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

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To: All Clients and Friends

From: Cliff Bernstein

Re: Current Developments

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

Contracts of Sale – Plaintiff-Purchaser brought an action for specific performance of a contract of sale, and the Defendant-Seller counterclaimed for a declaratory judgment that it was entitled to retain the contract deposit as liquidated damages due to the Purchaser's failure to appear at closing. The Supreme Court, New York County, dismissed the specific performance action and ordered that the deposit be returned to the Purchaser. As to the demand for specific performance, the Purchaser did not demonstrate that he was financially capable of performing on the closing date and, in any event, under the contract the Purchaser's remedies were limited to a return of the contract deposit and reimbursement of the cost of the title examination if the Seller was unable to convey "good and marketable title". The Seller could not retain the down payment since it had not demonstrated that it had cleared certain exceptions in the title report and could not therefore deliver an insurable and marketable title at closing. According to the Court, where "a contract… states that the seller shall tender title at closing that a reputable title company will insure, the burden of producing insurable title has been construed as a condition precedent to the seller holding the purchaser in default without first tendering performance". Gindi v. Intertrade International Ltd., decided July 17, 2006, is reported at 12 Misc. 3d 1182 (A) and 2006 WL 1982629 (N.Y. Sup.).

Foreign Sovereign Immunities Act – In a previous bulletin, we reported a decision of the United States District Court for the Southern District of New York, reported at 376 F. Supp. 2d 429, in which the District Court ruled that it had jurisdiction under the Foreign Sovereign Immunities Act (28 U.S.C. Section 1604) ("FISA") 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. The City had been levying 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. The 2nd Circuit Court of Appeals has affirmed the decision of the lower court, holding that the District Court had jurisdiction to hear the controversy by reason of FISA's "immovable property" exception to sovereign immunity. Under that exception, 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". The City of New York v. The Permanent Mission of India to the United Nations, decided April 26, 2006, is reported at 446 F. 3d 365.

"Home Equity Theft Prevention Act" – As stated in the Memorandum of Support for the legislation enacted as Chapter 308 of the Laws of 2006, the "Home Equity Theft Prevention Act" (the "Act") is intended to "help protect homeowners from deed theft scams which result in the loss of their homes and the equity they have built up". The Chapter adds new Section 265-a ("Home Equity Theft Prevention") to the Real Property Law. It also amends Banking Law Section 595-a ("Regulation of mortgage brokers, mortgage bankers and exempt organizations") to authorize the Banking Board to promulgate regulations and policies for fines to be imposed for the "making of a mortgage loan, or indirectly providing for the making of a mortgage loan" with knowledge of non-compliance with Section 265-a. The Act is effective on February 1, 2007 and applies to covered contracts entered into on and after that date.

The Act applies to a "Covered Contract" between an "equity seller" (a natural person who is the record owner of a one-to-four family, owner occupied dwelling with its mortgage in foreclosure or in default) and an "equity purchaser". A "Covered Contract" is a contract, agreement or arrangement between an equity seller and an equity purchaser "incident to the sale of a residence in foreclosure" or "incident to the sale of a residence in foreclosure or default when such contract, agreement or arrangement includes a reconveyance arrangement". A reconveyance arrangement is an agreement which would enable the equity seller to regain his or her interest in the property.

The Act sets forth specific requirement for Covered Contracts, and affords the equity seller a right of rescission. Transfers made in violation of specified subdivisions of the Act are voidable and may be rescinded by the equity seller within two years of the recording of the conveyance to the equity purchaser. Bona fide purchasers or encumbrancers for value obtaining their interests before the recording of a notice or rescission are not affected by the exercise of a right of rescission.

The Act also adds Section 1303 ("Foreclosures; required notice") to the Real Property Actions and Proceedings Law to require a foreclosing party to deliver with a summons and complaint a notice to be captioned "Help for Homeowners in Foreclosure", containing text and in a form specified in Section 1303.

A copy of Chapter 308 can be obtained at http://assembly.state.ny.us/leg/?bn=S4744.

Mechanic's Liens – The Supreme Court, Bronx County, denied the application for surplus monies arising out of a foreclosure sale brought by a person who had filed a mechanic's lien for work done at the premises. The mechanics lien had expired by operation of law before the

foreclosure sale and, in any event, the mechanic's lien was invalid because the applicant did not possess a valid New York City Department of Consumer Affairs Home Improvement Contractor's license. The applicant was therefore a mere unsecured creditor not entitled to surplus monies. Mortgage Lenders Network USA, Inc., v. Martinez, decided March 30, 2006, is reported at 11 Misc. 3d 1086 (A) and 2006 WL 1112964.

Mechanic's Liens – A tenant did not pay for the installation of a blast chiller at the leased premises. A mechanic's lien was filed and an action was commenced to foreclose the lien against the fee owner's real property. The Supreme Court, Rockland County, dismissed the complaint as to the fee owner and vacated the mechanic's lien. The Appellate Division, Second Department, affirmed the Order of the lower court. Although the fee owner participated in the construction of a portion of a different part of the leased premises and a room for the blast chiller was depicted on plans prepared by the fee owner's architects, there was nothing further in the record to suggest that the fee owner consented to the improvement. According to the Court, "(a) contractor who performs work for, or provides equipment to, a tenant may nonetheless impose a mechanic's lien against the premises where the owner of the premises affirmatively gave consent for the work or equipment directly to the contractor, but not where the owner has merely approved or acquiesced in the undertaking of such work or the provision of such equipment". Elliott-Williams Co., Inc. v. Impromptu Gourmet, Inc., decided April 25, 2006, is reported at 813 N.Y.S. 2d 778.

Mortgages – The Plaintiff applied for a mortgage loan to acquire certain real property and to fund the construction of improvements. The loan applied for was, however, more than twice the amount specified in the contract's mortgage contingency clause. The loan was denied and an action was brought for return of the down payment. The Supreme Court, New York County, denied the Plaintiff's motion for summary judgment, but the Appellate Division, First Department, reversed the Order of the lower courts and directed the Clerk to enter judgment in favor of the Plaintiff for the amount of the deposit plus interest. According to the Appellate Division, an email from the bank demonstrated that the loan application was denied because the income from the property would not support the loan debt and carrying charges for the acquisition loan. Markovitz v. Kachian, decided April 20, 2006, is reported at 814 N.Y.S. 2d 60.

Mortgages/MERS – In LaSalle Bank National Association, as Trustee, v. Lamy, the Plaintiff alleged that it held the note and mortgage pursuant to an assignment made by the Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the original lender. Plaintiff also submitted an undated allonge to the Note executed by the original lender endorsing the Note to the Plaintiff; the Allonge was not affixed to the Note. The Supreme Court, Suffolk County, denied the Plaintiff's motion for a default judgment. It held that there was not a proper assignment of the note or the mortgage; a nominee cannot assign a mortgage and a note. In addition, the allonge was not a proper endorsement to a note under UCC Section 3-302(2) ("Negotiation"), which states that "(a)n indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become part thereof". This decision, dated August 7, 2006, is reported at 12 Misc. 3d 1191(A) and 2006 WL 2251721 (N.Y. Sup.).

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 fourth quarter of calendar year 2006 on late payments and assessments of mortgage recording tax and 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 http://www.tax.state.ny.us/press/2006/int0806.htm.

New York City Department of Finance – New York State Chapter 385 of the Laws of 2006, signed into law on July 26, 2006, amended New York City Administrative Code ("Code") Section 11-208.1 (c) to authorize New York City's Commissioner of Finance ("Commissioner") to require that real property income and expense ("RPIE") statements for income producing property be submitted electronically. It also amended Code Section 11-2115 to provide that information in or relating to RPT returns filed on and after January 1, 2003 is not subject to the privacy provisions of that Section, except as regards social security numbers.

Accordingly, RPIE data may be filed electronically on New York City's Department of Finance website. The deadline of September 1, 2006 has been extended to Friday, September 15, 2006, for those who submit their RPIE data electronically. In addition, sales prices for cooperative units in New York City can now be accessed in ACRIS, the Automated City Register's Information System. The link to file RPIE forms is http://home2.nyc.gov/html/dof/html/property/property_info_rpie.shtml. A manual with instructions for locating sales prices for cooperative units on ACRIS is at http://nyc.gov/html/dof/html/pdf/06pdf/acris_coop.pdf.

Chapter 385 also amended Code Section 11-2105 to give the Commissioner the authority to require the electronic filing of the City's Real Property Transfer Tax Return.

New York City Real Estate Taxes – Chapter 63 of the Laws of 2003 and New York City's Local Law 47 of 2003 imposed a tax surcharge of 25% on real estate taxes net of abatements or exemptions on Class One real property owned by "absentee" landlords beginning with the 2003-2004 tax year. Class One property which is (i) the primary residence of the owner, (ii) occupied by the owner's parents or children, (iii) vacant or unoccupied, or (iv) otherwise occupied without rental income is exempt from the surcharge. Local Law 27 of 2006, signed into law by the Mayor on July 11, amended Administrative Code Section 11-238 ("Real property tax surcharge on absentee landlords") to reduce the surcharge to zero percent of net real property taxes for fiscal years beginning on and after July 1, 2006. See Intro. No. 391 of 2006 on the City Council's website at http://www.nyccouncil.info/.

Recordings/New York City – The Register of the City of New York has advised the New York State Land Title Association that documents to be recorded in connection with property in Bronx, Kings, New York, and Queens Counties can be submitted for recording at the Register's office in any of those counties.

Restrictive Covenants – The New York City Economic Development Corporation ("EDC") sought an Order requiring the removal of an outdoor advertising billboard alleged to have been erected in violation of a restrictive covenant, and for damages. The Supreme Court, Queens County, agreed that the billboard violated the restrictive covenant and ordered its removal; the

Appellate Division affirmed the ruling. In a subsequent trial for the awarding of damages the EDC claimed that since the Defendants were unjustly enriched by their illegal actions the EDC should be awarded the profits the Defendants made from the billboard's advertising revenues. The Supreme Court held that there is no authority for extending a claim on unjust enrichment to a breach of a restrictive covenant. According to the Court, "(n)either the New York courts, nor any state or federal court, have enforced a restrictive covenant by means of restitution". New York City Economic Development Corporation v. T.C. Foods Import and Export Co., Inc., decided April 17, 2006, is reported at 11 Misc. 3d 1087(A) and 2006 WL 1132350 (N.Y. Sup.).

Usury – When the Plaintiffs purchased their condominium unit they executed a purchase money mortgage and note to the Sponsor. The note provided that if the unit was sold prior to its maturity date the holder of the note would be entitled to "an amount equaling the Net Fair Market Value [of the unit] multiplied by the Equity Percentage" [here 50%], which was defined as "the percentage which the Principal Amount [$108,815.50] bears to the Original Purchase Price [$217,631]". The note had a thirty-year term and no interest payments were required to be made. The Plaintiffs sold the unit for $2,025,000.00 and the assignee of the Note sought to collect $1,012,500. The Plaintiffs brought an action claiming the obligation to pay that amount was usurious. The Defendant alleged that the transaction was an equity participation agreement and not a loan, and it moved to dismiss the Complaint. The Court denied the motion, holding that there was a question as to the Sponsor's intent. Although the agreement was a purchase money mortgage as to which civil usury did not apply, it was subject to the defense of criminal usury and a loan may be criminally usurious if there was a "criminal intent". Penal Law Section 190.40 ("Criminal usury in the second degree") provides, in part, that criminal usury applies when a person "knowingly charges, takes or receives any money or any property as interest on the loan or forbearance of any money or property at a rate exceeding 25% per annum…". Jean v. WV-II Limited Partnership, decided July 10, 2006, was reported in the New York Law Journal on August 10, 2006.

Zoning – Petitioner's application to the City of Albany Board of Zoning Appeals ("Board") for variances and a permit for a building to be constructed for use as a charter school was denied. Applicable zoning did not permit the use of the land for school purposes. The Supreme Court, Albany County, granted summary judgment to the Petitioner and directed that a special permit for the use of the property as a school be issued. It held that the provisions of the City's Zoning Ordinance excluding schools in commercial districts were unconstitutional and found the denial of the variances and permit to be arbitrary and capricious. On appeal, the Appellate Division, Third Department, concurred that the wholesale exclusion of educational uses from the commercial districts in question was unconstitutional. However, it remanded the case to the Board to determine if, after balancing the proposed use against other legitimate interests impacting the public welfare, a special permit should, in fact, be issued and whether reasonable conditions should be imposed to mitigate any deleterious effects on the community. Albany Preparatory Charter School v. City of Albany, decided July 6, 2006, is reported at 818 N.Y.S. 2d 651.

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