



First American Title Insurance Company of New York CURRENT DEVELOPMENTS

Bankruptcy Rules - The Federal Rules of Bankruptcy Procedure were amended effective December 1, 2009. According to the Judicial Conference of the United States, the changes “implement a consistent method of calculating time periods throughout the federal rules”. For example, subsection “h” (“Stay of order authorizing use, sale or lease of property”) of Rule 6004 (“Use, Sale or Lease of Property”) has been amended to provide that “(a)n order authorizing the use, sale or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise”. Similarly, subsection “d” (“Stay of order authorizing assignment”) of Rule 6006 (“Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease”) has been amended to provide that “(a)n order authorizing the trustee to assign an executory contract or unexpired lease under Section 365(f) is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise”. Subsection “a” (Fourteen-day period”) of Rule 8002 (“Time for Filing Notice of Appeal”) has also been amended and now provides that a notice of appeal may be filed “within 14 days of the date of the entry of the judgment, order or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires”. The time periods had been ten days.

Corporations - The NYC Department of Finance has posted the following notice:

“Under Section 1003 of the Business Corporation Law, as of October 1, 2009, Tax Clearance must be obtained from the NYC Department of Finance (Finance) when dissolving corporations that have done business in and incurred tax liability to the City of New York. Corporations must complete the Request For [Consent to] Dissolution and mail to Finance. Finance will send a Dissolution Consent to the address provided on the Request. The Dissolution Consent must be attached to Certificates of Dissolution that are filed with the New York State Secretary of State...If you are filing a Request for Dissolution on behalf of a corporation, you will need to obtain and submit a signed and dated Power of Attorney with your request”.

The notice is posted on the Department of Finance’s website at:
http://nyc.gov/html/dof/html/business/business_tax_gct.shtml#dissolution:

Not to be reprinted without written permission obtained in advance from First American.

The Request for Consent to Dissolution is posted at:

http://nyc.gov/html/dof/html/pdf/collections/request_dissolution.pdf.

Form POA-1, the Department's Power of Attorney for businesses, is posted at:

<http://nyc.gov/html/dof/html/pdf/poa/poa1.pdf>.

Easements - An easement agreement executed in 1961 granted a permanent easement of unrestricted light, air and view over a commercial property for the benefit of an adjoining residential building. The easement specified the exact location and volume of the air conditioning tower that could be installed on the roof of the burdened property. In 2005, the Defendants, owners of the commercial building, installed a new cooling tower on the roof. The Plaintiff-owner of the residential building alleged that the new cooling tower violated the terms of the easement agreement, that the excessive noise it generated violated the noise limit provisions of New York City's Administrative Code, and that it constituted a private and public nuisance. The Plaintiff sought a permanent injunction preventing the operation of the cooling tower and an Order requiring its removal. Although the Supreme Court, New York County, dismissed the claim of a public nuisance, it found the cooling tower violated the terms of the easement and was a private nuisance. The Court directed the Defendants to remove, replace or modify the existing cooling tower so that it complies with the requirements of the easement no later than March 1, 2010. *First Avenue Owners, Inc. v. Valentina Enterprises, LLC*, decided October 14, 2009, is reported at 25 Misc.3d 1219 and 2009 WL 3465983.

Eminent Domain – The Appellate Division, First Department, annulled the determination of the New York State Urban Development Corporation d/b/a Empire State Development Corporation which approved the acquisition by condemnation of approximately 17 acres in the Manhattanville area of West Harlem for the development of a new campus for Columbia University. The Court found that no public use, benefit or purpose was to be served by the proposed acquisition; “the record overwhelmingly establishes that the true beneficiary of the scheme to redevelop Manhattanville is not the community that is supposedly blighted, but rather Columbia University...” Citing the 2005 decision of the United States Supreme Court in *Kelo v. City of New London* (545 U.S. 469), the Court held that this use of eminent domain to benefit a private entity violated the Takings Clause, Article 1 Section 7 of the United States Constitution. *Kaur v. New York State Urban Development Corporation*, decided December 3, 2009, is reported at 2009 WL 4348472.

Foreclosures – Chapter 507 of the Laws of 2009, signed into law by Governor Paterson on December 15, 2009, amends the Real Property Actions and Proceedings Law, the Uniform Commercial Code, the Civil Practice Law and Rules, the Banking Law, and other laws, relating to foreclosure actions on home mortgage loans, including loans made on the security of cooperative interests, the Penal Law and the Real Property Law. According to a press release issued by the Governor's Office, “the Law will:

- Require the 90-day pre-foreclosure notice currently sent for subprime loans to be expanded to include all home loans. This measure allows additional time for many more homeowners to work with their lenders to find an affordable solution to prevent unnecessary foreclosures.
- Require those lenders who serve a 90-day notice on a homeowner to make a regulatory filing with the Banking Department within three days of that service with specified information. This regulatory filing will allow the Banking Department and the Division of Housing and Community Renewal (DHCR) to provide targeted assistance to distressed homeowners during the critical pre-foreclosure timeframe and closely monitor foreclosure statistics.
- Expand the scope of the early mandatory settlement conference to include borrowers of all home loans and not just borrowers with subprime loans.
- Establish protections for tenants in foreclosed properties by requiring that they receive written notification of the change in ownership of the property and be permitted to remain in their home for the remainder of the lease term or 90 days, whichever is longer.
- Require plaintiffs in a foreclosure action who obtain a judgment of foreclosure and sale to maintain the foreclosed property.
- Enhance consumer protections to prevent homeowners from falling prey to rescue scams, and prevent brokers who perform distressed property consulting services from accepting upfront fees.”

State Senate Bill S66007, signed into Law as Chapter 507, is posted on the Internet at <http://assembly.state.ny.us/leg/?bn=S66007&sh=t>.

Mortgage Foreclosures – Judge Spinner of the Supreme Court, Suffolk County, noting what he considered the Plaintiff-lender’s “inequitable, unconscionable, vexatious and opprobrious” conduct in the foreclosure of a subprime mortgage, voided the note, canceled and ordered the mortgage to be discharged, vacated the judgment of foreclosure, and canceled the notice of pendency for the action. The Court found that the “[p]laintiff had no good faith intention whatsoever of resolving this matter in any manner other than a complete and forcible devolution of title from Defendant”. *IndyMac Bank, F.S.B. v. Yano-Horoski*, decided November 19, 2009, is reported at 2009 WL 3858797.

Mortgage Foreclosures/Standing – Plaintiff commenced an action on November 30, 2007 to foreclose a mortgage assigned to it on December 4, 2007 by an instrument reciting that the assignment was effective on October 28, 2007. The Supreme Court, Westchester County, granted the Defendants’ motion to dismiss for lack of standing and the Appellate Division, Second Department, affirmed. According to the Appellate Division, “[t]he issue presented on this appeal is whether an assignee of a

note and mortgage has standing to commence a foreclosure action prior to the date of the execution of the assignment. We hold that an assignee in such a case has no standing". Wells Fargo Bank, N.A. v. Marchione, decided October 20, 2009, is reported at 2009 WL 3380639.

Mortgage Recording Tax – Form MT-15 ("Mortgage Recording Tax") is used to compute New York State's mortgage recording tax when a mortgage encumbers property in more than one locality and different rates of mortgage recording tax apply. A revised Form MT-15, effective December 1, 2009, has been issued by the New York State Department of Taxation and Finance. The form sets forth the mortgage recording tax rates in effect in each County, and accounts for the change in the mortgage tax rate in Dutchess County on December 1 from \$1.30 to \$1.05 for each \$100.00 of principal indebtedness secured. Revised Form MT-15 is posted at http://www.tax.state.ny.us/forms/form_number_order_mt_pt.htm.

Mortgage Recording Tax/New York State Transfer Tax - New York State's Office of Tax Policy Analysis in the State's Department of Taxation and Finance has posted at http://www.tax.state.ny.us/statistics/stat_fy_collections.htm its Annual Statistical Report of New York State Tax Collections for the State's fiscal year 2008-2009 (April 1, 2008-March 31, 2009). According to the Report, the amount of the State's Real Estate Transfer Tax collected in fiscal year 2008-2009 was \$701,163,664. Mortgage Recording Tax collected statewide in fiscal year 2008-2009 was \$1,433,276,367, of which \$860,445,376 was collected on mortgages recorded in The City of New York.

Mortgage Recording Tax/New York State Transfer Tax – The New York State Department of Taxation and Finance has announced that the interest rate to be charged for the period January 1, 2010 – March 31, 2010 on late payments and assessments of mortgage recording tax and the State's Real Estate Transfer Tax will be 8% per annum, compounded daily. The interest rate to be paid on refunds of those taxes will be 3% per annum, compounded daily. The interest rates are published at http://www.tax.state.ny.us/taxnews/int_curr.htm.

New York City Building Department – Under NYC Administrative Code Section 28-105.9 ("Expiration") a building permit expires "if the permitted work or use is not commenced within 12 months from the date of issuance of the permit or, if commenced, is suspended or abandoned for a period of 12 months thereafter". On October 28, 2009 Mayor Bloomberg signed into law Local Law 70 of 2009 amending Section 28-105.9. It authorizes the Commissioner of the Department of Buildings to establish a program to maintain the safety of construction sites when work is not commenced or is to be suspended. Under the Local Law, "(w)here the commissioner includes a site in the program, work permits issued for such construction site that would otherwise expire because of the suspension of work or failure to commence work at the site shall remain in effect until the end of the term for which they were issued and may be renewed for up to two additional terms consistent with section 28-105.8.1 so long as the site is in good standing under the program".

New York City Real Property Transfer Tax (“RPTT”) – According to Section 11-2106(b) of NYC’s Administrative Code, conveyances of real property by or to a corporation “organized and operated exclusively for religious, charitable or educational purposes” are, provided certain other criteria are met, exempt from payment of the RPTT. A Ruling dated June 11, 2009, issued by NYC Finance’s Office of Legal Affairs, involving the transfer of controlling economic interests in an entity owning and operating a low-income housing project to a taxpayer which had applied for but had not yet received an exemption from federal income taxation under IRC Section 501(c)(3). The taxpayer was held to be exempt from payment of the RPTT in the transaction since it had met the criteria for the federal exemption. However, “the taxpayer will be required to inform [the Office of Legal Affairs] in the event that its application for exemption under IRC Section 501(c)(3) is denied”. FLR 094895-021 is posted at http://www.nyc.gov/html/dof/html/pub/pub_guidance_lett rulings_rptt.shtml

Not-For-Profit Corporations – A New York Type-B not-for-profit corporation purchased real property and obtained grants from local governments to enable repairs to be made to the building. In 2005, its Chief Executive Officer, who was also Chairman of its Board of Directors, caused the property, the sole asset of the corporation, to be conveyed for no consideration, without the approval of the Board of Directors, to himself and his wife. The CEO and his wife then executed a mortgage to secure their personal line of credit. On petition of the New York State’s Attorney General, the Supreme Court, Sullivan County, declared the deed and the mortgage to be null and void and directed the County Clerk to “mark his records accordingly”. According to the Court, the “conveyance of all or substantially all of the property of a not-for-profit corporation without approval of the corporate directors or the court, and without notice to the Attorney General is void ab initio”. *Cuomo v. Daniels*, decided October 28, 2009, is reported at 25 Misc.3d 1226 and 2009 WL 3823257.

Powers-of-Attorney – The Executor of an Estate executed a power of attorney delegating to his attorney “all the powers provided to me as Executor of the Estate of Frank J. Sadlo and to act on my behalf with respect to said Estate”. The Surrogate’s Court, Dutchess County, held that the issuance of the power of attorney was void ab initio, and the attorney was not to be compensated for actions taken under the authority of the power of attorney. According to the Court, “[a]n executor is not authorized to give a power of attorney to an attorney representing the estate granting plenary powers to that attorney to act on his behalf”. *Matter of Sadlo*, decided September 25, 2009, is reported at 25 Misc.3d 1205 and 2009 WL 306665.

Recording Act – A mortgage executed in 2003 by the then owners of a property in Queens incorrectly referenced the tax lot; the mortgage was therefore mis-indexed. In an action to foreclose that mortgage, the current owner of the property and his mortgagee, both Defendants, asserted as an affirmative defense, that at their closing they had no actual or constructive notice of the Plaintiff’s mortgage. The Supreme

Court, Queens County, granted their motion for summary judgment, dismissing the complaint as to them and ordering that the Plaintiff's mortgage be vacated. Equitable subrogation did not apply to the Plaintiff's mortgage, notwithstanding that proceeds of its mortgage were used to satisfy a prior mortgage; the Defendant's mortgage did not exist when that payment was made. In addition, when the mortgage being foreclosed was assigned to Plaintiff, it was deemed to have had constructive notice of the Defendant's recorded mortgage. Residential Funding Corporation v. Epps, decided October 7, 2009, is reported at 2009 WL 3210351.

Recording Act - The owners of property in Dobbs Ferry transferred title to Isaac Garson to enable their mortgage to be refinanced. They remained in possession of the property and made the monthly payments for the new mortgage to Garson. However, without the consent of the prior record owners, Garson re-conveyed the property to a purchaser who secured purchase money mortgage financing from Fremont Investment & Loan ("Fremont"). An action was brought to determine the claims to the property and to void the deed from Garson and the Fremont mortgage. The Appellate Division, Second Department, affirming the ruling of the Supreme Court, Westchester County, denied Fremont's motion for summary judgment. Although Fremont met its prima facie burden of establishing that in relying on the record it was a bona fide encumbrancer for value, an issue remained as to whether it had knowledge of facts that should have led it to inquire about Garson's ownership. The appraisal report stated that the occupant claimed he owned the property and the pending transaction was a refinance. Maiorano v. Garson, decided September 29, 2009, is reported at 886 NYS 2d 190.

First American News - David L. Wanetik has joined the First American Title Insurance Company as the Chief Operating Officer for its UCC Division. Prior to joining First American, David served as Vice President of the UCC Insurance Division for LandAmerica. He has been actively involved in the Revision of Article 9 of the Uniform Commercial Code for over 15 years and has written and lectured extensively on this subject. Based in Manhattan, David can be reached at dwanetik@firstam.com or at (212) 551-9456 to answer any questions on UCC Title Insurance or related UCC issues,

Lastly, for 2009:

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

Michael J. Berey, General Counsel
No. 119. December 28, 2009
mberey@firstam.com