First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

This is another in a series of bulletins issued by email to clients of First American.

Contracts of Sale - The sellers of property in Suffolk County canceled their contract once a notice of pendency to foreclose the existing mortgage was filed, claiming that the foreclosure did not enable them to deliver title free of all encumbrances. The contract provided that the sellers could unilaterally cancel the contract if the property was subject to an encumbrance the sellers did not expressly agree to discharge. In an action for specific performance of the contract of sale, the court noted that the contract called for the plaintiff to discharge the existing mortgage and the cancellation provision of the contract did not apply to encumbrances the sellers were to discharge. The Appellate Division, Second Department affirmed the order of the Supreme Court, Suffolk County, and granted summary judgment to the plaintiff-purchaser. Marsh v. Christodoulou, decided November 19, 2001, is reported at 733 NYS 2d 463.

Cooperatives - Following the death of a shareholder-lessee of one of the units at an eight unit Manhattan cooperative, and prior to the sale of that unit, the shareholders of the cooperative corporation, at a special meeting, imposed a "flip" tax of three percent on the sale of the apartments of deceased shareholders. The Supreme Court, New York County, found that inadequate notice of the special meeting to consider the "flip" tax was afforded the estate's representative. The court also concluded that since the tax was, in fact, enacted for a specific estate, it was not imposed in good faith and was therefore invalid. It opined, however, that a "flip" tax applicable only to the estate of deceased shareholders may under other circumstances be lawfully applied under Business Corporation Law Section 501(c) which provides, in part, that, with respect to cooperative corporations, "each share shall be equal to every other share of the same class" and, provided shares meet certain enumerated requirements, "shares of the same class shall not be considered unequal because of variations in fees or charges payable to the corporation upon sale or transfer of shares and appurtenant proprietary leases". Seif v. 72 Horatio Street Owners Corp. was reported in the New York Law Journal on February 6, 2002.

Eminent Domain Procedure Law -Plaintiff's property was condemned in 1992 by the New York City School Construction Authority to enable construction of a public school. That project was abandoned, and the City of New York was instead to convey the property as an Urban Renewal Project to an adjoining food production business. Plaintiff brought an action to compel the Authority to re-convey the condemned property to him under Section 406(A) of the Eminent Domain Procedure Law which Section affords a condemnee a right of first offer when the

condemned property has not been materially improved and, within ten years of the taking, the property is to be disposed of for private use. The Appellate Division, Second Department, affirming the decision of the Supreme Court, Kings County, held that the right of first refusal was not exercisable. A condemnor may put property to an alternative public use on discontinuance of the originally planned public purpose. Here the City was disposing of the property as an Urban Renewal Project to create jobs. Vitucci v. New York City School Construction Authority was reported in the New York Law Journal on January 7, 2002.

Inverse Condemnation - Plaintiffs own property in Brooklyn adjoining the Gowanus Canal. Their common law riparian rights include the right of access to the abutting waterway and the "right to erect and maintain wharves and piers with a right of passage to and from them with reasonable safety and convenience". Across the Canal, the City of New York owns and operates a sanitation waste disposal plant. It was demonstrated that the movement of barges and tugboats in connection with the operation of the disposal plant prevented the plaintiffs from having a vessel safe berth along their portion of the canal and that a bulkhead and associated structures fronting on their part of the Canal were destroyed. The Appellate Division, Second Department, affirming the decision of the Supreme Court, Kings County, held that the City's activity effectively denied the plaintiffs their riparian rights to access the canal and upheld the compensation awarded for the taking. 627 Smith St. Corp. v. Bureau of Waste Disposal of the Department of Sanitation of the City of New York was reported in the New York Law Journal on January 7, 2002.

Lien Law - According to Lien Law Section 17 ("Duration of lien"), a mechanics' lien filed against "real property improved or to be improved with *a single family dwelling*" may only be extended within one year of the date on which the original notice of lien was filed by a court order of extension. A mechanics' lien against other types of property may be extended once without a court order merely by filing an extension of the lien with the county clerk of the county in which the notice of lien was filed. Mechanics' liens filed against defendant's property, improved by two detached single-family dwellings, were extended by only the filing of notices of extension. No action was commenced to foreclose the liens. The Supreme Court, Erie County, denied a motion to cancel the mechanics' liens. The Appellate Division, Fourth Department, reversed, and ordered that the mechanics' liens be canceled and discharged under Lien Law Section 19 ("Discharge of lien for private improvement") for failure to obtain court ordered extensions. The Appellate Division held that the definition of "property…improved with a single family dwelling" did not require that property be improved by only one single family residence. Given the definition of "single family dwelling" in Lien Law Section 10 ("Filing of notice of lien") when this action was commenced (defining the term "single family dwelling" as not including a dwelling unit in a subdivision of "five or more parcels of real property with single family dwellings"), property "improved with a single family dwelling" under Section 17 means property improved with between one and four single family residences.

The Appellate Division also held that work done at the property by developers in anticipation of a later sale of the property for commercial use, which sale did not take place, did not result in the property being commercial in nature since the property at all times was used solely for residential purposes. Matter of Cook v. Pariso, decided December 21, 2001, is reported at 2001 N.Y. App. Div. LEXIS 12480.

Mortgages - The Supreme Court, Westchester County, over the objection of the foreclosing mortgagee, granted a motion to stay the sale and permit the defendant-mortgagor to redeem the mortgage. On payment of all sums due, the mortgagee was directed to assign the mortgage to a third party lender. Although Real Property Law Section 275 ("Certificate of discharge of mortgage required"), as last amended in 1990, is permissive as to mortgage assignments, the court exercised its discretionary powers to require an assignment since the mortgagor was able to secure financing to satisfy the mortgage loan. 2301 Jerome Avenue Realty Corp. v. DiPaolo was reported in the New York Law Journal on January 23, 2002.

Notice of Pendency - Property in Queens County was conveyed in 1996 without consideration by Sally Mae Jenkins to Dorine Stephenson. In 1997, a Guardian as appointed for Ms. Jenkins under Article 81 of the Mental Hygiene Law ("Proceedings for appointment of a guardian for personal needs or property management"). Her Guardian filed a petition to void that deed and filed a notice of pendency in connection with that action. On the date the petition was filed, Stephenson sold the property to Legend Home Sales, Inc. ("Legend"). The deed to Legend was recorded after the notice was filed. The Supreme Court, Queens County, found that Ms. Jenkins was incapacitated when she conveyed the property, but it dismissed the action against Legend and directed cancellation of the notice of pendency on the ground that Legend was a bona fide purchaser. The Appellate Division, Second Department, reversed, in part, setting aside the deeds to Ms. Stephenson and to Legend. As Legend did not record its deed prior to the filing of the notice of pendency it was bound to the same extent as Ms. Stephenson by the judgment holding that Ms. Jenkins did not have the capacity to convey. Matter of Emma Jean Jenkins v. Stephenson, decided December 3, 2001, is reported at 733 NYS 2d 723.

Property Condition Disclosure Act – The "Property Condition Disclosure Act", was enacted by Chapter 456 of the Laws of 2001 and as Article 14 of the Real Property Law. Effective March 1, 2002, it requires a seller of residential real property improved by a one-to-four family dwelling to deliver to a purchaser an executed Disclosure Statement prior to the buyer's execution of a binding contract of sale. The buyer is to receive a credit of $500 against the purchase price if the seller does not deliver the Disclosure Statement. The Act was noted in the November 28, 2001 issue of "Current Developments". A form of a Disclosure Statement can be found on First American's Web Site at http://www.firstamny.com/documents/fc0268.pdf.

Statute of Limitations - The Appellate Division, Third Department, reversing an order of the Supreme Court, Schenectady County, dismissed an action to foreclose a mortgage as being barred by CPLR Section 213's ("Actions to be commenced within six years") six year statute of limitations, notwithstanding that partial payments of the debt were made by the receiver appointed in the prior, dismissed foreclosure action between the defendant and the plaintiff's predecessors in interest. According to the court, to renew or extend the limitations period under General Obligations Law Section 17-107 ("Effect of part payment on time limited for foreclosure of a mortgage") payments must be made by the debtor or its agent accompanied by acknowledgement of the remaining debt and a promise to pay the balance. The court held that the payments by the receiver were not to be deemed made by the debtor or its authorized agent. The court also noted that defendant's listing of the mortgage in the disclosure statement for a previously dismissed bankruptcy petition was not a promise to pay the mortgage so as to renew or extend the limitations period. Saini v. Cinelli Enterprises, Inc., decided December 13, 2001, is reported at 733 NYS 2d 824.

Statute of Limitations - The Appellate Division, Second Department, affirming the order of the Supreme Court, Kings County, held that the foreclosure of a mortgage made to secure a guaranty was time barred since the limitations period to enforce the underlying debt had run. According to the Second Department, the six-year statute of limitations applicable to enforcement of a guarantee begins to run when the debtor defaults on the underlying debt. Haber v. Nasser, decided December 3, 2001, is reported at 733 NYS 2d 720.

Statute of Limitations - The Appellate Division, Second Department, affirming the order of the Supreme Court, Dutchess County, held that an action to declare as unauthorized the execution and recording of a partial release of mortgage was subject to the six-year statute of limitations applicable to foreclosures and not CPLR Section 214's ("Actions to be commenced within three years") three year limitations period which encompasses actions seeking recovery on a liability created or imposed by statute. It was alleged that the right to cancel a recorded instrument relating to real property arose from Real Property Law Section 329 ("Actions to have certain instruments canceled of record"), but the court found that Section 329 merely codified a common law right of action. The court also held that since the mortgage debt was not accelerated, recovery of installments due within six years of commencement of the foreclosure were not timed barred. Esther M. Mertz Trust v. Fox Meadow Partners, LTD., decided November 19, 2001, is reported at 734 NYS 2d 77.

***"Talkline-The Stoler Report"* - First American Vice-President Michael Stoler, on his radio show, broadcast Wednesdays at 10:00 PM on WPAT 930 AM, will host on February 20 a discussion of the Commercial Brokers Perspective on the Real Estate Market in New York City with Stephen B. Siegel, Chairman of Insignia/ESG. Inc., Bruce Mosler, President of U.S. Operations for Cushman and Wakefield, James**

Kuhn, President of Newmark & Company Real Estate, Inc. and Marc Jaccom, Executive Vice-President of Julien J. Studley, Inc.

On February 27, David Brause, Vice-President and Principal of Brause Realty, Inc. and Lester Petracca, President of Triangle Equities, will discuss, with Michael Stoler, Commercial, Retail & Residential Developments in the Borough of Queens on "*Talkline-The Stoler Report*".

Transfer Tax - The Technical Services Division of the New York State Department of Taxation and Finance on December 6, 2001 issued an Advisory Opinion (TSB-A-01(8)R) on the application of the state's Real Estate Transfer Tax to the development by the New York Times Company and Forest City Ratner of an office building on property located on the east side of Eighth Avenue in Manhattan between 40th and 41st Streets. As part of that project, the 42nd St. Development Project, Inc., a subsidiary of the New York State Urban Development Corporation, is to obtain title to the land through condemnation. The land will be ground leased with an option to purchase to The New York Times Building LLC ("LLC") and a memorandum of lease will be recorded, but the LLC will not have the rights of a tenant under the Ground Lease until title is acquired by condemnation and vacant possession of the land has been delivered to it. Among other issues considered, the Advisory Opinion concluded that the conveyance of the beneficial ownership of the land under the ground lease will be effected and be transfer taxable when vacant possession of the land is delivered to the LLC. Further, the execution of the lease and recording of the memorandum of lease prior to the delivery of vacant possession of the land will be exempt from transfer tax as the granting of an option to purchase real property without use and occupancy under Tax Law Section 1405(b)(9). The Opinion also indicates that the building to be constructed by the LLC will contain leasehold condominium units, and the conveyance, as structured, of legal title to the units to the respective members of the LLC will be exempt from transfer tax as a mere change of identity or form of ownership under Tax Law Section 1405(b)(6). The Advisory Opinion is located on the Internet at the address http://www.tax.state.ny.us/pdf/Advisory_Opinions/Real_Estate/A01_8r.pdf.

Usury – On reconsideration of his earlier decision, Judge Rudolf, of the Commercial Division of the Supreme Court, Westchester County, held that a default judgment obtained in a Canadian Court is enforceable in New York, notwithstanding that the 20% interest rate for the subject loan is usurious under New York law and the promissory note being enforced would, under New York law, be void. Citing principles of comity, the Court found that enforcing the Canadian judgment would not violate a strong New York public policy. Larwex Enterprises, Inc. v. Bacharach was reported in the New York Law Journal on January 3, 2002.

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