



**First American Title Insurance Company of New York
CURRENT DEVELOPMENTS**

Bankruptcy - A deposit of \$1,000,000 was required to bid at an auction sale of property owned by a Chapter XI Debtor. Under the terms of a bankruptcy court order, if the successful bidder failed to tender the balance of its bid by a certain date its entire deposit would be forfeited. The highest bidder failed to complete the purchase and the property was sold to a different bidder for a purchase price \$50,000 less than the first highest bid. The bankruptcy judge granted the escrow agent's motion to transfer the entire forfeited deposit to the Debtor and the first highest bidder appealed. After stating that a bankruptcy court may provide for the forfeiture of a purchaser's deposit upon default so long as the court explicitly indicates the conditions of the forfeiture, as in this case, the United States District Court for the Southern District of New York remanded the escrow agent's motion to the bankruptcy court for a determination of whether, based on equitable principles, the Debtor was entitled to retain as a "substantial windfall" an amount in excess of the difference between the amount of the forfeited deposit and the final purchase price. In Re Target Two Associates LP was reported in the New York Law Journal on June 9, 2005.

Condominiums - The Appellate Division, First Department, has held that a condominium's by-laws can be amended to restrict the sale or lease of certain apartments only to owners of other units within the same building. The restriction applied to the sale or lease of what the Court characterized as "small, relatively inexpensive studios" in a luxury building with other "large, expensive multi-bedroom units". According to the Court, the "restriction on the leasing of studios does not constitute an unreasonable restraint on alienation", "nor can it be said that the purpose of the restrictions on the sale of the studio units - to preserve the character of the condominium - is unreasonable". Demchick v. 90 East End Avenue Condominium, decided May 31, 2005, is reported at 2005 NY Slip Op 04322 and can be obtained at www.courts.state.ny.us/reporter/3dseries/2005/2005_04322.htm.

Cooperatives/Flip Tax - The seller of a cooperative unit in Westchester County sued the cooperative corporation for the return of a flip tax he paid as required by a resolution approved by a vote of the shareholders of the cooperative corporation after the plaintiff entered into his contract of sale. Only Board approval of the sale and the buyer's obtaining mortgage financing remained to be completed after the flip tax was adopted. The Village Court, in the Village of Tuckahoe, Westchester County, ordered the return of the flip tax to the plaintiff since the contract was binding between the parties before the flip tax was adopted. The Court indicated

that “it would be bad public policy to put the beneficiary of the flip tax, the cooperative association, in a position where by delaying the approval of a candidate, it could insure (sic) application of the flip tax”. *Lioi v. Westview Equities*, decided May 23, 2005, is reported at 2005 N.Y. Misc. LEXIS 1016.

Marketability of Title - An above-ground pool being installed collapsed into an undisclosed and hidden in-ground swimming pool. The building permit for the hidden pool was marked “void” on the Town’s records. The new owner of the property brought an action against the former owner, the Town, the Agent, and the title insurer the Agent represented alleging, in part, that the Agent and the title insurance company were responsible for damages incurred by the plaintiff as the result of the Agent’s negligent examination of the Town’s records. The action against the Agent was dismissed, but the Supreme Court, Nassau County, denied the title insurer’s motion to dismiss the complaint for the failure to state a cause of action. According to the Court in *Sabbagh v. Pizzuro*, the title company “insured against the ‘unmarketability of the title’... [and] given the circumstances herein, there may be a cloud on title because there now exists an illegal in-ground structure for which the building permit has been cancelled”. (This decision, reported in the *New York Law Journal* on September 1, 2004, was criticized in “Title Insurers Sink in the Pool of Unmarketability”, an article published in the *New York Law Journal* on November 26, 2004). On April 19, 2005, following reargument, the Court issued an Order dismissing the action against the title insurer for the failure to state a cause of action. According to the Court, the title company “only insured against the unmarketability of title to the subject premises and not against the Town’s regulation of the property; the questionable legality of the hidden in-ground pool and the lack of a valid building permit pertain only to public regulation of the use of the property which are not impairments on title that affect its marketability and are, thus, not within the scope of coverage afforded by the title policy”.

Mortgage Foreclosures – A senior mortgagee, having obtained a judgment in France on obligations secured by two mortgages on a property in Manhattan, commenced an action to foreclose its mortgages. A junior mortgagee moved to dismiss the complaint asserting that the action was barred by Real Property Actions and Proceedings Law Section 1301(1) (“Separate Action for Mortgage Debt”). Section 1301(1) provides, in part, that “(w)here final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment.....and has been returned wholly or partly unsatisfied”. The Plaintiff contended that the requirement of Section 1301(1) does not apply in the case of a foreign judgment. The Supreme Court, New York County, however, granted the junior mortgagee’s motion to dismiss. According to the Court, “it is the location of the property within the State, not where the remedy is pursued, that determined the applicability of the election of remedies bar in RPAPL 1301(1)”. *CDR Creances S.A. v. Euro-American Lodging Corporation* was decided on February 16, 2005.

Mortgage Foreclosure - The United States District Court for the Southern District of New York held that a contract vendee, whose contract was recorded prior to commencement of a mortgage foreclosure, could redeem the mortgage and receive a deed to the property notwithstanding that the foreclosure sale had been held since the vendee had not received notice of the action. In Re Oligbo was reported in the New York Law Journal on April 18, 2005.

Mortgage Recording Tax/Aggregation - Current Developments issued April 18, 2005 reported that there would be an increase of \$.05 per \$100 in mortgage recording tax rates in the City of New York and in Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester counties effective June 1, 2005. The Technical Services Division, of the New York State Department of Taxation and Finance has issued Memorandum TSB-M-05(4)R, "Increase in the Mortgage Recording Tax in the Metropolitan Commuter Transportation District", in connection with the tax increase setting forth information regarding the increase. According to the Memorandum, "(i)n cases where this aggregation clause is applied to a mortgage recorded prior to June 1, 2005, and a mortgage recorded on and after June 1, 2005, the additional tax imposed under section 253.2(a) at the higher MCTD rate [the increase effective June 1] will not apply to the mortgage recorded prior to June 1, 2005". The Memorandum, dated May 9, 2005, was posted on May 10, 2005 at http://www.tax.state.ny.us/pubs_and_bulls/memos/mortgage_rec_memos.htm.

Mortgage Recording Tax/New York State Transfer Tax - New York State's Office of Tax Policy Analysis's Annual Statistical Report of 2003-2004 New York State Tax Collections is published at www.tax.state.ny.us/statistics/stat_fy_collections.htm. According to the Report, the New York State Real Estate Transfer Tax collected in Fiscal Year 2004 was \$510,442,500. Mortgage Recording Tax collected in Fiscal Year 2004 was \$2,057,255,620. The State's Fiscal Year is April 1-March 31.

New York City Real Estate Taxes - Current Developments issued September 8, 2004 reported that the Administrative Code of the City of New York had been amended by Chapter 60 of the Laws of 2004 to authorize the Commissioner of the Department of Finance to require owners of properties having an annual real estate tax liability equal to or greater than \$300,000, and entities paying real estate taxes aggregating \$300,000 or more on behalf of more than one property owner, to pay real estate taxes by electronic funds transfer ("EFT"). On April 20, 2005 the Department of Finance issued its Memorandum No. 05-2-R ("Mandatory Payment of Real Property Taxes") advising that payment by EFT will, in such instances, be required beginning with tax payments due July 1, 2005. The Memorandum, explaining the scope of the law and how it will be administered, provides, however, that "(t)he first time an electronic payment is required, but is paid by another means (such as by check), Finance will mail a warning notice listing the requirement to pay electronically and the penalties for failing to do so. For each subsequent violation, a penalty of one percent of the tax installment will be imposed. This

penalty will accrue interest and will be a lien on the property that can be included in the tax lien sale or a foreclosure". The Finance Department's Memorandum can be downloaded from <http://www.titlelaw-newyork.com/Mans/Finance-05-2-R.pdf>.

New York City Real Property Transfer Tax ("RPTT") – 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. Current Developments issued December 27, 2004 reported that an Administrative Law Judge, in Matter of the Petition of Daniel and Sheila Rosenbaum (TAT (H) 01-31 (RP)), decided November 9, 2004, held that the sale of multiple individual residential condominium units is subject to the lower RPTT rates. The Deputy Chief Administrative Law Judge of the New York City Tax Appeals Tribunal has since also held, in Matter of the Petition of David Gruber (TAT(H) 03-7, 03-8 and 03-9), decided May 5, 2005, that the transfer of multiple residential condominium units is the sale of residential property subject to the lower rates. (The Judge also held that even if bulk sales were subject to the higher rates, the transfers of the units in this case were not a bulk sale since the units were to be used by the purchaser as a single residence). Matter of the Petition of Cambridge Leasing Corporation is on appeal. Notwithstanding these decisions, pending the determination of the appeal in Petition of Cambridge Leasing Corporation, the Department of Finance is applying the commercial transfer tax rates to so-called "bulk sales".

Richmond County – Effective June 1, 2005 the Richmond County Clerk is requiring that each real property document to be submitted for recording be accompanied by an electronic cover page that will be recorded as a part of that document. The cover page is at the County Clerk's website, www.richmondcountyclerk.com.

"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. WEB Casts are at <http://www.stolerreport.com>.

The program, "Hospitality Industry in the Tri-State Region", first broadcast on May 30, is being rebroadcast on June 18 at 4PM, June 19 at 1PM, June 21 at 5AM, and June 23 at 11PM. Michael Stoler's guests for this program are Frank Anderson, Senior Vice-President and International Head of Hospitality & Leisure, HSH Nordbank AG, New York Branch, Richard Born, Principal, BD Hotels LLC, Sam Chang, President, MCSAM Hotels LLC, Jeffrey Eisenberg, Managing Director, Starwood Capital Group, Mark Gordon, Principal and Managing Director, International Lodging & Leisure Group, Sonnenbelick-Goldman, and Timothy Haskin, Executive Vice-President and Managing Director, Tishman Hotel Corporation.

The program “Long Island City, Flushing, Williamsburg, Greenpoint, Brooklyn & Queens - Industry Leaders Perspective” will be first broadcast on June 27 at 10 AM. It will be rebroadcast on June 27 at 4 PM and 10 PM, July 2 at 5 PM, July 3 at 8:30 AM, July 5 at 11 PM, July 7 at 1 AM, July 9 at 2 PM, July 12 at Midnight, July 16 at 4 PM, July 17 at 1 PM, July 19 at 5 AM, and July 21 at 11 PM. Michael Stoler’s guests for this program are Shaya Boymelgreen, Principal, Lev Boymelgreen Development, Jeffrey Levine, President, Levine Builders, Jason Muss, Executive Vice-President, Muss Development Company, Alan Suna, Chief Operating Officer, Silvercup Studios, Sam Suzuki, Managing Director, Vintage Group, and Frank Zuckerbrot, President, Shalom & Zuckerbrot.

Tax Lien Sales - Under Section 11-335 of the New York City Administrative Code “(a) plaintiff in an action to foreclose a tax lien shall recover reasonable attorney’s fees for maintaining such action”. Applying Section 11-335, the Supreme Court, Kings County, set aside a foreclosure sale to enforce a \$59,000 tax lien since the judgment of foreclosure and sale included \$80,000 in legal fees. According to the Court, “inflated legal fees in foreclosure proceedings will render the sale vulnerable to vacatur” and, in this case, “broad public policy considerations that militate for keeping foreclosure costs low in order to give owners an opportunity to redeem or at the very least recoup some of their losses in a surplus money proceeding, mandate a drastic reduction in the fee awarded here which is so grossly disproportionate to the amount actually recovered in the underlying proceeding”. The judgment of foreclosure and sale was amended to insert instead a provision awarding \$5,000 in legal fees. NYCTL 1998-1 Trust v. Oneg Shabbos Inc., reported in the New York Law Journal on June 1, 2005.

Usury - The Supreme Court, Nassau County, on its own motion, dismissed an action to enforce a note with a criminally usurious rate of interest (exceeding 25% percent per annum) notwithstanding that the defendant defaulted in appearing. According to the Court, permitting the plaintiff to obtain a default judgment “would be permitting [the Plaintiff] to circumvent the usury laws”. Bales v. Pfeifer was reported in the New York Law Journal on January 26, 2005.

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