



First American Title Insurance Company of New York CURRENT DEVELOPMENTS

Bankruptcy/Transfer Tax – The United States Bankruptcy Court for the Southern District of New York held that the auction sale of twenty-three parcels of real property by a debtor in possession prior to confirmation of a plan of reorganization was exempt from imposition of New York City’s Real Property Transfer Tax under Section 1146(c) of the Bankruptcy Code since the sale was “necessary and integral to the anticipated confirmation of a chapter 11 plan in this case”. The Court indicated that its ruling would also apply to application of the mortgage recording tax if the debtor needed to arrange a financing prior to confirmation of a plan of reorganization. In *Re Beulah Church of God in Christ Jesus, Inc.*, decided October 18, 2004, is reported at 316 B.R. 41.

Closing Procedures – To confirm the identity of the parties to a real estate transaction and prevent fraud, First American - New York is requesting that all persons involved in a transaction present to the title closer two forms of identification, at least one of which contains a photograph.

Contracts of Sale - The Supreme Court, Nassau County, granted the defendants’ motion for summary judgment and dismissed an action brought by the seller of real property seeking to retain the contract deposit as liquidated damages. Although the contract of sale was signed, and the down-payment was delivered to the seller’s counsel, material terms were not agreed upon. A letter agreement modifying material terms of the contract was signed, and then modified, by counsel for the parties. The Court held that there was no binding contract and granted the Defendants’ motion for summary judgment dismissing the action. The contract, as amended by the letter amendment, did not comply with the Statue of Fraud’s (General Obligations Law Section 5-703(2)) which requires that a contract for the sale of real estate be in writing signed by the party to be charged. Defendants’ counsel did not have written authorization from his clients to agree to the change in terms. *Gottlieb v. Gurrieri*, decided October 12, 2004, is reported at 2004 N.Y. Misc. LEXIS 1750.

Credit Line Mortgages – The Chapter 7 trustee of the estate of the mortgagor of an unrecorded credit line mortgage securing a revolving note sought a determination that the credit line mortgage was an encumbrance superior to a money judgment. The judgment creditor asserted that under Real Property Law Section 281 (Credit Line Mortgage) a mortgage must be recorded to create a lien to secure the repayment of subsequent advances. Section 281 provides, in part, that a credit line

mortgage secures “not only the original indebtedness but also the indebtedness created by future advances thereunder made within twenty years from the date of the recording of such credit line mortgage”. However, the United States Bankruptcy Court for the Western District of New York held that a judgment creditor is not protected by New York’s Recording Act and does not have priority over advances under an unrecorded credit line mortgage. According to the Court, “(n)othing in [Section 281] establishes that advances before recordation are necessarily unsecured...” In *Brosnahan, Jr., Debtor v. Brosnahan*, decided July 20, 2004, is reported at 312 B.R. 220.

Land Use – The Zoning Board of Appeals of the Village of Mamaroneck, in Westchester County, denied the Plaintiff’s application for modification of its special permit to enable renovations and improvements to made to its existing buildings and to construct a new building on its property. Plaintiff, which operates a religious day school on its property, then brought an action alleging that that the Village violated the Religious Land Use and Institutionalized Persons Act of 2000 which provides, in part, at 42 U.S.C. Section 2000cc(a)(1), that “no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person...unless the government demonstrates that imposition of the burden...(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means or furthering that compelling governmental interest”. The United States District Court for the Southern District of New York granted summary judgment to the Plaintiff and ordered the Defendants to approve the application. The United States Court of Appeals for the Second Circuit vacated the judgment and remanded the case for further proceedings. It found that entry of summary judgment was improper as there were issues of fact essential to a decision in the case on which there was reasonable disagreement. *Westchester Day School v. Village of Mamaroneck*, decided September 27, 2004, is reported at 386F.3d 183.

Mitchell-Lama Housing – The tenants of the Cooper Gramercy Mitchell-Lama housing complex in Manhattan brought an action challenging the limited profit housing company-ground lessee’s withdrawal of the property from the Mitchell-Lama program for publicly assisted housing. The Appellate Division, First Department, affirmed the Order of the Supreme Court, New York County, dismissing the complaint. There is no requirement that publicly assisted housing be provided for the entire seventy-five year term of the ground lease and, therefore, the ground lessee could withdraw the property from the program under Section 35 of the Private Housing Finance Law after twenty years of participation. *Concerned Cooper Gramercy Tenants’ Association v. New York City Educational Construction Fund*, decided December 2, 2004, is reported at 2004 N.Y. App. Div. LEXIS 14702.

New York City Real Estate Taxes – The first half 2004-2005 real estate tax bills in the City of New York applied the 2003-2004 real estate tax rates. New York City’s Department of Finance has adjusted the real estate taxes payable in the second half of current fiscal year 2004-2005 to account for the changed tax rates. The increase in tax applicable to the 1st half of the tax year is payable as part of the 2nd half tax bill and equally as between the 3rd and 4th tax quarter tax bills for taxpayers making quarterly payments.

The rate for each \$100 or assessed valuation for fiscal year 2004-2005 was changed for Class One from 14.550 to 15.094; for Class Two from 12.620 to 12.216; for Class Three from 12.418 to 12.553; and for Class Four from 11.431 to 11.558. Class One generally includes one-to-three family residential real property, small stores and offices with one or two apartments attached, vacant land zoned for residential use, and most condominiums that are not more than three stories. Class Two includes all other real property that is primarily residential, such as cooperative buildings. Class Three includes utility real property. Class Four includes all commercial and industrial real property not within the other three tax classes.

New York City Real Property Transfer Tax – Current Developments issued October 28, 2004 reported the holding of the Chief Administrative Law Judge of the New York City’s Tax Appeals Tribunal in Matter of the Petition of Cambridge Leasing Corporation (TAT (H) 03-11(RP)) that the sale of multiple individual residential condominium units is a sale of residential real property subject to the lower RPTT rates. Another Administrative Law Judge, in Matter of the Petition of Daniel and Sheila Rosenbaum (TAT (H) 01-31 (RP)) decided November 9, 2004 has also held that the sale of individual residential condominium units is subject to the lower rates. Matter of the Petition of Cambridge Leasing Corporation is on appeal; the Department of Finance is applying the commercial transfer tax rates to so-called “bulk sales” pending the determination on appeal.

New York City Real Property Transfer Tax Return – An RPT filing fee has not been charged for the filing of an RPTT in connection with a transfer by deed or the assignment of a lease in a “qualified leasehold condominium” since January 1, 2003. It has not been required to be paid in connection with any other type of transfer of an interest in real property since April 1, 2004. The filing fee was erroneously required to be paid on the filing of an RPTT in connection with non-deed transfers between January 1, 2003 and March 31, 2004. A “Co-Op RPTT Filing Fee Refunds” form for obtaining a refund of the filing fee paid in connection with the transfer of a cooperative apartment or another type of transfer not involving a deed has been posted at <http://nyc.gov/html/dof/html/emailcoopfee.html>.

New York State Transfer Tax, Mortgage Recording Tax, and Non-Resident Estimated Income Tax Forms – The New York State Department of Taxation and Finance has posted to its WEB site a November 2004 revision of the “Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax” (“TPF-584”) and a December 2004 revision of the “Mortgage Recording Tax Return’ (“MT-15”). The MT-15 is used when the mortgaged property is in more than one county and different mortgage tax rates apply. The revised TP-584 and Instructions are at http://www.tax.state.ny.us/forms/form_number_order_st_y.htm. See http://www.tax.state.ny.us/forms/form_number_order_mt_pt.htm for revised Form MT-15. ACRIS, New York City’s Automated City Register Information System, continues to use the October 2003 version of TP-584 and the Department advises that it will presently accept that earlier version.

2005 Forms IT-2663 (“Nonresident Real Property Estimated Tax Payment Form”) and IT-2664 (“Nonresident Cooperative Unit Estimated Income Tax Payment Form”) for transfers after December 31, 2004 but before January 1, 2006, with Instructions, should be posted on the WEB on or about January 1, 2005 at http://www.tax.state.ny.us/forms/form_number_order_income.htm. The new 2005 Forms had been posted but were withdrawn by the Department to ensure they were not inadvertently used for transfers in 2004.

Notices of Pendency – In *Wilson v. Power House Development Corp.*, decided November 15, 2004, and reported at 783 N.Y.S. 858, the Appellate Division, Second Department, reversed an Order of the Supreme Court, Queens County and reinstated a notice of pendency in an action to foreclose a vendee’s lien and recover a down payment made on a contract for the sale of real property. The judgment demanded would affect the title to real property. *Wilson v. Power House Development Corp.*, decided November 15, 2004, is reported at 783 N.Y.S. 858.

Restrictive Covenants – In exchange for donations made by two private, charitable foundations to enable the purchase of property in Westchester County in 1979 the entity that purchased the property with those funds agreed that the property would remain used as a nature preserve. The Supreme Court, Westchester County, in an action brought to determine claims to the property, held that the restrictive covenant did not run with the land and, as noted in a companion case, was “invalid. According to the Appellate Division, Second Department, in affirming the decision of the lower court, “(t)he agreement was not part of the grantor’s deed and the defendant’s predecessors in interest did not own property which would be benefited by the enforcement of the covenant”. *Cappelli Armonk, LLC v. Village/Town of Mount Kisco*, decided November 15, 2004, is reported at 2004 N.Y. App. Div. LEXIS 13632. The companion case is *Village/Town of Mount Kisco v. Rene Dubos Center for Human Environments, Inc.*, 2004 N.Y. App. Div. LEXIS 13694.

“The Stoler Report: Real Estate Trends in the Tri-State Region” – New York’s only television show on real estate trends in the tri-state region, hosted by First American Vice-President Michael Stoler, airs on CUNY TV, Channel 75. “The State of Real Estate for 2005-Real Estate Leaders’ Perspective”, first broadcast on December 27, will be rebroadcast on January 1 at 5 PM, January 2 at 8:30 AM, January 5 at 11 PM, January 6 at 1 AM, January 11 at Midnight, January 15 at 2 PM, January 16 at Midnight, January 18 at 5 AM, January 20 at 1 AM, and January 26 at 11 PM. Michael Stoler’s guests are James Fitzgerald, Senior Vice-President and Head of Real Estate for North America, HSH-Nordbank, Norman Sturner, Principal and Co-Founder, Murray Hill Properties, Thomas Lydon, Jr., President, The City Investment Fund, L.P., Howard Lorber, Chairman, Prudential Douglas Elliman Real Estate, Scott Latham, Executive Director, Capital Markets Group, Cushman & Wakefield, and Michael Belfonti, President and CEO, Belfonti Associates. WEB Casts are at <http://www.stolerreport.com>.

Terrorism Insurance – The Appellate Division, First Department, affirming a decision of the Supreme Court, New York County, held that the Plaintiff was obligated to obtain additional terrorism coverage under mortgage provisions requiring the property to be insured against “any peril now or hereafter included within the classification ‘All Risk’ or ‘Special Perils’” and requiring “such other insurance...as Lender from time to time may reasonably request against such other insurable hazards which at the time are commonly insured against” for comparable properties in Manhattan. The Court also held that the lender was authorized under the mortgage to obtain such coverage at the plaintiff’s expense. *BFP 245 Park Co., LLC v. GMAC Commercial Mortgage Corporation*, decided November 30, 2004, is reported at 2004 N.Y. App. Div. LEXIS 14394.

Zoning – The Supreme Court, New York County, granting the defendants’ motion for summary judgment, ruled that the 2003 amendments to the New York City Zoning Resolution and the Zoning Map, changing the zoning for a 10-block area within the South Street Seaport Historic District, are valid and enforceable. A property owner within the District sought a declaratory judgment that the amendments were aimed solely at preventing the development of its property and was therefore an unlawful taking of its property without compensation, and that the amendments constituted impermissible reverse spot zoning. *Peck Slip Associates, L.L.C. v. The City Council of The City of New York and The City of New York*, decided September 29, 2004, is reported at 2004 N.Y. Misc. LEXIS 2265.

The officers and employees of First American wish you health and prosperity in the New Year.

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