



First American Title Insurance Company of New York

CURRENT DEVELOPMENTS

Indian Land/Real Estate Taxes – The United States Court of Appeals, Second Circuit, affirming the decision of the United States District Court for the Northern District, enjoined Madison and Oneida Counties from foreclosing on property owned by the Oneida Indian Nation of New York (“OIN”) for unpaid real estate taxes. According to the Court of Appeals, “the remedy of foreclosure is not available to the Counties unless and until Congress authorizes such suits or the OIN consents to such suits. Because neither of these events has occurred, the foreclosure actions are barred by the OIN’s sovereign immunity from suit”. *Oneida Indian Nation of New York v. Madison County and Oneida County, New York*, decided April 27, 2010, is reported at 2010 WL 1659452.

MERS/Fannie Mae Servicing Policy Change – A Fannie Mae Announcement dated March 30, 2010 sets forth Miscellaneous Servicing Policy Changes, including a change for “Foreclosure Actions in the Name of MERS”.

“Effective with foreclosures referred on or after May 1, 2010, MERS must not be named as a plaintiff in any foreclosure action, whether judicial or non-judicial, on a mortgage loan owned or securitized by Fannie Mae.

MERS is the mortgagee of record when either a mortgage names MERS as the original mortgagee and is recorded in the applicable land records or a completed and recorded assignment names MERS as the mortgage assignee. Therefore, when MERS is the mortgagee of record, the servicer must prepare a mortgage assignment from MERS to the servicer, and then bring the foreclosure in its own name, unless Fannie Mae specifically requires that the foreclosure be brought in the name of Fannie Mae. In that event, the assignment must be from MERS to Fannie Mae, in care of the servicer at the servicer’s address for receipt of notices. In all cases, the assignment from MERS to the servicer or Fannie Mae must be recorded before the foreclosure begins.

Fannie Mae will not reimburse the servicer for any expense incurred in preparing or recording an assignment of the mortgage loan from MERS to the servicer or to Fannie Mae.

If an assignment has been recorded from MERS to either the servicer or Fannie Mae and the borrower reinstates the mortgage loan prior to the completion of the foreclosure proceedings, the servicer need not re-assign the mortgage to MERS and re-register the mortgage with MERS. Re-assigning and re-registering the mortgage with MERS is not required by Fannie Mae and any such action will be at the discretion and expense of the servicer.

The servicer should consult its foreclosure attorney to determine if any other legal requirements apply when conducting foreclosures of mortgage loans in which MERS is the prior mortgagee of record”.

Fannie Mae Announcement SVC-2010-05 is posted at:

<https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1005.pdf>

Mortgage Foreclosures – Plaintiff alleged that he was injured due to a defective sidewalk adjoining the property being foreclosed. The accident was alleged to have taken place between the date on which the judgment of foreclosure and sale was issued and the date on which the mortgagee purchased the property at the foreclosure sale. Plaintiff claimed that the mortgagee, which was paying the property’s real estate taxes and property preservation fees during the action, was the “equity owner” of the property when he was injured. The Supreme Court, Kings County, granted the Defendant’s motion to dismiss the complaint. According to the Court, as the property is a multiple dwelling, the Defendant “had no duty in law or equity to maintain or repair the property” until completion of the foreclosure sale. “[A] mortgagee prosecuting a foreclosure action [involving a multiple dwelling] is not charged with repairs of the property and a duty to repair cannot be created by arguing the applicability of equity”. *Forbes v. Aaron*, decided March 4, 2010, is reported at 2010 WL 811115.

Mortgage Foreclosures – In an Action to foreclose a mortgage securing a loan in the amount of \$302,500.00 on a residential property, Justice Spinner of the Supreme Court, Suffolk County barred the Plaintiff from collecting interest on the loan from May 1, 2008, the date of the borrower’s default, to March 1, 2010, which was just before the date of the settlement conference. He also barred the Plaintiff from recovering other advances it had made and its legal fees and expenses, and limited the debt recoverable by the Plaintiff to \$301,721.58. The Court also awarded the Defendants \$100,000 in exemplary damages. The Court found that there was no justification for the fourteen month delay between default and the commencement of the Action other than to increase the amount of default interest; that the terms and conditions of the Adjustable Rate Note, Default Interest Rate Rider and Mortgage were in the nature of contracts of adhesion; that the legal fees and costs claimed were “excessive and unreasonable”; and that the accrued interest was computed at a “confiscatory rate”. According to the Court, “the conduct of Plaintiff in this matter has been over-reaching, shocking, willful and unconscionable, is wholly devoid of even so much as a scintilla of good faith and cannot be countenanced by this Court”. *Emigrant Mortgage Co. Inc. v. Corcione*, decided April 16, 2010, is reported at 2010 WL 1531432.

Mortgage Foreclosures/Home Equity Theft Prevention Act –Real Property Actions and Proceedings Law (“RPAPL”) Section 1303 (“Foreclosures; required notices”), effective February 1, 2007, requires the holder of a mortgage foreclosing against a residential real property to send a statutory form of notice before proceeding with the Action. Section 1303 was added to the RPAPL by the enactment of the Home Equity Theft Prevention Act (“HETPA”), Chapter 308 of the Laws of 2006.

In *First National Bank of Chicago v. Silver*, the Defendants’ answer did not allege the failure to comply with the notice requirements of Section 1301. However, when the Plaintiff moved for summary judgment the Defendants cross-moved for summary judgment dismissing the complaint, asserting the Plaintiff’s failure to provide the required notice. The Supreme Court, Nassau County granted the Plaintiff’s motion, but its ruling was reversed by the Appellate Division, Second Department, which granted the Defendants’ motion to dismiss the complaint. According to the Appellate Division, showing compliance with the notice requirement of RPAPL Section 1303 “is a condition precedent which is the plaintiff’s

burden to meet, and which does not have to be raised as an affirmative defense in the answer”. The issue was raised, although belatedly, by the Defendants, and since “the foreclosing party failed to meet its burden of establishing compliance with the notice requirements of HETPA, the complaint should have been dismissed”. This decision, issued on March 23, 2010, is reported at 2010 WL 1078805.

Mortgage Foreclosures/Power of Sale – Section 1421 (“Right to seek judicial intervention”) of Article 14 (“Foreclosure of mortgage of power of sale”) of the RPAPL, which sunset July 1, 2009, provided that the mortgagor may, within forty days after the date on which it receives the required notice of intention to foreclose, move for an order directing the proceedings to be conducted judicially under RPAPL Article 13 (“Action to foreclose a mortgage”) if “under the facts and circumstances, allowing the foreclosure to proceed ...would cause an undue hardship to the mortgagor”. In a non-judicial foreclosure commenced on June 30, 2009 to enforce a mortgage on six vacant lots in Red Hook, Brooklyn, the mortgagor moved for the action to be converted to a judicial foreclosure.

The Court found that the mortgagor had acted in good faith by timely paying interest on the twelve month loan for ten months and by paying nearly \$1,400,000 of the \$7,500,000 loan. Further, the area in which the property is located had been undergoing gentrification. Accordingly, it seemed to the Court, the Plaintiff’s equity in the property “is secure”. The Court therefore found that the Plaintiff would not be prejudiced by proceeding under Article 13 and that continuing to foreclose under Article 14 would cause “undue hardship to the mortgagor”. The Supreme Court, Kings County, granted the Defendant’s motion. *Approved Financial Corp. v. Dragonhearth Realty, LLC*, decided February 18, 2010, is reported at 896 N.Y.S. 2d 832.

Mortgage Foreclosures/Trespass by Mortgagee – The Plaintiff in the case *Wells Fargo v. Tyson* commenced an Action to foreclose its mortgage. The Defendant notified the Plaintiff that he had discontinued utility services at the property and the winterization and securing of the dwelling. The Defendant advised the Plaintiff that the property was not, however, abandoned; the Defendant also visited the property regularly and had a neighbor watch the property in his absence. After a private property inspection and preservation company employed by the Plaintiff found the front door of the home open and the premises unsecured, the Plaintiff directed that the locks be changed and the house secured and winterized. The Plaintiff insisted that it had the right under the terms of the mortgage to enter the premises at any time without consent, which happened at least twice, to inspect and protect its security. The Defendant claimed that damage was caused to the property and various items of personal property were taken.

The mortgage provided that the lender could enter and inspect the property in a reasonable manner and at reasonable times on notice, but there was no indication that notice to the Defendant was provided. The mortgage also provided that if the property was abandoned the mortgagee could secure and repair the property, including change the locks. The Supreme Court, Suffolk County, ruled that all actions taken by the Plaintiff were required to be reasonable and entry into the property had to be on notice to the Defendant. It held that the Plaintiff had committed a trespass and awarded the Defendant \$200 in damages for the trespass, \$4,892 for the value of the personal property that was lost, and exemplary damages of \$150,000. The decision, on March 5, 2010, is reported at 2010 WL 753360.

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 July 1, 2010 – September 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/Special Additional Tax – Under Tax Law Section 253.1-a(a), a portion of the mortgage recording tax known as the “special additional tax”, which is a tax of one-quarter of one-percent, is, unless an exemption applies, payable by the mortgagee when (a) the mortgaged property is principally improved or will be improved by one or more structures containing not more than six residential dwelling units, each unit having its own separate cooking facilities or (b) the mortgagee is a tax exempt organization.

As reported in Current Developments dated December 10, 2008, TSB-M-08(5) R (“Special Additional Mortgage Recording Tax Exemption for Federal Credit Unions that Convert to State Credit Unions”) issued by the New York State Department of Taxation and Finance (“Department”) and dated December 10, 2008, advised that, effective January 1, 2009, under new Section 486-a of the Banking Law (“Retention of special additional mortgage recording tax exemption for converted federal credit unions”), the special additional tax is not payable by the mortgagor or the mortgagee on a mortgage made to a New York State chartered credit union that has converted from a federal credit union on or after January 1, 2009.

The Department has issued TSB-M-10(1)R (“Special Additional Mortgage Recording Tax Exemption for State Credit Unions”), dated March 30, 2010, further advising that, effective January 1, 2010, the special additional mortgage recording tax is not payable by the mortgagor or the mortgagee on a mortgage made to a New York State chartered credit union organized under Article 11 of the Banking Law. This change was made by Chapter 522 of the Laws of 2008.

To claim this exemption, an affidavit must be submitted with the mortgage at recording, affirming the following:

1. the mortgaged premises constitute real property that is principally improved by a structure containing a total of not more than six residential dwelling units, each with its own separate cooking facilities;
2. the mortgagee is a state credit union formed under Article 11 of the Banking Law; and
3. the mortgagee is exempt from payment of the special additional mortgage recording tax imposed by Tax Law Section 253.1-a(a).

TSB-M-10(1)R is at www.tax.state.ny.us/pdf/memos/mortgage/m10_1r.pdf.

Recording Act – The Plaintiff in the case of Phillips-Thomas v. Ellison alleged that she was defrauded into transferring title to her property to avoid foreclosure. The property was re-conveyed by her grantee to a bona fide purchaser who financed his purchase with a mortgage loan made by New Century Mortgage. The mortgage was subsequently assigned

to Deutsche Bank National Trust Company, as Trustee, which foreclosed the mortgage and took title to the property. Prior to the assignment of the mortgage to Deutsche Bank, the Plaintiff sued, seeking damages for fraud and an order returning to her title to the property. A notice of pendency was filed.

A motion made by Deutsche Bank to vacate the notice of pendency was granted by the Supreme Court, Nassau County. There was no allegation that the mortgagor or New Century Mortgage had any notice of the fraud. New Century Mortgage was therefore an “incumbrancer for a valuable consideration”, protected under Real Property Law Section 266 (“Rights of purchaser or incumbrancer for valuable consideration protected”), which provides that “[t]his article [8, “conveyances and mortgages”] does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor”. The protection afforded New Century Mortgage by Section 266 protected Deutsche Bank even though the assignment to it was made after the notice of pendency was filed. The decision, on March 31, 2010, was reported in the New York Law Journal on April 14, 2010.

Rule Against Perpetuities – Plaintiff, a commercial tenant, sought a declaration that its lease was void for violating the Rule Against Perpetuities (Estates, Powers and Trusts Law Section 9-1.1(b) (“Rule against perpetuities”). The lease, dated July 9, 2008, was to commence on the Defendant-Landlord’s substantial completion of certain improvements (the “Owner’s Initial Work”), which was to be prior to January 31, 2009 with an outside date for substantial completion of December 31, 2009. If the Landlord did not perform, the tenant could either cancel the lease or obtain a rent abatement. Due to a fire at the building on February 9, 2009, the Landlord informed the tenant that the Delivery Cancellation Date was being extended under the Force Majeure Delay provision of the lease. The tenant responded that “[b]ecause the ‘Substantial Completion Date’ may or may not occur within twenty-one (21) years of the date of the Lease, there is no definitive Commencement Date...the lease is void and of no further force and effect under the Rule Against Perpetuities”. The Supreme Court, New York County, granted the Defendant’s motion for partial summary judgment dismissing the complaint, and it denied the Plaintiff’s cross-motion for summary judgment. According to the Court, “[a]ssuming that the Rule Against Perpetuities is applicable...[t]he inclusion of specific times for the Landlord’s performance of the Owner’s Initial Work, with an outside date for performance, and express remedies for the tenant upon the landlord’s breach, not only evinces an intent to comply with the Rule Against Perpetuities, but exhibits clear, express compliance with that statute by requiring performance in far less than 21 years plus lives-in-being”. *Tourneau, LLC v. 53rd and Madison Tower Development LLC*, decided February 26, 2010, is reported at 896 N.Y.S. 2d 631.

First American News – “Chapter 507, Laws of 2009: Enforcing Real Estate Mortgages and Cooperative Unit Security Interests”, by Michael J. Berey, was published in the Spring 2010 issue of the N.Y. Real Property Law Journal, issued by the Real Property Section of the New York State Bar Association.

Michael J. Berey, General Counsel
No. 122. June 1, 2010
mberey@firstam.com