First American Title Insurance Company of New York
CURRENT DEVELOPMENTS

Condominiums – Current Developments dated December 20, 2006 reported on Lisenenkov v. Kaszirer (827 N.Y.S. 2d 579), an Action to recover the down payment under a contract of sale for the purchase of a condominium unit in Manhattan. The Plaintiff alleged that she was not required to complete the purchase when the title company would not insure title to the unit, since the condominium's Board of Managers would not waive its right of first refusal to purchase the Unit or provide other documents unless the Plaintiff paid two years of common charges in advance. The Supreme Court, New York County, ordered that the down payment be returned since the Plaintiff, not being obligated to pay common charges in advance, had not breached the contract of sale, and the Seller was not able to deliver an "insurable title" under the contract. This ruling has been affirmed by the Appellate Division, First Department in a decision dated June 21, 2007, reported at 2007 WL 1775379.

Contracts of Sale – Under a contract of sale, property in Kings County was to be conveyed subject to zoning and subdivision laws and regulations, provided that they did not render title unmarketable and were not violated by the existing buildings and improvements on the property and their use. After the contract was executed but before the scheduled closing date the property was down-zoned. As a result of the change in zoning, the Plaintiff-Buyer sought return of his down payment, and the Defendants-Sellers sought an award of liquidated damages for breach of the contract. The Supreme Court, Kings County, granted the Defendants' motion for summary judgment and awarded them liquidated damages pursuant to the contract's terms. The contract was not conditioned on the zoning remaining unchanged and the Plaintiff, a licensed real estate broker and developer, could have inquired as to pending zoning changes before entering into the contract. Defendants had no information that was unavailable to the general public. Dunn v. Arniotes, decided May 29, 2007, is reported at 2007 WL 1615120.

Eminent Domain – Petitioners acquired an office building in the Village of Haverstraw, in Rockland County. Petitioner intended to provide affordable rental housing units on two additional floors to be constructed. The Board of Trustees of the Village subsequently passed a resolution directing its counsel to acquire the building by gift, purchase or condemnation. The Board of Trustees found that condemnation was appropriate to provide a health care center, affordable housing,

and office space for a not-for-profit organization which was already a tenant in the building. Petitioner sought judicial review by the Appellate Division, Second Department, under Eminent Domain Procedure Law Section 207 ("Judicial Review"), requesting that the Court reject the Village's determination and findings. Petitioner alleged that no "public use, benefit or purpose will be served by the proposed acquisition", which is required under Section 207 for a taking to be upheld.

The Appellate Division annulled the Village's determination. It found that the beneficiaries of the condemnation would be the local not-for-profit organization, which would through condemnation obtain title to the building it had been unable to purchase, and a private developer which would receive credit toward its affordable housing obligations to the Village by constructing residential condominium units in the building. According to the Court, the "ostensible purpose of providing affordable housing was a pretext to benefit private entities resulting in the creation of less affordable housing than if there had been no taking of property at all, and the taking does not rationally relate to any other purpose". Matter of 49 WB, LLC v. Village of Haverstraw, decided June 19, 2007, is reported at 2007 WL 1775976.

<u>Foreclosures/Service By Publication</u> **– First publication of the summons and complaint against the Defendant in a tax lien foreclosure was not made within thirty days of the date on which the Order authorizing service by publication was entered, as required by the Order and by CPLR Rule 316(c). The Supreme Court, Kings County, denied the Plaintiff's motion for an Order deeming the affidavits of publication as having been filed timely *nunc pro tunc*. According to the Court, "[f]ailure to comply with the strict time requirements of CPLR Rule 316(c) is jurisdictional". The Court granted leave to obtain a new Order for service by publication. NYCTL-1 Trust v. Cruz, decided June 7, 2007, is reported at 2007 WL 1630681.**

<u>Foreclosures/Surplus Money</u> **– Motions were before the Supreme Court, Bronx County, to alternatively confirm or reject the Referee's report on the disposition of surplus monies from a sale of real property in a tax lien foreclosure. The Referee determined that since the property, acquired by the record owner prior to his marriage, was to be conveyed by him to his spouse pursuant to a 1999 divorce decree, the former spouse's Estate should be awarded the entire surplus, notwithstanding that the transfer did not occur. The Court affirmed the finding, holding that the divorce decree, turned into an Order and Judgment, transferred to the owner's spouse an equitable interest in the property which is a vested interest entitling her Estate to claim surplus monies. However, the Court rejected the claim that a judgment creditor of the record owner had a right to surplus monies, since the 1993 money judgment was rendered in Kings County and docketed solely in Queens County, not in Bronx County where the property is located. NYCTL 19980-1 Trust v. Gabbay, decided June 5, 2007, is reported at 2007 WL 1696016.**

<u>Foreign Sovereign Immunities Act</u> – Current Developments dated August 2, 2005 reported on the ruling of the United States District Court for the Southern District of New York that it had jurisdiction under the Foreign Sovereign Immunities Act (28 U.S.C. Section 1604) ("FSIA") to determine the validity of real estate tax liens filed by the City of New York against property owned by the Permanent Mission of India to the United Nations and by the Principal Resident Representative of the Mongolia People's Republic to the United Nations (376 F. Supp. 2d 429). The City had levied real estate taxes under Real Property Tax Law Section 418 ("Foreign Governments") on portions of the Defendants' buildings used as residences for staff below the rank of ambassador. Current Developments dated September 5, 2006 reported that the 2nd Circuit Court of Appeals affirmed the decision of the lower court, holding that the District Court had jurisdiction to hear the controversy under FSIA's "immovable property" exception to sovereign immunity, under which a foreign state is not immune from jurisdiction in any case in which "rights in immovable property situated in the United States is in issue" (446 F. 3d 365). The judgment of the Circuit Court has been affirmed by the United States Supreme Court. The Permanent Mission of India to the United Nations v. City of New York, decided June 14, 2007, is reported at 127 S.Ct. 2352.

<u>Leases</u> – Cellular Telephone Company ("Cellular"), a New York partnership whose partners were owned or controlled by a wholly owned subsidiary of AT&T Wireless Services ("AT&T"), was the tenant under a Lease providing that it could not be assigned or otherwise transferred without the Landlord's consent; an assignment was defined to include the transfer of more than 25% of the stock "of tenant" or in excess of 25% of the total interest in any other entity "which is tenant". The assignment of the Lease to an "affiliate, parent or successor of the Tenant" could be made without the Landlord's consent.

Through a series of intra-corporate mergers following Cingular Wireless LLC's ("Cingular") purchase of AT&T, the tenant became New Cingular PCS. The Landlord elected to cancel the lease and commenced a holdover proceeding. Cellular sought a declaration by the Court that the Lease had not been validly cancelled. The Supreme Court, New York County, granted the Plaintiff's motion for summary judgment dismissing the complaint, finding that the purchase of AT&T by Cingular was not the purchase of stock "which is Tenant". The Appellate Division, First Department, affirmed. According to the Appellate Court, "(g)iven the vast web of interlocking ownership between many corporations, it would be unreasonable to read the lease provision as effecting an assignment or transfer whenever some far removed corporate parent is sold, especially when the lease expressly limits the prohibition to capital stock of 'tenant' or other entity which is 'tenant'".

However, the Lease also provided that "[i]n the case of an assignment or subletting of the entire premises...Owner may notify Tenant that Owner elects to cancel this Lease...". The Appellate Division, reversing the lower court, held that the merger of the tenant into New Cingular PCS triggered the Landlord's right to recapture the

Lease, the right to recapture was independent of the tenant's right to assign the Lease to an "affiliate, parent or successor of the Tenant", and the Lease was therefore validly cancelled. Cellular Telephone Company v. 210 East 86th Street Corp., decided June 28, 2007, is reported at 2007 WL 1841173.

Mechanic's Liens – The Supreme Court, Kings County, denied a motion to discharge two mechanic's liens and granted a cross-motion for leave to amend nunc pro tunc notices of lien filed against the name of the sponsor of a newly formed condominium and the tax lots prior to recording of the condominium Declaration. Three of the nine units were sold before the liens were filed. According to the Court, the "use of the original block and lot numbers...does not compel the court to find that the liens at issue constitute improper 'blanket liens' on the property...[T]he language of both liens limits each on its face to only that property in which [the sponsor] still holds an interest". Amendment of the mechanic's liens would not prejudice any "existing lienor, mortgagee or purchaser in good faith", in compliance with Lien Law Section 12-a ("Amendment"). SGS Associates, LLC v. R.A. German Construction Corp, decided May 14, 2007, is reported at 2007 WL 1439054.

Mortgage Foreclosure/Standing/MERS – The Defendant moved to dismiss the complaint in an Action brought by Mortgage Electronic Registration Systems, Inc. ("MERS") to foreclose a mortgage made to the First National Bank of Arizona ("First National"), alleging that MERS lacked standing. The Note was endorsed by First National to the First National Bank of Nevada which, in turn, endorsed the note in blank and transferred it to MERS. The Supreme Court, Suffolk County, denied the Defendant's motion and the Appellate Division, Second Department, affirmed the ruling of the lower court. According to the Appellate Division, the promissory note, a negotiable instrument under the Uniform Commercial Code, was duly transferred to MERS and the mortgage "passed as an incident to the promissory note". In addition, the Court noted, the mortgage provided that MERS had the right to foreclose in the event of a default. Mortgage Electronic Registration Systems, Inc. v. Coakley, decided June 19, 2007, is reported at 2007 WL 1775981.

Mortgage Foreclosure/Standing – The Supreme Court, Kings County, in a mortgage foreclosure brought by Deutsche Bank National Trust Company ("DB") denied, without prejudice, an application for a judgment of foreclosure and sale since the Plaintiff, having assigned the note and the mortgage during the pendency of the Action, lacked standing to proceed. The Court indicated it would on motion allow the assignee to be substituted as the plaintiff. Deutsche Bank National Trust Company v. Castellanos, decided May 11, 2007, is reported at 2007 WL 1378059.

Mortgage Foreclosure/Standing – EMC Mortgage Corporation ("EMC"), the Plaintiff foreclosing a mortgage, moved for an Order of Reference and to amend the caption of the Action to reflect that the plaintiff is La Salle National Bank, as Trustee for Certificateholders of Bear Stearns Asset Backed Securities I LLC, Asset

Back Certificates, Series 2006-HE7, EMC's assignee. The Supreme Court, Kings County, denied the motion and dismissed the Action. According to the Court, EMC lacked standing to foreclose since it assigned the mortgage to La Salle, and the limited power of attorney under which EMC was named as La Salle's attorney-in-fact did not name La Salle as Trustee of the Pooling and Servicing Agreement for Certificateholders of Bear Stearns Asset Backed Securities I LLC, Asset Backed Certificates, Series 2006-HE7. Further, "[e]ven if the proper pooling and servicing agreement were listed in Exhibit A of the instant limited power of attorney, the Court cannot without a properly offered copy of the pooling and servicing agreement referred to in the limited power of attorney determine if EMC may properly act as servicing agent for La Salle". EMC Mortgage Corporation v. Batista, decided June 5, 2007, is reported at 2007 N.Y. Misc. LEXIS 3941.

Mortgage Foreclosure/Standing – On June 17, 2005, Wells Fargo Bank Minnesota, National Association, as Trustee ("Wells") commenced a mortgage foreclosure involving property in Richmond County. The mortgage was assigned to Wells by an Assignment of Mortgage dated June 20, 2005. In his attorney's affirmation in opposition to Wells' motion for summary judgment the defendant, for the first time, asserted that Wells lacked standing because it did not have title to the mortgage when the Action was commenced. The Supreme Court, Richmond County, sua sponte, dismissed with prejudice. The Appellate Division, Second Department, reversed and granted summary judgment to the Plaintiff. The Appellate Division held that standing as a defense was waived by its not being raised in an answer or in a pre-answer motion to dismiss the complaint, as required by Subsection (e) of Civil Practice Law and Rules Section 311 ("Motion to dismiss"). According to the Court, Wells' "alleged lack of standing at the time this action was commenced...was not a jurisdictional defect that was 'so fundamental to the power of adjudication of a court' [citation omitted] that it could not be waived, could be raised at any time, and warranted dismissal of the action by the court, sua sponte". Lack of standing is not the equivalent of a defense of lack of capacity to sue or a Court's lack of subject matter jurisdiction which, under CPLR Section 311(e), are non-waivable defenses that can be raised at any time. Wells Fargo Bank Minnesota, National Association, as Trustee v. Mastropaolo, decided May 29, 2007, is reported at 2007 WL 1558887.

Mortgage Foreclosure/Successful Bidders – Although the Terms of Sale in the foreclosure of a first mortgage required a down payment at auction by either cash or a certified check, the second mortgagee, which was the successful bidder, tendered an uncertified, "starter" check stamped with the name of its law firm. The check contained no reference to its being an escrow or attorney trust account check. The second mortgagee requested an adjournment of the sale to correct the defect in the down payment but, on instructions of the Justice who appointed the Referee, the property was then re-auctioned and sold to a different bidder for a lesser amount. The Supreme Court, Suffolk County, denied the second mortgagee's application for an Order vacating the resale and ratified and confirmed the sale. The Court found that "the Referee acted in a reasonable, prudent, proper and professional manner..." and emphasized that the Referee had taken direction from the

appointing Justice. Chase Home Finance LLC v. Diaz, decided May 21, 2007, is reported at 2007 WL 1462236.

<u>New York City Real Estate Taxes</u> – The real property tax rates set for July 1, 2007 – June 30, 2008 are 15.434% for Class One properties, 11.928% for Class Two properties, 11.577% for Class Three properties, and 10.059% for Class Four properties. Class One generally includes one-to-three family residential real property, small stores and offices with one or two apartments attached, vacant land zoned for residential use, and most condominiums that are not more than three stories. Class Two includes all other real property that is primarily residential, such as cooperative buildings. Class Three includes utility real property. Class Four includes all commercial and industrial real property not within the other three tax classes.

<u>New York City Sidewalks</u> – In a lawsuit for damages suffered by a pedestrian due to the elevation of a sidewalk slab caused by tree roots, the adjoining property owner moved for summary judgment dismissing the Complaint, citing cases to the effect that "an abutting landowner is not responsible for damage caused to a sidewalk by the roots of a tree". The Supreme Court, Kings County, denied the motion. Under Administrative Code Section 19-152 ("Duties and obligations of property owners with respect to sidewalks and lots"), an abutting property owner is responsible for repairing a sidewalk flag where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch and, under Administrative Code Section 7-210 ("Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition"), the owner of real property (other than an owner-occupied one-to-three family dwelling used exclusively for residential purposes) abutting a sidewalk is liable for an injury proximately caused by the failure of such owner to maintain the sidewalk in a reasonably safe condition. The Defendant did not meet its burden of demonstrating that the differential was less than one half inch. Moore v. Newport Associates LP, decided June 11, 2007, is reported at 2007 WL 1696019.

<u>Rockland County</u> – In May 2007 the Office of the Rockland County Clerk issued a Bulletin announcing that "(e)ffective June 1, 2007 documents will not be returned to filers unless an appropriately sized pre-addressed envelope, which contains adequate pre-paid postage stamps, accompanies them. If you would like to make alternative arrangements for return, please contact us at 845-638-5221 prior to submitting documents". The New York State Land Title Association has since then been advised that the Clerk's Office will, for now, return documents notwithstanding the lack of the pre-addressed and stamped envelope. However, at some time compliance with the new procedure will be required.

Michael J. Berey
General Counsel
No. 97, July 12, 2007
<u>mberey@firstam.com</u>