included as an asset available to pay the cost of medical care provided to his wife, notwithstanding that the deed to him from his father recited that his father was to live in the house for the remainder of his life. The defendant contended that his interest in the property had no market value due to the restriction benefiting his father and, therefore, the defendant’s remainder interest in the home would not be an available resource. *Commissioner of the Department of Social Services of the City of New York, v. Morello*, decided June 22, 2004, is reported at 779 N.Y.S. 2d 61.

Mortgage Foreclosure – The holder of the senior mortgage being foreclosed also held a second mortgage discharged by the erroneous recording of a satisfaction of mortgage. The second mortgage did not cover all of the property encumbered by the first mortgage or all of the property encumbered by a third, privately held mortgage. Instead of reinstating the second mortgage, the lender recorded a new mortgage (“Replacement Mortgage”) on all of the property. According to the Appellate Division, Second Department, the note secured by the second mortgage not having been satisfied, the mortgagee retained an equitable mortgage represented by the Replacement Mortgage and the Replacement Mortgage had the same priority as the original, second mortgage to the extent of the property subject to the lien of the second mortgage. Accordingly, the Court held that surplus funds from the foreclosure sale attributable to the sale of the parcels not subject to the lien of the second mortgage would be applied to the third mortgage. Any remaining surplus monies would be applied to a mortgage made to the SBA (the priority of which relative to the replacement mortgage could not be established) and then to the Replacement Mortgage before any other surplus funds would be paid to the third mortgagee. *Citibank, N.A. v. Kenney*, decided August 9, 2004, is reported at 2004 N.Y. App. Div. LEXIS 10183.

Mortgage Foreclosure – Chapter 71 of the Laws of 2002, effective May 21, 2002, prohibits the foreclosure of a mortgage given to secure payment of legal fees in matrimonial actions, including those mortgages obtained prior to that date. The mortgages at issue were executed in 1988 and 1991 to secure the payment of legal fees charged for representation in a matrimonial action. The Appellate Division, Third Department, held that the application of Chapter 71 to mortgages made prior to its enactment was an unconstitutional impairment of contracts. The Court noted that 22 NYCRR 1400.5(b) and 22 NYCRR 1200.11(c)(2)(iii), prohibiting foreclosure of a mortgage taken on a client’s primary residence by an attorney in a domestic relations matter, became effective in 1993 and would not be applied retroactively. *Schantz v. O’Sullivan*, decided July 29, 2004, is reported at 2004 N.Y. App. Div. LEXIS 10049.

Mortgage Foreclosure – The Supreme Court, Queens County, held that because surplus money resulting from a foreclosure sale is personal property, half of the surplus, representing the interest of the husband-mortgagor in the property as a tenant by the entirety, was subject to the interest of the State under a tax warrant it had docketed against the husband. The Court also held that the husband could not claim a Homestead Exemption under Civil Practice Law and Rules Section 5206 because the exemption only applies to actions to enforce money judgments. Accordingly, one-half of the surplus monies, after payment of the referee's fee, was to be paid to the State of New York. *Greenpoint Savings Bank v. Papoutsakis* was reported in the New York Law Journal on August 17, 2004.

Nassau County/Payment of New York State Real Estate Transfer Tax – By her letter dated July 14, 2004 the Nassau County Clerk has advised the New York State Land Title Association that in all instance effective August 1 the Clerk's office will not stamp the Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax (Form "TP-584") to acknowledge receipt of the State's Transfer Tax until the related conveyance is accepted for recording. Interest and penalties accrue if the Tax is not paid within fifteen days following the date of transfer. When there is a concern that a taxable transfer may not be accepted for recording in Nassau County within fifteen days form the date of transfer, Form TP-584, a copy of the completed form, payment of the Transfer Tax, and a return envelope may be sent by overnight delivery to New York State Department of Taxation and Finance, Misc. Tax Insourcing Unit, W.A. Harriman Campus, Building #8, Room 700, Albany, New York 12227. The copy of Form TP-584, returned stamped by the State, must be submitted with the instrument being recorded.

New Rochelle Real Estate Taxes – Current Developments issued September 5, 2003 reported on changes to the real estate tax payment dates for property located with the City of New Rochelle in Westchester County. There have been further changes. County real estate taxes for 2005, previously due in March, will be due on June 1, payable without penalty by June 30, for the January 1 through December 31 tax year. The School Tax for the period July 1 through June 30, beginning with the 2004-2005 tax year, will be due in two payments. The first installment of 50% will be due October 1, payable without penalty by October 31. The balance of the tax will be due April 1, payable without penalty by April 30. School taxes had been due in three installments for the 2003-2004 tax year, and semi-annual payments were required in prior years. The City Tax, for the period January 1 through December 31, will continue to be due in one annual payment on January 1, payable without penalty until January 31. For further information contact Jean Partridge at 914-428-3433.

New York City Real Estate Taxes – Part T of Chapter 60 of the Laws of 2004, signed into law on August 20, adds Section 11-128 ("Payment of Real Property Taxes by Electronic Funds Transfer") to the Administrative Code of the City of New York, authorizing the Commissioner of the City's Department of Finance to require the

payment of real estate taxes by electronic funds transfer. This may be required for properties having an annual real estate tax liability equal to or greater than \$300,000, and for real estate tax payments aggregating \$300,000 or more made by a single entity on behalf of more than one taxpayer, such as when taxes are paid by a mortgage escrow agent. Taxes are to be paid either by a taxpayer initiated electronic funds transfer or by an automatic debit program pursuant to which the Department debits an identified account. A penalty of 1% of the amount of a tax payment will be charged when payment by electronic funds transfer, once required, is made by any other method after issuance of a warning notice. Notice of the date on which a property owner or its designated party must enroll in the electronic payment program will be mailed to the party designated on a filed owner's registration card. A waiver for "hardship" may be made by written application to the Department.

New York City Real Property Transfer Tax ("RPT") – The New York City Department of Taxation and Finance has ruled that the commercial transfer tax rate of 1.425% of consideration applies when separate deeds pursuant to separate contracts of sale, each having a consideration of \$500,000 or less, are executed to the same grantee by tenants-in-common, notwithstanding that the aggregate amount paid by the purchaser exceeds \$500,000 and the holders of the tenant-in-common interests take back a single purchase money note and mortgage. (The commercial transfer tax rate of 2.625% applies when consideration is more than \$500,000). Ruling FLR#044823-021, issued May 26, 2004, is identified as Ruling 04-4823 at <http://www.ci.nyc.ny.us/html/dof/html/redacted.html#rptt>.

Partition – The Appellate Division, Second Department, reversing the holding of the Supreme Court, Nassau County, denying the defendants' motion to dismiss, held that a partition action could not be brought by the purchaser at a judicial sale of the ownership interest of a tenant by the entirety. Under Article 9 of the Real Property Actions and Proceedings Law partition cannot be maintained when the property is owned by the entireties. The plaintiff did not raise a triable issue of fact as to the defendants' marital status. *Scarison, Inc. v. Paracha*, decided May 10, 2004, is reported at 777 N.Y.S. 2d 131.

Perpetuities – The deed from a Hospital for an adjoining property, the condominium documents for a medical office building constructed on the adjoining property, and the condominium unit deeds each provided that, except as authorized in writing by the hospital, only "qualified persons" could own or occupy the premises. "Qualified persons" was defined to be doctors and dentists who were active or provisional members of the Hospital or applicants for such status. The Supreme Court, Albany County, holding that the restriction did not violate the rule against perpetuities (Estates, Powers and Trusts Law, Section 9.1.1) since the restriction did not prevent the creation of future interests, also held that the restriction was void and unenforceable as an unreasonable restraint on alienation. The Court noted that the plaintiffs' units had been vacant for a number of years and that there was a 45% vacancy rate in the condominium. *WFR Associates v.*

Memorial Hospital, Albany, NY, decided April 18, 2004, is reported at 775 N.Y.S. 2d 814.

Statute of Frauds – The Supreme Court, Kings County, held that a signature at the bottom of an email is sufficient to satisfy the requirement under New York’s statute of Frauds (General Obligations Law, Section 5-701) that a written agreement be “subscribed by the party to be charged therewith”. However, the Court also held that there was no binding contract of sale since the emails between the parties did not set forth an agreement as to all of the essential terms of a contract of sale. The amount of the contract deposit and the disposition of a commercial lease on the property were not dealt with in the exchange of emails. *Rosenfeld v. Zerneck*, decided May 4, 2004, is reported at 776 N.Y.S. 2d 458.

“The Stoler Report: Real Estate Trends in the Tri-State Region” – New York’s only television talk show on real estate trends in the tri-state region, hosted by First American Vice-President Michael Stoler, returns to CUNY TV, Channel 75 for its fourth season with “Developments in Downtown Manhattan Three Years After 9-11” which will air on Monday, September 27 at 10 AM, and be rebroadcast on September 27 at 10 PM, October 2 at 5 PM, October 3 at 8:30 AM, October 7 at 11 PM, October 10 at Midnight, October 12 at Midnight, October 14 at 1 AM, October 19 at 5 AM, October 20 at 11 PM and October 21 at 1 AM. Michael Stoler’s guests for this program will be Kamram Elghayan, Rockrose Organization, Joseph Moinian, The Moinian Organization, Kent Swig, Swig Burris Equities, Robert Verone, Wavhovia Securities, and Steven Witkoff, The Witkoff Organization. Live broadcasts and later Web Casts of programs can be viewed on the Internet at <http://www.stolerreport.com> or at www.cuny.tv. Michael Stoler also authors the “Commercial Real Estate” column in each Thursday’s edition of the New York Sun.

Yonkers Real Estate Taxes – One-third of the 2004-2005 City Tax for the City of Yonkers in Westchester County will be due on each of September 13, 2004, October 6, 2004, and January 6, 2005. For the 2003-2004 tax year the first payment was due August 4, 2003. Interest for the first payment, if the payment is not made by September 13, will be charged at 2.05% to September 30. The City of Yonkers has also advised that due to an error affecting certain tax bills, any 2004/2005 City Tax with a “sundry” item (typically for past unpaid water charges) or an exemption other than a Basic Star Exemption will be subject to correction. For further information contact Jean Partridge at 914-428-3433.

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