CB Title
Title Insurance Services
New York New Jersey Nationwide

140 Mountain Avenue – Suite 101
Springfield, NJ 07081
Tel: 973-921-0990
Fax: 973-921-0902
www.cbtitlegroup.com

Date: July 6, 2006

To: All Clients and Friends

From: Cliff Bernstein

Re: Current Developments

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

UCC Filing Issues for Cooperative Units/NYC Register's Office – June 30, 2006 was the final day to continue the effectiveness under Revised Article 9 of New York's Uniform Commercial Code of a Security Interest filed under former Article 9. In connection with a Security Interest on an cooperative unit (a "Cooperative Interest") a UCC Financing Statement Amendment filed as a Continuation (for perfection of the Security Interest for five years from the date of the filing on the Continuation Statement), or a UCC Financing Statement Cooperative Addendum ("Addendum") (for perfection of the Security Interest for fifty years from the date of the filing of an initial financing statement), needed to be filed in the County real estate records. A UCC-1 Financing Statement first filed on and after July 1, 2001 should also have been accompanied by an Addendum for the Security Interest to be perfected against a Cooperative Interest for fifty years.

Financing statements filed against Cooperative Interests are not being properly indexed by the New York City Register in ACRIS, its "Automated City Register Information System". For example, when an Addendum is filed the index may show an expiration date of fifty years from the date on which the Addendum was filed, instead of fifty years from the date on which the original UCC-1 financing statement was filed. When only a Continuation is filed, without the filing of an Addendum, ACRIS may show an expiration date of fifty years, instead of five years. When a Continuation is filed with a Cooperative Addendum ACRIS may indicate an expiration date of five years. A UCC-1 Financing Statement filed on or about June 2, 2006 with an Addendum may be shown on ACRIS as being effective for only five years. All financing statements on Cooperative Interest as filed should be carefully reviewed to verify the accuracy of the public record.

Adverse Possession – One of the elements of a claim of adverse possession under common law is that the possession of the claimant to the land in question must be hostile and under claim of right for the statutory period. The Court of Appeals, in a decision dated June 13, 2006, has held that "an adverse possessor's actual knowledge of the true owner is not fatal to an adverse possession claim". Defendants had argued that there is no claim of right when an adverse possessor has actual knowledge of the true owner at the time of the possession, and the lower court had found that there were triable issues of fact as to whether Plaintiffs had knowledge of the true owners before they made improvements on the disputed land. Walling v. Pryzbylo is reported at 2006 WL 153948 (N.Y.) and is also posted at www.courts.state.ny.us/ctapps/decisions/jun06/68opn09.pdf.

Contracts of Sale – Under General Obligations Law Section 15-301 ("When written agreement of other instrument cannot be changed by oral executory agreement…"), an agreement which provides that it can only be modified in writing can be changed only by a written agreement signed by the party against whom enforcement of the change is sought. In this case, the Trustee of a revocable trust contracted to sell the residence of the Trust's Settlor. The contract recited that it could only be changed in writing and it further provided that the deposit would be retained as liquidated damages on the purchaser's default. Although there was no mortgage contingency clause, the purchaser obtained a mortgage commitment. The closing was delayed as the Settlor did not vacate the premises; but the Settlor assured the Purchaser that he would direct the Trustee not to enforce the liquidated damages provision if her mortgage commitment expired and she could not obtain a new mortgage on acceptable terms. The trust became irrevocable, the mortgage commitment expired, the closing was called off, and the Trustee would not return the down payment. An action was commenced by the Trustee to declare the Purchaser in default and to obtain an Order that he could retain the deposit. The Supreme Court, New York County, however, ordered the return of the deposit. First, the Purchaser was entitled to rely on the Settlor's assurances under Estates, Powers and Trusts Law Section 10-10.6 ("Effect of reserved unqualified power to revoke"), which provides that the creator of a trust with an "unqualified power of revocation…remains the absolute owner of the property disposed of so far as the rights of his creditors or purchasers are concerned". Second, there is an exception to the application of GOL Section 15-301 when, as in this case, there is (a) reliance on an oral modification to a contract to one's detriment, (b) the conduct relied upon to establish estoppel is not otherwise compatible with the agreement as written, and (c) the party arguing for estoppel acted in a manner that she would not have acted but for the oral modification. Kurzman v. Graham, decided April 17, 2006, is reported at 2006 WL 1024208 (N.Y. Sup.).

Eminent Domain – The Stuyvesant Falls Hydroelectric Project in Columbia County is owned by Erie Boulevard Hydropower, L.P. ("ERIE") and operated under a license issued under special legislation by the Federal Energy Regulatory Commission ("FERC") to the Town of Stuyvesant. Pursuant to that legislation the Town added the Stuyvesant Falls Hydro Corporation ("HYDRO"), a private corporation, as a co-licensee. Unsuccessful in attempts to purchase the project from ERIE, as part of the process to acquire title by eminent domain HYDRO adopted the determination and findings required by Section 204 of the Eminent Domain Procedure Law. ERIE commenced an action under EDPL Sec. 207 ("Judicial review") to annul the determination and findings, claiming that HYDRO, a non-governmental entity, lacked the power to condemn. The Appellate Division, Third Department, dismissed its petition; under the terms of the license

the licensees are required to obtain title to the property and the FERC permits the Town to delegate its power of eminent domain to its co-licensee. The Court also held that SEQRA review of the taking was not required; FERC's jurisdiction under the Federal Power Act over hydroelectric facilities "pre-empts all state licensing and permit functions". Erie Boulevard Hydropower, L.P. v. Stuyvesant Falls Hydro Corporation, decided June 1, 2006, is reported at 2005 WL 4049841 (N.Y.A.D. 3 Dept.).

Mechanic's Liens – Under Lien Law Section 17 ("Duration of Lien"), a filed mechanic's lien is effective for one year unless the lien is extended, an action is commenced to foreclose the mechanic's lien, or the Lienor is named as a party defendant in an action to foreclose another mechanic's lien. In Fountainview at College Road, Inc. v. Pearl River Plumbing, Heating & Electric, Inc., the property owner petitioned for an Order to discharge the lien. The lienor's defense was that the bankruptcy of the general contractor stayed all actions against the general contractor and, as a result, the mechanic had an extended period within which to extend its lien. The Supreme Court, Rockland County, granted the petition to discharge the lien; the lien had not been extended, no foreclosure had been commenced, and the subcontractor may not claim it is bound by the contractor's bankruptcy. This Decision, issued April 20, 2006, is reported at 11 Misc. 3d 1082(A) and 2006 WL 1029714 (N.Y. Supp.).

Mortgage Assignments – The Appellate Division, First Department, held that the owners of certain commercial property in Manhattan who prepaid their mortgages when refinancing were not entitled to an assignment of the prior mortgages. Except in the context of a mortgage foreclosure to preserve the mortgagor's right of redemption, there is no right to an assignment under Real Property Law Section 275 ("Certificate of discharge of mortgage required"). In addition, absent an ambiguity in the loan documents, which was not the case here, there is no basis to admit evidence of current industry practices. Plaintiffs therefore had no right to recover, as to one Plaintiff, additional mortgage tax paid; or, as to the other Plaintiff, the fee paid to obtain a mortgage assignment from the Defendant. 767 Third Avenue LLC v. Orix Capital Markets, LLC, decided February 14, 2006, is reported at 812 N.Y.S. 2d 8.

Mortgage Foreclosures – Subsection (b) of Civil Practice Law and Rules, Section 8003 ("Referees") provides, in part, that a referee appointed to sell real property pursuant to a judgment is entitled to be paid a commission of up to $500, "unless the property [is] sold for $50,000 or more, in which event the referee may receive such additional compensation *as to the court may seem proper*". (Emphasis added). The Supreme Court, Bronx County (Victor, J.), in an action involving the foreclosure of a mortgage on a condominium unit, approved the referee's charge of an additional $500 for conducting a sit-down closing in his office. The Court found, as agreed to by the parties, that the additional amount was fair and reasonable, and surplus monies were sufficient to pay the lien of the condominium for common charges and filed judgments.

For future proceedings, to expedite approval of a motion for additional fees, the Court will accept the referee's affidavit on the motion, together with an affidavit of service on all parties entitled to notice, in accordance with the following guidelines:

> "In future applications, the following language (if not already included by counsel for plaintiff) will be appended by this court to judgments appointing the referee to

> sell: 'For any scheduled sale, canceled on less that 48 hours notice to the referee, the referee shall be entitled to an additional $250.00 for each said scheduled sale, subject to the approval of the court at the time of the confirmation of the sale pursuant to CPLR Section 8003(b). In the event the referee attends a sale which is canceled without prior notice to the referee, the referee shall be entitled to an additional $500 for attending a re-scheduled sale, subject to the approval of the court at the time of confirmation of the sale pursuant to CPLR 8003(b). For a third party closing, the referee shall be entitled to an additional fee of $500, subject to the approval of the court at the time of the confirmation of the sale pursuant to CPLR Section 8003(b). All parties may address the court as to the reasonableness of such fees, including the adequacy or inadequacy thereof, on the motion to confirm the report of sale or by separate motion'".

The Court further noted that attendance at a new scheduled sale cannot be contingent on the prepayment of the referee's fee. JP Morgan Chase Bank v. Pizzini, decided April 5, 2006, is reported at 813 N.Y.S. 2d 649.

Mortgage Recording Tax – Tax Law, Section 253(1-a) provides for the payment of a special additional tax of $.25 per each $100 and each remaining major fraction thereof of principal indebtedness secured by a mortgage on real property. When the mortgaged property is improved by a structure containing not more than six residential dwelling units, each with its own separate cooking facilities, the special additional tax is payable by the mortgagee unless the mortgagee qualifies as an exempt organization under paragraph (b) of Section 253-(1-a), in which case the special additional tax is payable by the mortgagor. The New York State Department of Taxation and Finance, in an Advisory Opinion (TSB-A-06(1)R) dated May 30, 2006, has concluded that the Hudson River Community Credit Union, a New York State-chartered credit union incorporated under Article XI of the Banking Law, is not an exempt organization for purposes of application of the special additional tax. A State-chartered credit union does not qualify for the exemption, since it may pay earnings to its members. The Advisory Opinion is posted on the Web at www.state.ny.us/pubs_and_bulls/advisory_opinions/mortgage_rec_ao.htm.

Mortgage Recording Tax and Real Estate Transfer Tax – The New York State Department of Taxation and Finance has reported that the interest rate to be charged for the third quarter of calendar year 2006 on late payments and assessments of mortgage recording tax and the State's real estate transfer tax will be 10% per annum compounded daily. The interest rate to be paid on refunds of these taxes will be 7% per annum compounded daily. The interest rates are published at www.tax.state.ny.us/press/2006/int0506.htm.

New York City/Water Charges – On May 18, 2006, the Department of Environmental Protection issued an "Announcement" setting forth procedures effective July 1, 2006 for obtaining water meter readings. For a fee of $25 payable to the NYC Water Board, received by a borough Bureau of Customer Services no less than 30 days before the date of a closing, the Bureau will within 30 days provide for "meter only billed property" a formal letter confirming that existing charges are valid, setting forth charges for current consumption or revisions to the reading date, or stating that charges cannot be confirmed due to conditions at the premises, such as missing, removed or illegally removed meters, which prevent the Bureau from rendering a

determination. Confirmation can also be obtained that fiscal billing is correct for "Flat-Rate Reconciliation-frontage" property billed on the "Transition Program" (involving six or more units with an approved meter installed at the head of the service). It is intended that a credit resulting from these procedures is to be refunded, as directed by the requesting party, within 45 days of the billing revision, unless the customer elects in writing to leave the credit on the account.

City of Peekskill, Westchester County – Section 300-48 of the Code of the City of Peekskill (now Section 575-50 of Article IX of the Zoning Code of the City of Peekskill) was amended effective January 1, 2006 to provide that as to the sale or transfer of any improved property, including a condominium, "(u)pon the sale or transfer of such real property, an updated certificate of occupancy, issued no earlier than 30 days before closing, shall be required before the premises may be used or occupied. It shall be the obligation of the seller to apply for and obtain the updated certificate of occupancy unless the parties agree otherwise in their contract of sale".

Prepayment – In an action to foreclose a mortgage, the Plaintiff sought to enforce a prepayment provision in the Note providing for a premium to be charged on any prepayment prior to the end of the loan term, computed pursuant to a treasury based "yield maintenance" formula. The Note provides that the prepayment penalty is payable if there is a payment beyond the sum in default after default and acceleration, which provision was intended to prevent evasion of prepayment penalty on the grounds that there was a default and acceleration of the principal balance due under the Note. Although the Supreme Court, Nassau County, stated that a "clear and unambiguous clause which calls for payment of the prepayment premium…at any time after default and acceleration…is generally enforceable", it held that the prepayment premium was not recoverable in the foreclosure proceeding. The prepayment clause in the Note did not expressly indicate that it applied in the event of a foreclosure. According to the Court, "(t)he [prepayment] clause does not, however, contain language indicating prepayment application in foreclosure…If the word 'prepayment' was intended to include 'redemption' in the context of foreclosure, it would be expressly included…" The Northwestern Mutual Life Insurance Company v. Uniondale Realty Associates, decided February 3, 2006, is reported at 11 Misc. 3d980 and at 2006 WL 481215 (N.Y. Sup.).

Property Condition Disclosure Act/Res Judicata – A prior action for damages due to termite infestation in the home the Plaintiffs purchased from the Defendants was dismissed for the failure to show that the Plaintiffs relied on any representation made in the pre-closing Property Condition Disclosure Statement provided under Article 14 of the Real Property Law ("Property Condition Disclosure in the Sale of Residential Real Property"). A second action was commenced by the Plaintiffs alleging the deliberate concealment of termite damage. The Supreme Court, Richmond County, granted the Defendant's motion to dismiss the complaint. According to the Court, the "claim of 'active concealment' as asserted in the present action could have been raised in the prior proceeding and is barred by res judicata". Conanan v. Oliveri, decided May 26, 2006, was reported in the New York Law Journal on June 21, 2006.

Recording Act – In 2000 the Plaintiffs' corporation acquired at a tax sale two vacant parcels of land ("Parcels B and E") in the Town of Wappinger, Dutchess County. Parcels B and E had

been owned by the developers of the adjoining condominium development. In approving the condominium project, the Town Planning Board designated Parcels B and E as "permanent open space", and the minutes of the Planning Board approving the subdivision indicate "(t)hat no building permits will be issued for Parcels B and E, as indicated on the Subdivision Plat". However, the Planning Board's minutes of 1962 and the subdivision plat approved in 1963 which showed Parcels B and E as a "buffer" area were not recorded in the Dutchess County Clerk's Office. In 2003 the Plaintiffs obtained a building permit for a home to be built on Parcel B but the Town, once the restrictions were brought to its attention, refused to issue a certificate of occupancy. The United States District Court for the Southern District of New York, held that the Plaintiffs owned the parcels free and clear of the restrictions prohibiting development, and it ordered the Town to issue a certificate of occupancy if the home otherwise complied with the Town Code. According to the Court, the Plaintiffs were not bound by the notation on the Map or the Planning Board Resolution, since neither document was "of record" as required by Section 291 of New York's Real Property Law ("Recording of conveyances"). "Where a restriction limiting development does not appear in the owner's chain of title, the restriction is unenforceable" against a good faith purchaser for valuable consideration who first records. O'Mara v. Town of Wappinger, decided December 2, 2005, is reported at 400 F. Supp.2d 634.

Rockland County – The Private Well Testing Law, Chapter 389 of the Laws of Rockland County (Local Law 1 of 2005) requires the seller of real property in the County which is served by a private water system to order a water quality test within ten days of the signing of the contract and to deliver a well testing report to the purchaser within sixty days of the ordering of the test. A private water system or well is defined as "(a)ny system to provide or potentially provide drinking water other than that secured from a public water system, including, but not limited to, any water system that contains connections to a home or other structure, a pool or similar construct, or a spigot or other device used for drinking purposes". A copy of the Private Well Testing Law, effective as to contracts entered into on and after August 4, 2005, can be obtained on the County's Website at www.co.rockland.ny.us.

Tax Sales – The United States Supreme Court, reversing a decision of the Arkansas Supreme Court, held that under the due process clause of the Fourteenth Amendment "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so". Notice of the tax arrears and of the right to redeem and a further notice of the tax sale sent to the owner at the property address by certified mail were returned unopened and marked "unclaimed". The Court suggested that notice might have either been re-sent by regular mail so that a signature would not have been required, posted to the front door of the property or re-sent addressed to "occupant". Jones v. Flowers, decided April 26, 2006, is reported at 126 S. Ct. 1708.

Transfer Tax/New York City – New York City's Real Property Transfer Tax when the taxable consideration is more than $500,000 is 1.425% for the transfer of a 1-3 family house, an individual residential condominium unit or an individual residential cooperative apartment, and 2.625% for all other property including vacant land. The Department of Finance, in a Ruling dated March 6, 2006 (FLR 064845-021) has taken the position that the rate of 1.425% applies to the transfer of a building consisting of two residential units and a medical office constituting less

than 10% of the approximate gross square footage of the building. According to the Ruling, the classification of the property as Class I for application of the real property tax is "controlling for RPTT purposes". Class I real property includes all one-to-three family homes, including those used in part for nonresidential purposes but which are used primarily for residential purposes. This Ruling is not yet posted to the Department's Website.

Transfer Tax/Mansion Tax – The Division of Tax Appeals of the State of New York ruled that the transfer of vacant land for more than $1,000,000 under a contract of sale providing that the seller, a builder, would construct a residence on the land for the purchaser was subject to the "Mansion Tax" (Tax Law, Section 1402-a). Although the contract of sale provided that the land and the residence were to be conveyed to the Petitioner before construction to meet a condition of the construction lender that the Petitioner own the land. Denying the petition for a refund, the Administrative Law Judge stated that "(h)ad the builder obtained financing as originally planned, then the builder would have transferred the property when the home was complete, and the conveyance would have been subject to [the Mansion Tax]. The severing of the transaction into the steps necessary to secure financing should not be afforded a different tax treatment when the documentary evidence does not support separating the transaction into independent steps". Petition of Kevin Kelly, DTA No. 819863, decided on December 8, 2005, is posted at www.nysdta.org/Determinations/819863.det.pdf.

Transfer Tax/REITS – The New York State and New York City transfer tax rates applicable to conveyances of real property to existing REITS have been extended to all such conveyances occurring before September 1, 2008. See "Extension of Reduced Real Estate Transfer Tax Rate for Real Estate Investment Trusts" (TSB-M-06(1)R, dated June 7, 2006 on the New York State Tax Commission's Website at www.tax.state.ny.us/pubs_and_bulls/memos/real_estate_tran_memos.htm. The New York State Form TP-584-REIT (4/06) ("Combined Real Estate Transfer Tax Return and Credit Line Mortgage Certificate for Real Estate Investment Trusts") is at www.tax.state.ny.us/pdf/2006/property/tp584reit_406.pdf. For New York City Schedule R ("Real Estate Investment Trust Transfers") of the RPT may also apply. See www.nyc.gov/html/dof/html/pdf/01pdf/nycrpt_01.pdf.

This bulletin is sent courtesy of CB Title Agency of New York, LLC and First American Title Insurance Company of New York