



First American Title Insurance Company of New York CURRENT DEVELOPMENTS

ACRIS – “ACRIS E-Tax Forms are Changing Closings in New York City”, by First American Counsel, was published on May 10, 2004 in the New York Law Journal. The Department of Finance has not announced the date after which E-Tax Forms will be required for transfers of interests in real property being recorded in the Counties of the Bronx, Brooklyn, Manhattan and Queens. For information on ACRIS contact your sales representative at First American.

Break-Up Fees - The tenant of a building in Manhattan exercised a right of first refusal to purchase and then sued its seller for the “willful or unlawful inflation of the purchase price”. It claimed the price was manipulated to compensate the owner for a break-up fee it paid the contract vendee. The Supreme Court, New York County, granted summary judgment to the defendant, holding that there was no evidence that the purchase price paid by the plaintiff was “manipulated”. According to the Court, the break-up fee of 5.2 percent of the purchase price was not unreasonable in an arms-length real estate transaction. *Liberty Theatres Inc. v. Local 91 Realty Corp.* was reported in the New York Law Journal on March 10, 2004.

Easements – A building has emergency access to the street by use of a fire ladder leading to the defendant’s property next door. Both parcels had formerly been in common ownership. In constructing a new building on its property the defendant removed the ladder, leaving the plaintiff’s building with no access to the street. Plaintiff brought an action for a declaratory judgment that his property had an easement of necessity and for an injunction against interference with the easement. The Supreme Court, New York County, held that there was an easement by necessity, granted a preliminary injunction, and ordered the defendant to restore the fire ladder and provide access from the ladder to the street. The Court noted that without an emergency exit there was a high probability that the defendant’s building would be subject to a vacate order being issued by the Building Department. *Bennett v. 48 Laight Street Associates* was reported in the New York Law Journal on March 17, 2004.

Mortgage Foreclosure – The property owner’s son fraudulently conveyed her property to himself and then executed the mortgage which was being foreclosed. He was convicted of grand larceny, forgery and offering a false instrument for filing. His mother intervened in the foreclosure. The Supreme Court, Kings County, granted her motion for summary judgment and dismissed the complaint, holding

that the fraudulent deed and mortgage were of no legal effect. The Court ruled that the plaintiff was collaterally estopped from re-litigating the validity of the mortgage even though it was not a party to the criminal proceeding. It had not made an appearance or otherwise communicated with the Court as the Court had directed and as it had been requested to do by the District Attorney and the Plaintiff's counsel. *Altegra Credit Company v. Chu* was reported in the *New York Law Journal* on April 22, 2004.

New York City Real Estate Taxes – The October 28, 2003 and January 14, 2004 issues of *Current Developments* reported on a tax surcharge of 25% to be imposed on Class One real property owned by “absentee” landlords. Local law 6 of 2004 changes the fiscal year in which the tax surcharge will first take effect to the year beginning July 1, 2006. The surcharge was first effective for the fiscal year beginning July 1, 2003; it has not been billed by the Department of Finance.

New York City Real Property Transfer Tax Return (“RPT”) – Since January 1, 2003 a filing fee for the RPT has not been charged either on a deed transfer or on the assignment of a leasehold in a “Qualified Leasehold Condominium” under Real Property Law Section 339-3(12), such as Battery Park City. Instead, a filing fee, now \$50.00, has been charged on submission of the State Board of Real Property Service’s Real Property Transfer Report (“Form RP-5217NYC”), commonly known as the Equalization and Assessment Form. New York City’s Department of Finance advises that effective April 1, 2004 a fee is no longer required to be paid to file an RPT for any other transfer of an interest in real property (as defined in the transfer tax statutes), such as the transfer of a cooperative unit, a controlling interest or development rights, the grant of an easement, or the grant or assignment of a leasehold. The Department of Finance has advised the New York State Land Title Association that refunds of RPT filing fees paid on the transfer of cooperative units on and after April 1 can be requested by email sent to coopfee@finance.nyc.gov.

In a related development, a lawsuit, *Stephen L. Schwartz, on behalf of himself and all others similarly situated, vs. the New York City Department of Finance*, was filed in March, 2004 in the Supreme Court, New York County. The Class, if certified, would consist of those persons who sold their cooperative apartments in the City of New York on and after January 1, 2003. The plaintiff claims that the collection of a \$50.00 RPT filing fee for each transfer of a cooperative apartment on and after January 1, 2003 has been unlawful. The relief sought, in part, includes certification of the Class, injunctive relief, a declaration that this charge was imposed without authority, and an Order requiring the defendant to account to the Class for all such fees that were wrongfully obtained.

Not-For-Profit Corporations – Plaintiff moved for a default judgment declaring that the defendant not-for-profit corporation must specifically perform under a contract to sell its property in Queens County to the plaintiff. The New York State Attorney General opposed the motion and the Supreme Court, Queens County, denied the motion. The Court held that it was without the authority to order specific

performance since the corporation had not complied with Sections 510 and 511 of the State's Not-For-Profit Corporation law. Those Sections require a not-for-profit corporation to obtain leave of court to sell all or substantially all of its assets. *Century 2000 Custom Home Builders and Developers, LLC v. United Muslim Organization of New York, Inc.*, decided May 6, 2003, is reported at 772 N.Y.S. 2d 186.

Restrictive Covenants – Each of the 32 lots in a subdivision were conveyed to a single owner by deeds restricting construction on each parcel to “one residence”. The common owner, or his estate, re-conveyed the lots, all but two of the deeds reciting that the conveyances were “subject to covenants and restrictions of record”. The developer, which owned 19 of the lots, the deeds to which all contained the “subject to” provision, intended to construct multi-family, attached residences on the property. It sought a judgment that the restrictive covenants were extinguished when the common owner took title. A cross-motion for summary judgment was brought by the owners of the other lots. The Supreme Court, Westchester County, granted the cross-motion and held that the restrictive covenants were enforceable. The Appellate Division, Second Department, affirmed, holding that the common owner re-imposed the covenants by making the lots subject to restrictions of record. *Realis Development, LLC v. Neuberger*, decided by the Appellate Division on April 19, 2004, is reported at 2004 N.Y. App. Div. LEXIS 4700.

Suffolk County – The Suffolk County Legislature has amended Section 636-1 of the County's Administrative Code to authorize the County Clerk to appropriate excess funds paid to that office for fees and taxes up to \$30.00. Those excess amounts paid will not be refunded. Resolution 295-2004 was approved by the County Executive and became effective on March 29, 2004.

Tax Lien Sales – The Appellate Division, Second Department denied a motion to cancel the notice of pendency filed in a tax lien foreclosure after the previous lis pendens had lapsed. The Court cited *Slutsky v. Blooming Grove Inn*, 542 N.Y.S. 2d 721, in which the Appellate Division, Second Department held in 1989 that a plaintiff-mortgagee could file an RPAPL lis pendens when the CPLR notice of pendency was vacated for improper service and complete its foreclosure. An action in New York City to foreclose a tax lien is governed by the “rules of practice applicable to actions to foreclose mortgages on real property”. Administrative Code, Section 11-335. *NYCTL 1997-1 Trust v. Oneg Shabbos, Inc.*, decided March 15, 2004, is reported at 772 N.Y.S. 2d 848.

Tax Lien Sales – The owner of a tax lot subject to a tax lien foreclosure obtained from JER Revenue Services, the tax lien's Servicing Agent, a statement for the payment of all amounts owed on February 25, 2003. The instructions were that payment was to be made to the NYCTL 1996-1 Trust at a certain post office box address. That notice further stated that the “failure to follow the above instructions may delay the crediting of your payment”. Payment was made on February 24, however, to the Bank of New York, as the Account Manager for JER Revenue

Services, at a different address, and the payment was not credited to the Trust until February 26. On February 25 the property was sold in the tax lien foreclosure to a third party. The Supreme Court, Kings County, denied the motion of the grantee of the prior owner to set aside the foreclosure sale and held that the prior owner's equity of redemption had been extinguished. Title to the property passed at the time of the sale, notwithstanding the later delivery of a deed, and the failure of the prior owner to have its payment credited in a timely manner was due to non-compliance with the written instructions for payment. NYCTL 1996-1 Trust v. Thompson was reported in the New York Law Journal on April 7, 2004.

“The Stoler Report: Real Estate Trends in the Tri-State Region” – New York's only television talk 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 Commercial Real Estate: Industry Leaders' Perspective” will be broadcast on Monday, May 24 at 10 AM, and will be re-broadcast on May 24 at 10 PM, May 29 at 5 PM, May 30 at 8:30 AM, June 2 at 11 PM, June 4 at 5 AM, June 6 at 5 AM, June 8 at Midnight, June 10 at 2 AM and June 15 at 5 AM. Among Michael Stoler's guests will be Steven Kantor, Global Head of Real Estate Finance for CS First Boston, Robert Lapidus, Principal of L & L Acquisitions, Eric Hadar, President of Allied Partners, Leslie Himmel, Managing Partner, Himmel & Meringoff Capital Corp., and David Brause, Vice-President, Brause Realty, Inc. Live broadcasts and later Web Casts of programs are on the Internet at <http://www.stolerrport.com>.

Writs of Assistance/Stay on Appeal – A defendant in a real property action, ordered to deliver possession of the property to the plaintiff, did not vacate the premises. Plaintiff therefore moved for a writ of assistance under RPAPL Section 221 under which the Sheriff would obtain possession for the plaintiff. The defendant cross-moved for a stay of enforcement of the order to vacate, “undertaking” not to commit waste and to pay for use and occupancy of the premises if the plaintiff was successful on appeal. The Supreme Court, Kings County, held that to obtain a stay CPLR Section 5519 requires the filing of a surety bond or depositing a sum of money with the Court in an amount set by the Court. A commitment to maintain the premises and pay for use and occupancy, without an undertaking as required by statute, does not support issuance of a stay. The Court denied the plaintiff's motion for a writ of assistance without prejudice and the defendant's cross-motion for a stay. It scheduled a settlement conference to determine the amount of the undertaking to be required for a stay during the pendency of the defendant's appeal. Morgan v. Morgan was reported in the New York Law Journal on April 26, 2004.

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