



First American Title Insurance Company of New York **CURRENT DEVELOPMENTS**

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Bankruptcy - “Current Developments” dated August 28, 2000 reported on In Re Ainsley H. Bean, a case decided by the United States District Court for the Southern District of New York, which upheld an unauthorized post-petition transfer of the Debtor’s residence because the net proceeds of the transfer were turned over to the Trustee. The Trustee sought to recover from the purchasers for the bankruptcy estate the fair market value of the property. The United States Court of Appeals for the Second Circuit affirmed, holding that “property of the estate” under Bankruptcy Code Section 541 includes only the debtor’s equity in the property on the date of the bankruptcy filing, which amount was the equivalent of the net proceeds turned over to the Trustee. The court noted that the purchasers could not claim bona fide purchaser status under Code Section 549(c) as reference to the bankruptcy filing in their title report provided constructive notice of the bankruptcy proceeding. *McCord v. Agard* was reported in the New York Law Journal on July 5, 2001 at page 25.

Bankruptcy - The United States District Court for the Eastern District of New York, in an adversary proceeding brought by the Trustee to void a purchase money mortgage on the Debtor’s property, affirmed the decision of the Bankruptcy Court granting summary judgment to the holders of the mortgage. The Trustee claimed the status of a bona fide purchaser as to the mortgage since it was unrecorded on the date the bankruptcy petition was filed. However, the deed to the property was also unrecorded on that date. According to the court, since on the date of the filing of the petition record title was inconsistent with possession by the Debtor, the Trustee could have made a reasonable inquiry that would have revealed the existence of the mortgage. The Trustee, chargeable with inquiry notice under Real Property Law Section 291, was not a bona fide purchaser as to the mortgage. In *Re Mario Rodriguez*, decided March 22, 2001, is reported at 261 B.R. 92; 2001 U.S. Dist. LEXIS 4063.

Constructive Trust - The Supreme Court, Ulster County, held that certain property conveyed to the defendant was subject to a constructive trust in favor of the plaintiff. It ordered that the property be re-conveyed to the plaintiff, subject to a mortgage executed by the defendant before the notice of pendency of the action to impose the constructive trust was filed but recorded after the filing. The Appellate Division, Third Department affirmed. Although the mortgage was recorded after the notice of pendency was filed, the plaintiff had actual notice of the mortgage

prior to the filing. In addition, since the proceeds of the mortgage were used to satisfy two prior mortgages the doctrine of equitable subrogation applied. *Gerenstein v. Williams*, decided April 5, 2001, is reported at 723 NYS 2d 257.

Constructive Trust - The Supreme Court, New York County held that a same-sex domestic partner could seek an order that property held by the partners as joint tenants would, after severance of the joint tenancy into a tenancy in common by a deed executed by the other partner, be held subject to a constructive trust in the plaintiff's favor. According to the court, a constructive trust can be imposed to prevent unjust enrichment where there has been a confidential marital or other family relationship, such as in this instance. The court found, however, no basis to reform the title documents. *Minieri v. Knittel*, decided June 1, 2001, is reported at 2001 N.Y. Misc. LEXIS 185.

Environmental Control Board Judgments - Effective June 12, 2001, the New York City's Environmental Control Board requires that interest on a judgment entered by the Board under Section 1404 of Chapter 57 of the City Charter be paid to obtain a satisfaction. Interest from the docket date of the violation is being computed at 9% per annum.

Estates - The Supreme Court, Greene County, granted the petition of the daughter of a decedent to be appointed voluntary administrator and for administration of the estate as a small estate pursuant to Surrogate Court Procedures Act Article 13, notwithstanding that the assets of the estate included the interest of mortgagee under a purchase money mortgage. Voluntary administration of a small estate is granted only as to assets which constitute personal property. The court held that as a debt secured by a mortgage is personalty, the voluntary administrator could collect that debt for the estate. The court also found that Real Property Law Section 321, authorizing a personal representative to satisfy a mortgage, and EPTL Article 13 together implied legislative authority for a personal representative to assign a mortgage. *Matter of the Estate of Scheuer*, decided April 19, 2001, is reported at 725 NYS 2d 188.

Licensees - The District Court, Nassau County held that the "domestic partner" of the petitioner was a licensee subject to eviction from the residence owned by petitioner by a summary proceeding brought under Real Property Actions and Proceedings Law Section 713 ("Grounds where no landlord-tenant relationship exists"). The court found, however, that their children born out-of-wedlock were not licensees as the petitioner is legally obligated for their support, and the proceeding against them was dismissed. The warrant of eviction was stayed to enable the respondent to find suitable housing and to pursue a proceeding for the custody and support of the children in Family Court. *Blake v. Stradford*, decided April 24, 2001, is reported at 725 NYS 2d 189.

Mansion Tax - An Advisory Opinion of the Technical Services Division of the New York State Department of Taxation and Finance issued June 1, 2001 takes the position that the Additional Tax under Tax Law Section 1402-a is not due on the conveyance of a cooperative unit which was intended to be used as a residence but which at the time of closing could only function as non-residential property. The unit had for at least 40 years been used as medical offices and it could only be occupied as a residence after the making of substantial physical alternations and amendment of the certificate of occupancy. TSB-A-01(6)R is on the Internet at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Real_Estate/A01_6r.pdf

Mortgage Foreclosure - Authority for the foreclosure of a mortgage by a power of sale under Article 14 of the Real Property Actions and Procedures Law was extended until July 1, 2005 by Chapter 76 of the Laws of 2001. The Chapter also clarified a type of property not subject to non-judicial foreclosure by amending Section 1401(1)(d) to exclude from the scope of Article 14 “a building located in a city with a population of one million or more where the number of units occupied by residential tenants is equal to or greater than sixty-five per centum of the total number of units in the building”. The law had excluded “a building containing sixty-five per centum or more residential tenancies located in a city with a population of one million or more”.

Mortgage Foreclosure - The United States District Court for the Southern District of New York held that the owner of a one hundred percent participation interest in a mortgage being foreclosed was not a necessary party to the action and therefore was not required to be joined in the action. Its interest is that of a creditor of the foreclosing mortgagee, not the holder of an encumbrance or lien on the property. *Regency Savings Bank, F.S.B. vs. Merritt Park Lands Associates*, decided April 5, 2001, is reported at 139 F. Supp. 2d 462 and at 2001 U.S. Dist. LEXIS 4406.

Mortgage Foreclosure - The Appellate Division, Second Department, reversing the order of the lower court granting the defendant’s motion for summary judgment dismissing the complaint, held that the failure to notice a foreclosure sale as required by Real Property Actions and Proceedings Law Section 231 is not a jurisdictional defect requiring the sale to be vacated unless a substantial right of a party was prejudiced thereby. There was no showing made that any prospective bidders were prevented from attending the sale for lack of proper notice and the defendant property owner had notice of the sale. *Amresco New England II, L.P. v. Denino*, decided May 29, 2001, is reported at 725 NYS 2d 78.

Mortgage Recording Tax - Advisory Opinions of the Technical Services Division of the New York State Department of Taxation and Finance issued April 12, 2001 and May 23, 2001 take the position that no mortgage tax is due on mortgages made either to the New York State Urban Development Corporation d/b/s Empire State Development Corporation or the Roosevelt Island Operating Corporation of the State of New York where the UDC or the RIOC is the mortgagee and presents the mortgages for recording, notwithstanding that they are not to advance any funds

and upon recording they will assign their interests in the mortgages. Such mortgages can thereafter be further assigned and modified provided that there is no increase in the principal balance secured. TSB-A-01(1)R, TSB-A-01(2)R, and TSB-A-01(5)R are on the Department's WEB Site at the following addresses: http://www.tax.state.ny.us/pdf/Advisory_Opinions/Mortgage/A01_1r.pdf, http://www.tax.state.ny.us/pdf/Advisory_Opinions/Mortgage/A01_2r.pdf, http://www.tax.state.ny.us/pdf/Advisory_Opinions/Mortgage/A01_5r.pdf,

Mortgage Recording Tax - An Advisory Opinion of the Technical Services Division of the New York State Department of Taxation and Finance issued May 23, 2001 takes the position that no additional mortgage tax is due on severance of a construction mortgage made by a Housing Development Fund Company formed under Article XI of the Private Housing Finance Law into substitute mortgages, on the assumption by a purchaser of part of the premises of the indebtedness secured by a substitute mortgage, or on the subsequent modification and extension of such mortgage by a purchaser and the construction loan mortgagee or third party lender taking the mortgage by assignment. The recording of a mortgages of a HDFC are exempt from tax under Section 577(2) of the PHFL. This Opinion, TSB-A-01(4)R, is at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Mortgage/A01_4r.pdf.

Mortgage Recording Tax - The Appellate Division, Third Department affirmed the determination of the Tax Appeals Tribunal to refund mortgage tax since the proceeds of the new mortgage loan on which tax was paid were used to pay debt owed to the wrap - around mortgagee. Since the total debt remained the same no new mortgage tax was deemed payable on recording of the new mortgage. This Opinion was issued July 24, 2001 in Matter of City of New York v. New York State Tax Appeals Tribunal (TSB-D-96(8.1)R).

Mortgage Recording Tax - "Current Developments" dated May 17, 2000 reported that the New York State Division of Tax Appeals Tribunal affirmed a decision of an Administrative Law Judge to refund tax paid on mortgages made by certain cooperative housing corporations to the extent that refinancing proceeds were applied to reduce the amount due the respective wrap-around mortgagees. The Tax Appeals Tribunal, in a Decision dated June 14, 2001, affirmed the decision of the Administrative Law Judge. It denied the further contention of the City of New York that agreements subordinating the wrap mortgages constituted new, taxable mortgages. According to the Tribunal, "(w)e perceive the City's argument in this matter to be yet another unsuccessful attempt to tax a transaction where there is neither a new mortgage or new funds". Matter of the City of New York, DTA Nos. 816772-775, is on the Internet at <http://www.nysdta.org/Decisions/816772.dec.htm>.

Nassau County Sewer Connections - Pursuant to Nassau County Ordinance No. 100C-2001, effective June 25, 2001 the County's Department of Public Works charges a fee of \$15.00 to issue a written verification of a connection to the County Sewers. Payments are made to the Nassau County Treasurer.

Partnerships - A United States District Court for the Southern District of New York held that the transfer of title to a Section 8 subsidized housing project from a limited partnership to a REIT in exchange for operating partnership units without the consent of all partners violated Section 98 of New York's Partnership Law. The transfer made it "impossible to carry on the ordinary business of the partnership" which, according to the partnership certificate, was to "hold title" and "to operate" the property. *Rosewood Apartments Corporation v. Perpignano*, decided June 11, 2001, is reported at 2001 U.S. Dist. LEXIS 7777.

Powers of Attorney - A power of attorney executed by the sole owner, director and officer of the defendant corporation granted the attorney-in-fact authority as to "business operating transactions". The Appellate Division, First Department, held that this language did not authorize the agent to sell the defendant's real property. *288 St. Nick L.L.C. v. 288 Kiseki Realty, Inc.* was reported in the New York Law Journal on July 9, 2001.

Real Estate Transfer Tax - An Advisory Opinion of the Technical Services Division of the New York State Department of Taxation and Finance issued April 18, 2001 takes the position that in connection with development of property on land adjoining Columbus Circle the conversion after construction to condominium ownership and the transfer of a separate condominium unit to each one of the Members of the Limited Liability Company presently in record title is exempt from tax since the conversion and transfers do not effectuate a change in beneficial ownership. Under the Operating Agreement of the LLC, each Member is considered the beneficial owner of the condominium unit to be transferred to it upon completion of construction. TSB-A-01(3)R is on the Department's WEB Site at http://www.tax.state.ny.us/pdf/Advisory_Opinions/Real_Estate/A01_3r.pdf

Rent Stabilization Fees, New York City - Section 26-517.1(a) of Title 26, Chapter 4 ("Rent Stabilization") of New York City's Administrative Code requires the owner of each housing accommodation registered under the Emergency Tenant Protection Act of 1974 with the State Division of Housing and Community Renewal to pay an annual fee of \$10.00 per unit. Unpaid charges become a lien on the related real property recoverable by tax foreclosure. Local Law 36 of 2001 provides that an owner of a subject housing accommodation who has failed to pay the annual fee for any year from 1984 to 1998 is not to be liable for payment of any interest thereon if all unpaid annual fees are paid within 90 days of receipt of a notice from the Department of Finance demanding payment. In addition, under the Local Law, if it is determined that the annual fees for each year from 1993 to 1998 have been paid, the annual fee for each year prior to 1993 shall be deemed paid.

Right of Recission - The Nassau County District Court held that a borrower issued a loan commitment for the refinance of his residence that did not close was "under the circumstances of this case" entitled to a refund of the commitment fee since he rescinded the transaction within three years of the commitment date. Under Regulation Z of the Federal Truth in Lending Law (12 CFR Section 226.23) the

right to rescind can be exercised within three years from the date on which a transaction is consummated if no notice is given. No notice of the right to rescind had been received. In issue was whether the lender issued its commitment on the understanding that the loan was to be secured only by a one-half interest in certain real property. *DeMaria v. Emigrant Mortgage Company, Inc.* was reported in the *New York Law Journal* on May 23, 2001.

Tax Lien Sales, New York City -Pursuant to Local Law 26 of 1996, as amended, the City's Administrative Code has authorized a tax lien on residential property (Class One and Class Two real property that is a residential cooperative or a residential condominium unit) to be sold only when a real property tax component of the lien has been unpaid for three years. For Class Three (utility) and Class Four (commercial) real property, a tax lien could be sold if a real estate tax, a water charge or sewer charge is unpaid for one year, so long as there is a real estate tax other than a Business Improvement District tax unpaid at the time of the sale.

Local Law 36 of 2001 amended Code Section 11-319 to extend the authority of the City to conduct the sale of tax liens to October 31, 2003. It also provides that a tax lien on Class Two property, other than a residential cooperative or residential condominium, or on Class Three property (utility real property) may be sold only if there is a real property tax component due as of the date of the first publication of the notice of sale. The lien may be sold after the date of first publication if the charges remaining due do not include a real property tax component. A tax lien on Class Four property may be sold only if as of the date of first publication there is unpaid either a real property tax component, a water charge or a sewer charge. An unpaid tax lien on Class Four property remaining unpaid after the date of first publication may be sold regardless of whether a real estate tax, water charge or sewer charge remains unpaid.

Tenancy By The Entirety - A separation agreement provided for the wife to convey to her husband her interest in certain property on the payment to her of a sum of money. A deed was executed and held in escrow. Record ownership was as tenants by the entirety. The husband died before the deed was released from escrow. An alleged illegitimate heir of the husband commenced an action claiming that title passed to her father under the separation agreement. The wife's motion for summary judgment was granted and the complaint was dismissed. The Supreme Court, Kings County held that title continued to be held as tenant by the entirety and passed to the wife on her husband's death. There was no conveyance of the property to the husband, the title was not converted to a tenancy in common by a judicial decree of separation, annulment or divorce, and the separation agreement did not partition or divide the property to satisfy the requirements of Section 3-309 of the General Obligations Law. That section permits the division or partition of real property held by the entireties if clearly expressed. *Gallup v. Morgan* was reported in the *New York Law Journal* on July 13, 2001 at page 21.

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