First American Title

First American Title Insurance Company

Current Developments

CONTRACTS OF SALE

As the result of binding arbitration conducted by the New York State Attorney General's Office, purchasers of condominium units were granted the right to rescind their contracts with the Sponsor. The Sponsor's request for a preliminary injunction prohibiting the release of the contract deposits from escrow was denied by the United States District Court for the Southern District of New York. The Sponsor appealed, claiming that the release of the escrow would cause it irreparable harm. It alleged that it would be "unquantifiably difficult" to recover the escrow payments at a later date since a significant number of enforcement actions would have to be brought and the contract vendees would spend the payments and could thereafter become insolvent. The Second Circuit held that neither of these arguments supported a finding of irreparable harm, and it affirmed the holding of the District Court. Irreparable harm could be found if it was shown that the insolvency of a party was likely or imminent, but only "conclusory assertions" that a defendant might spend the monies and become insolvent were presented to the Court. CRP/Extell Parcel I, L.P. v. Cuomo, decided September 30, 2010, is reported at 2010 WL 3784214.

FOREIGN GOVERNMENTS

A deed to a parcel of real property located next to the residence of the Ambassador of the Republic of Benin's Mission to the United Nations was executed by the then Director of Administration of the Republic's Ministry of Foreign Affairs. The grantee of that deed then deeded that parcel to a third party. The Republic of Benin claimed that the Director was not authorized to make the conveyance, and it brought an action to void both deeds. The United States District Court for the Southern District of New York held that both deeds were void. New York must look to the law of Benin to determine the actual authority of an agent of the Benin government and, under the law of Benin, only the ambassador and foreign minister of Benin have the authority to convey the property on instructions of its Council of Ministers. According to the Court, "the defendants [at the first conveyance] were aware that they needed to obtain written authorization for Guedegbe [the Director of Administration] to convey the property…and it was unreasonable for the defendants to close the transaction without receiving the required written authorization". As to the second deed, "a void deed cannot convey title even to a bona fide purchaser for value". Republic of Benin v. Mezei, decided September 9, 2010, is reported at 2020 WL 3564270.

FOREIGN MISSIONS ACT/FOREIGN SOVEREIGN IMMUNITIES ACT

Current Developments issued September 5, 2006 reported on litigation brought to determine the validity of tax liens filed by The City of New York against property of the Permanent Mission of India to the United Nations and the Principal Resident Representative of the Mongolia People's Republic to the United Nations. The City has been levying real estate taxes on those portions of the buildings on the property in question used as residences for staff below the rank of ambassador. The Second Circuit Court of Appeals, affirming the ruling of the federal district court, held, in a decision reported at 446 F. 3d 365, that the District Court had jurisdiction under the Federal Sovereign Immunities Act (28 USC Section 1604) to hear the controversy. The cases were remanded to the District Court for a determination on the merits.

The District Court, in a ruling reported at 533 F. Supp. 2d 457, held that the parts of the properties used to house staff were subject to real estate taxation. However, on June 23, 2009, while an appeal from that ruling was pending, the United States Department of State, pursuant to its authority under the Foreign Missions Act (22 U.S.C. Section 4301 et seq.), issued a notice exempting from real estate taxes property owned by foreign governments used to house the staff of permanent missions to the United Nations, of the Organization of American States or of consular posts. The notice expressly preempted inconsistent state and local laws to the contrary and it applied retroactively to real estate taxes previously assessed.

The United States Court of Appeals for the Second Circuit, finding that the State Department acted within its statutory authority, reversed the holding of the District Court and directed it to dismiss the actions. According to the Court of Appeals, "the Foreign Missions Act permits the State Department to designate affirmative benefits such as tax exemptions and that the Act allows the State Department to make such tax exemptions preemptive of State and municipal tax laws", and it could do so retroactively. Further, issuance of the notice was within the "foreign affairs function" exception to the "notice and comment" requirements of the Administrative Procedure Act (5 U.S.C. Section 553 (a)(1)). The City of New York v. The Permanent Mission of India to the United Nations, decided August 17, 2010, is reported at 2010 WL 3221889.

INDIAN LAND CLAIMS/THE ONEIDA INDIAN NATION

As reported in Current Developments issued May 31, 2007, three Oneida Indian tribal groups brought an action to recover approximately 250,000 acres of land in the Counties of Oneida and Madison, alleging that the lands were transferred to the State of New York between 1795 and 1846 in violation of the Indian Trade and Intercourse Act (barring the sale of tribal land without the consent of the federal government), the Treaty of Canandaigua, and federal common law. The case was originally brought against Madison and Oneida Counties, seeking compensation for their illegal occupancy of certain of those lands; the State of New York was named a defendant in 2000. The United States intervened in the litigation in 1998.

In 2007, the United States District Court for the Northern District of New York, in a ruling reported at 500 F. Supp. 2d 128, held that laches barred the Plaintiffs' possessory claims, but the Plaintiffs' claims for unconscionable consideration in connection with the original land transfers could proceed. The Second Circuit Court of Appeals, in a decision issued on August 9, 2010, affirmed the dismissal of the Plaintiffs' possessory claims but reversed on the Plaintiffs' non-possessory claims. According to the Court, the possessory claims were barred by equitable principles, such as laches, acquiescence and impossibility, applied in the Second Circuit's 2005 decision in Cayuga Indian Nation v. Pataki ("Cayuga"), reported at 413 F. 3d 266; the non-possessory claims are barred by New York's sovereign immunity and by equitable defenses. (In Cayuga, the Court found that "possessory claims - claims premised on the assertion of a continuing right to possession of ancient tribal lands - are by their nature disruptive, in that they call into question settled land titles"). The damage claim for violation of the Indian Trade and Intercourse Act was similarly barred. Oneida Indian Nation of New York v. County of Oneida is reported at 2010 WL 3078266.

INTERSTATE LAND SALES FULL DISCLOSURE ACT ("ILSA") - (15U.S.C. SECTION 1701 ET SEQ.)

- Under subsection (d) of Section 1703 ("Requirements respecting sale or lease of lots") of the ILSA, "[a]ny contract or agreement which is for the sale or lease of a lot not exempt under section 1702 of this title and which does not provide – (1) a description of the lot which makes such lot clearly identifiable and which is in a form acceptable for recording by the appropriate public office responsible for maintaining land records in the jurisdiction in which the lot is located…may be revoked at the option of the purchaser or lessee for two years from the date of the signing of such contract or agreement..".

The United States District Court for the Southern District of New York, granting the Plaintiffs' motion for summary judgment, held that since the signatures to a contract of sale with the Sponsor for a condominium unit were not acknowledged the Plaintiffs were entitled to rescind the contract and be refunded their contract deposits, with interest; the contract, containing a description of the property to be conveyed, was not in recordable form. Bacolitsas v. 86th & 3rd Owner, LLC, decided September 21, 2010, is reported at 2010 WL 3734088.

- Under subsection (a)(1)(B) of Section 1703 of the ILSA, a developer may not use "any means or instruments of transportation or communication in interstate commerce, or of the mails…to sell or lease any lot unless a printed property report, meeting the requirements of section 1707 of this title, has been furnished to the purchaser or lessee in advance of the signing of any contract or agreement by such purchaser or lessee".

In Nu-Chan, LLC v. 20 Pine Street LLC, the Sponsor of a condominium offering subject to ILSA did not provide the Plaintiffs, prior to signing their purchase agreements, a property report, as required by Section 1703(c), and the contracts did not include a notice of the Plaintiffs' right to rescind within two years, as required by Section 1703(d). Since the Plaintiffs did not demand rescission within two years, the Supreme Court, New York County, granted Defendant-Sponsor's motion for

summary judgment with respect to the Plaintiffs' claims regarding the automatic rescission right under Section 1703(d). However, under Section 1709(b) ("Civil liabilities"), "[a] purchaser or lessee may bring an action at law or in equity against the seller…to enforce any rights under subsection (b), (c), (d) or (e) of section 1703 of this title" and, under Section 1711(b), an action for a violation of Section 1703(c) and (d) may be maintained within three years of the date of the signing of the contract of sale. The Plaintiffs' claims for equitable rescission and damages under Section 1709(b), having been asserted within three years, were not barred. This decision, dated September 30, 2010, is reported at 2010 WL 3825734.

MORTGAGE FORECLOSURES

Real Property Actions and Proceedings Law Section 1304 ("Required notices"), effective September 1, 2008, requires that a notice, captioned "You Could Lose Your Home. Please Read the Following Notice Carefully", be sent to a borrower at least ninety days prior to commencing a mortgage foreclosure when the loan in question is any of a "high-cost", "subprime" or "non-traditional" home loan. The law was amended effective January 14, 2010 to apply to any "home loan", as defined in RPAPL Section 1304.

The Plaintiff in Bank of America, National Association v. Maharaj did not provide proper evidentiary proof of compliance with the notice requirement of RPAPL Section 1304. Accordingly, the Supreme Court, Suffolk County, denied the Plaintiff's application for an order of reference and dismissed the action. According to Judge Mayer,

> "(t)his application is an example of the scores of prior applications for orders of reference from plaintiff's counsel in this action, as well as from plaintiff-banks' attorneys in general, in which a lack of attention to detail leave this Court and, no doubt, courts throughout the State, the unenviable and overwhelming task of closely scrutinizing hundreds and thousands of foreclosure motions to effectuate the legislative protections afforded to homeowners in the throes of foreclosure..".

This case, decided September 21, 2010, is reported at 2010 WL 3769224.

MORTGAGE FORECLOSURES

The Supreme Court, Richmond County, granted a motion by the court-appointed temporary guardian of defendant Deborah Bernhardt to vacate a default judgment of foreclosure and sale due to the lack of personal service, dismissed the foreclosure action and canceled the notice of pendency. The Court held, however, that the purchaser of the property at the foreclosure sale would retain title to the property. The successful bidder was a bona fide purchaser for value who did not know, and had no reason to know, that the Defendant was allegedly incapacitated or incompetent. Further, it was not disputed that the Defendant had defaulted on the mortgage loan, and it was not alleged that she had any ability to redeem the property or forestall a further foreclosure by the mortgagee. U.S. Bank, N.A., as Trustee v. Bernhardt, decided August 18, 2010, is reported at 28 Misc. 3d 1234 and 2010 WL 3565527.

MORTGAGE FORECLOSURES/MERS

A mortgage on a condominium unit in Manhattan was executed to Wall Street Bankers Ltd. ("WSB") and to the Mortgage Electronic Registration Systems, Inc. ("MERS"), acting as nominee for WSB. The mortgage secured a note made to WSB. The mortgage was assigned to LPP Mortgage Ltd. ("LPP"). WSB was not a party to the assignment and, according to Judge Madden of the Supreme Court, New York County, "there is no evidence it consented to it". LPP commenced an action to foreclose the mortgage and the defendant moved to dismiss the complaint for lack of standing to sue. The motion was granted by the Court since there were "no allegations or evidence that MERS was the owner of the note such that it could assign it to LPP. Thus, the assignment [of the mortgage and note] from MERS was insufficient to confer ownership of the note to LPP and it has no standing to bring this action". LPP Mortgage Ltd. v. Sabine Properties, LLC, decided August 27, 2010, is reported at 2010 NY Slip Op 32367, posted at: **http://www.courts.state.ny.us/reporter/pdfs/2010/2010_32367.pdf.**

MORTGAGE FORECLOSURES

In an action to foreclose a mortgage securing a "no income-documentation" loan, the Defendant asserted affirmative defenses that the loan was substantively unconscionable and the making of the loan was an unfair and deceptive practice in violation of General Business Law Section 349 ("Deceptive acts and practices unlawful") because the lender knew or should have known when the loan was made that the Defendant's income was insufficient to enable her to make the required payments. The mortgagee's motions to dismiss the affirmative defenses and for summary judgment were denied by Judge Spinner of the Supreme Court, Suffolk County. According to the Court, there was an issue of fact as to whether the loan was grossly unreasonable or unconscionable and, if the loan was a high cost loan or a subprime home loan, the lender had to establish, as required by Banking Law Sections 6-l(2)(k) ("High-cost home loans") and 6-m(4) ("Subprime home loans"), that it considered the borrower's ability to repay before making the loan. There was also an issue of fact as to whether the act of offering such loans to the Defendant and other homeowners in "similarly financially vulnerable or desperate situations" was materially misleading in violation of GBL Section 349. Emigrant Mortgage Company, Inc. v. Fitzpatrick, decided August 11, 2010, is reported at 906 N.Y.S. 2d 874.

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 October 1, 2010 – December 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**.

POWERS OF ATTORNEY/STATUTORY GIFTS RIDER

As reported in Current Developments issued August 19, 2010, Chapter 340 of the Laws of 2010 directed the New York State Law Revision Commission ("LRC") "to study all aspects of the implementation of" Title 15 ("Statutory Short Form and Other Powers of Attorney for Financial and Estate Planning") of Article 5 of New York's General Obligations Law and to report to the Governor and the Legislature. Its preliminary report on the Statutory Gifts Rider is posted at: **http://www.lawrevision.state.ny.us/reports/revisedseptember1report.pdf**. A further report is required to be issued by the LRC by January 1, 2012.

STATUTE OF FRAUDS

Under subsections "2" and "3" of General Obligations Law Section 703 ("Conveyances and contracts concerning real property required to be in writing"), also known as the Statute of Frauds, a contract for the sale of real property is void unless it is evidenced "in [a] writing subscribed to by the party to be charged" or by his lawfully authorized agent.

The Plaintiff in the case of Naldi v. Grunberg alleged that the Defendant failed to honor a right of first refusal granted to the Plaintiff, exercisable while the Plaintiff conducted due diligence before entering into a formal contract of sale. The right of first refusal was set forth in an exchange of emails between the parties' brokers. The Appellate Division, First Department, reversed the Order of the Supreme Court, New York County, denying the Defendant's motion to dismiss the complaint, finding that since there was no agreement on a purchase price in the emails there was "no meeting of the minds" and, therefore, the right of first refusal was unenforceable under the Statute of Frauds. The Appellate Division did, however, state that "an email will satisfy the statute of frauds so long as its contents and subscription meet all requirements of the statute".

According to the Appellate Division, an exchange of emails may be enforceable under either the Statute of Frauds or the Electronic Signatures in Global and National Commerce Act ("ESIGN") (15 USC Section 7001 et seq.). "[T]he terms 'writing' and 'subscribed' in GOL Section 5-703 should now be construed to include, respectively, records of electronic communications and electronic signatures…". "E-SIGN's requirement that an electronically memorialized and subscribed contract be given the same legal effect as a contract memorialized and subscribed on paper…is part of New York law, whether or not the transaction at issue is a matter 'in or affecting interstate or foreign commerce'". Naldi v. Grunberg, decided October 5, 2010, is reported at 2010 WL 3855189.

New York State's Insurance Department's Circular Letter No. 14 ("Title Insurance Companies' Issuance of Comfort Letters in Lieu of Endorsements"), dated September 14, 2010, addresses so-called "comfort" or "non-impairment" letters issued by underwriters and their agents that purport "to modify the obligations of an existing loan insurance policy or that are otherwise issued in lieu of issuing an endorsement to a policy". Such letters, according to the Department, "state that the coverage under an existing loan insurance policy continues in full force notwithstanding modifications to the insured loan". In its Circular Letter, the Department has directed title insurance companies not to "issue a comfort letter to a lender in lieu of issuing an endorsement in a form, and subject to the rates, approved by the Superintendant [of Insurance]". Circular Letter 14 is posted at:
http://www.ins.state.ny.us/circltr/2010/cl2010_14.htm

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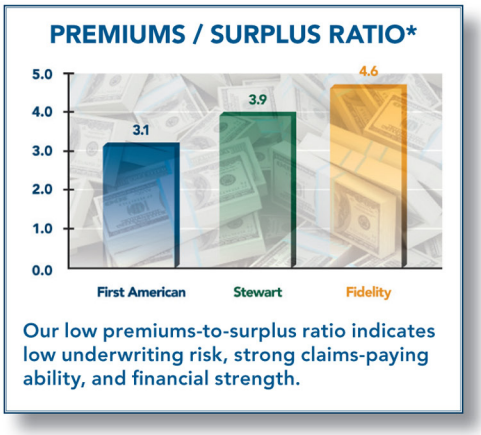
Remember when?



Our low premiums-to-surplus ratio indicates low underwriting risk, strong claims-paying ability, and financial strength.

Our low debt-to-capital ratio shows that the company is conservatively capitalized and financially strong.

At First American, we not only remember that old adage, we live by it. In fact, our low premiums-to-surplus ratio means that we set aside more capital for every dollar in premiums we write than any other major title insurance underwriter. It's this kind of conservative capitalization that helps us to keep our claims-paying ability strong. Our low debt-to-capital ratio also shows that we keep our debt in check. Add to this more than $5 billion in assets, and it all adds up to fi nancial strength you can count on.

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