First American Title Insurance Company of New York

CURRENT DEVELOPMENTS

Limited Liability Companies - Under Section 808 ("Doing business without certificate of authority") of New York's Limited Liability Company Law, "[a] foreign limited liability company doing business in this state without having received a certificate of authority [under Limited Liability Company Law Section 803] to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall has received a certificate of authority in this state". Justice Stinson of the Supreme Court, Bronx County, found that the Plaintiff in a mortgage foreclosure, a foreign limited liability company, had not obtained a certificate of authority and was "doing business" in New York State. She granted a cross-motion dismissing the Action, unless "no later than one year following the date of entry of this order, plaintiff obtains authority pursuant to [the] Limited Liability Company Law to conduct business in the State of New York, including obtaining approval from the New York Superintendent of Banks to use its name, and moves to amend its complaint to correctly identify its company status and the state of its formation". Aries Financial LLC v. 2729 Claflin Avenue LLC, decided January 26, 2010, was reported in the New York Law Journal on February 10, 2010.

Limited Liability Companies/"De Facto" Company Doctrine – Articles of Organization ("Articles") for a newly formed limited liability company (the "LLC"), formed by a son and the daughter of the grantor of the deed in question, were executed on October 4, 2001 but not filed with New York's Department of State ("Department") until November 16, 2001. On November 2, 2001, before the Articles were filed, the mother of the two persons above-referenced executed a deed transferring the ownership of certain property to the LLC. The deed was recorded on December 3, 2001.

After the grantor died, representatives of the children of two predeceased children of the grantor asserted that the property was not properly conveyed to the LLC and should be distributed as an asset of the Estate. The Surrogate's Court, Kings County, held that the conveyance was valid, holding that the LLC was operated as a valid "de facto" company prior to the filing of the Articles. The "de facto" company doctrine, traditionally applicable to corporations, applies "where there exists (1) a law under which the corporation might be organized, (2) an attempt to organize the corporation, and (3) an exercise of corporate powers thereafter".

The Appellate Division, Second Department, reversed the Order of the Surrogate, holding the conveyance to be void because there was no attempt to file the Articles before the deed was executed. The Court of Appeals affirmed. According to the

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Court, while the de facto corporation doctrine applies to limited liability companies, "the formation of a de facto company requires a 'colorable attempt to comply with the statutes governing incorporation' prior to the exercise of corporate powers, including the filing requirement". In this case, there was no bona fide attempt to file the Articles before the deed was executed. "Because an entity that is neither de facto nor de jure cannot take title to real property [citation omitted], there was no entity in existence capable of receiving title to the real property and the purported conveyance is therefore void". Estate of Hausman, decided December 1, 2009, is reported at 13 N.Y. 3d 408.

Mortgage Recording Tax/Cooperative Units - Information has been received that the Governor's draft Budget Bill includes a provision for the imposition of mortgage recording tax on the filing of a financing statement against a cooperative unit. The security interest evidenced by a filed financing statement would not be enforceable without payment of the tax. If included in the final enacted Budget Bill this change would take effect on the first day of the third month after it shall have become law and shall apply to financing statements filed on or after that date.

Mortgage Recording Tax/New York State Transfer Tax – New York State's Department of Taxation and Finance has announced that the interest rate to be charged for the period April 1, 2010 – June 30, 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.

Mortgage Recording Tax/Westchester County – Responding to a request from the Office of the Westchester County Clerk, the Westchester County Attorney's Office issued a Memorandum dated January 15, 2010 stating that the recording in Westchester County of an Assignment of Leases and Rents as security for a loan, when the Assignment does not afford the secured party with a remedy enforceable against the property, is not a mortgage on which the payment of mortgage recording tax is required. The County Clerk requested a ruling when a customer attempted to pay mortgage recording tax on submitting for recording an Assignment of Leases and Rents; the County Clerk's computer system is not set up to collect mortgage recording tax on recording of an assignment of leases and rents. The Memorandum does not indicate that the State's Department of Taxation and Finance was consulted.

New York State "Additional Tax" ("Mansion Tax") – New York State's Department of Taxation and Finance's Publication 577 (2/10), "FAQs Regarding the Additional Tax on Transfers of Residential Real Property for $1 Million or More", is posted at http://www.tax.state.ny.us/pdf/publications/real_estate/pub577.pdf.

Recording Act – The lien of a money judgment obtained June 30, 1998 and docketed October 19, 1999 in the office of the Richmond County Clerk expired on June 30, 2008 and was extended *nunc pro tunc* as of September 30, 2008. On January 27,

2004 the mortgage being foreclosed was recorded; proceeds of the mortgage were applied, in part, to pay off a prior mortgage recorded September 22, 1998. The foreclosing lender, the assignee of the mortgage, moved for a Judgment of Foreclosure and Sale and a declaration that its mortgage had priority over the money judgment because the judgment had expired. It asserted, in the alternative, that it should be equitably subrogated to rights arising under the mortgage which was satisfied with proceeds of its loan.

The Supreme Court, Richmond County, held that the lien of the money judgment was superior to the lien of the mortgage. Although not an exception in its title policy, the original holder of the mortgage had notice of the money judgment when the mortgage was executed, and "[t]he plaintiff [the assignee of the mortgage] has not shown any change in its position to its detriment as a result of [Defendant's] failure to timely move for a renewal lien". The Court noted that whether or not the renewal judgment was granted *nunc pro tunc* relief was of no consequence since "[a] renewal lien relates back to its initial docketing, and is a continuation of the original lien which in this case was docketed on June 30, 1998". Deutsche Bank National Trust Company, as trustee v. Gonzalez, decided January 29, 2010, is reported at 26 Misc. 3d 1219(A) and 2010 WL 424033.

<u>Title Insurance/Creditors' Rights</u> **- The Board of Governors of the American Land Title Association ("ALTA") has voted to withdraw its ALTA Form 21 Endorsement (the "Creditors' Rights" Endorsement) from use effective as of March 8, 2010. The California Land Title Association has also decertified its version of the ALTA 21 Endorsement. Filed Creditors' Rights endorsements have been withdrawn in Pennsylvania and New Jersey and withdrawal of the endorsements is being considered in a number of other states. A creditors' rights endorsement has not been available in New York, New Mexico and Texas. First American and a number of other title insurers have announced that they will no longer afford creditors' rights coverage outside of the coverage expressly afforded within the Covered Risks of the 2006 ALTA Policies.**

The 2006 ALTA Policies insure, in the Owner's Policy, against loss or damage sustained or incurred by the Insured by reason of "title being vested other than as stated in Schedule A or being defective" and, in the Loan Policy, against "(t)he invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the title,

> **(a) as a result of [resulting from] the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction vesting Title as shown in Schedule A [creating the lien of the insured mortgage] because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or other similar creditors' rights laws; or**
>
> **(b) because the instrument of transfer vesting Title as shown in Schedule A [the Insured Mortgage] constitutes a preferential transfer under federal**

bankruptcy, state solvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records (i) to be timely, or (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor".

Title Insurance/TIRSA Rate Manual – Section 15 ("Owner's Policy to Foreclosing Lender") of the Title Insurance Rate Service Association, Inc. ("TIRSA") Rate Manual has been amended effective March 3, 2010. Former Section 15 read as follows:

"Whenever an application for an owner's policy is made within 5 years of the date of a loan policy insuring a mortgage by the existing insured lender and the lender (or its assignee or subsidiary) has acquired title by a Referee's deed in foreclosure or conveyance in lieu of foreclosure of the insured mortgage, the charge for such insurance shall be seventy percent (70%) of the owner's rate as applied to the unpaid principal balance due on the previously insured mortgage, plus the full owner's rate on any excess.

The provisions of this section do not apply to the issuance of a TIRSA Owner's Extended Protection Policy".

Section 15, as revised, now reads as follows:

"An owner's policy issued to insure an insured lender, or its assignee or subsidiary, that is made within 5 years from the date of a loan policy, when the lender, or its assignee or subsidiary, has acquired title by a Referee's deed in foreclosure or conveyance in lieu of foreclosure of the insured mortgage shall not be issued in an amount less than the lesser of:

(i) the fair market value of the real property; or
(ii) the unpaid principal balance due on the previously insured mortgage.

The charge for such insurance shall be seventy percent (70%) of the owner's rate up to the unpaid principal balance due on the previously insured mortgage, plus the full owner's rate on any excess.

The provisions of this section do not apply to the issuance of the TIRSA Owner's Extended Protection Policy".

Underlining has been added to highlight the substantive change.

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