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To: All Clients and Friends

From: Cliff Bernstein

Re: Current Developments

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

Condominiums – The Appellate Division, Second Department, held that a unit owner does not have standing to sue individually for damages to the common elements of the condominium. This right to bring an action or proceeding with respect to common elements on behalf of two or more unit owners is in the Board of Managers under real Property Law Section 339-dd ("Actions"). However, the Court also held that a unit owner may bring a derivative action on behalf of the condominium. According to the Court, "(a) derivative action proceeds…as an assertion of the interest of the entity by one or more of its owners or members when the management of the entity fails to act to protect that interest". In this case, Plaintiffs asserted derivatively, on behalf of a condominium located in Queens County in which they are unit owners, causes of action alleging breach of fiduciary duty by the Sponsor, members of the Sponsor and of the Board of Managers, for waste and gross mismanagement of condominium property against those Defendants and managing agents, and for professional negligence against the Condominium's accountants. Caprer v. Nussbaum, decided October 17, 2006, is reported at 2006 WL 2963128 (N.Y.A.D. 2 Dept.).

Corporations – A corporation was dissolved by proclamation by New York's Secretary of State in 1973 for the non-payment of franchise taxes and not reinstated. The majority shareholder transferred all of her rights in the corporation to the minority shareholder in 1981. In 1986 the corporation conveyed the title to its real property to its then sole shareholder. It was asserted (presumably by an heir of the deceased former majority shareholder) that the corporation's deed and the deed reconveying the property to the grantee and his wife were void, since upon dissolution of the corporation the property reverted to its shareholders. The Appellate Division, Second Department, affirmed the ruling of the Surrogate's Court, Rockland County, which denied the Petition for a ruling that the deeds were void. According to the Appellate Division,

"(t)he dissolution of a business corporation for failure to pay franchise taxes does not affect the corporation's right to collect or distribute its assets" and the corporation therefore retained title until its conveyance in 1986 to its then sole shareholder. Matter of Sullivan, decided July 18, 2006, is reported at 819 N.Y.S. 2d 531.

Mechanics' Liens – The Appellate Division, Second Department, affirmed the Order of the Supreme Court, Queens County, granting Plaintiffs' motion to vacate a demand for a verified statement under Lien Law Section 76(5), and denied the Defendant's motion for leave to amend its answer to assert a counterclaim seeking the imposition of a trust under Lien Law Article 3-A to enforce its right to be paid for its installation of modular workstations. According to the Appellate Division, "(t)he installation of modular workstations does not qualify as an 'improvement' within the meaning of Lien Law Section 2(4) and Section 70(1). The appellant did not demolish, erect, or alter any structure, nor did it perform work or furnish materials for its permanent improvement". Under Lien Law, Section 3, a mechanic's lien can be field against real property by a mechanic or a materialman who "performs labor or furnished materials for the improvement of real property". Negvesky v. United Interior Resources, Inc., decided August 29, 2006, is reported at 821 N.Y.S. 2d 107.

NYC Real Property Transfer Tax ("RPTT") – RPTT is charged on the transfer of "one, two or three-family houses", "individual residential condominium units" or an "individual cooperative apartment" at the rate of 1 percent when the amount of taxable consideration is $500,000 or less, and at the rate of 1.425 percent when the amount of taxable consideration is more than $500,000. These tax rates are commonly referred to as the "Residential Rates". Other types of property are subject to the so-called "Commercial Rate", which are 1.425 percent when the amount of taxable consideration is $500,000 or less and 2.625 percent when the amount of taxable consideration is greater than that amount.

New York City's Department of Finance applies the Commercial Rates to what it deems to be a "Bulk Sale", the transfer by a single grantor of more than one residential condominium unit or cooperative apartment to a single grantee. However, as stated in Finance Memorandum 00-6 dated June 19, 2000 ("Real Property Transfer Tax on Bulk Sales of Cooperative Apartments and Residential Condominium Units"), the Residential Rates apply to a transfer of adjacent cooperative apartments or residential condominium units that have been physically combined into a single residence; such a transfer will not be considered a Bulk Sale.

The Chief Administrative Law Judge for the New York City Tax Appeals Tribunal ("Tribunal") in the Matter of the Petition of Cambridge Leasing Corp., decided September 28, 2004, held that the transfer of multiple residential condominium units between the same parties is subject to New York City's RPTT at the Residential Rates. An Administrative Law Judge, in the Matter of the Petition of Daniel and Sheila Rosenblum, decided November 9, 2004, and the Deputy Chief Administrative Law Judge in the Matter of David Gruber, decided May 5, 2005, also held that the sale of multiple residential condominium units between the same parties is subject to the Residential Rates. The judges in these cases also ruled that even if Bulk Sales of condominium units are properly subject to the Commercial Rates, the transfers in question were not, on the facts presented, Bulk Sales and, on that basis, the Residential Rates applied to the transactions.

On September 12, 2006 the Tribunal's Appeals Division, acting by two Commissioners, one of whom had been involved in the issuance of Finance Memorandum 00-6 before being appointed to the Tribunal, ruled on these three cases. Each Decision sustained the Administrative Law Judges' cancellations of the Notices of Deficiency and sustained their findings that refunds were due. However, the Commissioners ruled solely on the facts. They held, in each Decision, that the transfers in question did not constitute the conveyance of more than one residential condominium unit for application of the Commercial Rates. They were not "Bulk Sales".

As to whether the Commercial Rates could be applied at all to the transfer of a residential unit, each Decision stated that "…we decline to adopt the [Administrative Law Judges'] conclusion that no sale of multiple residential condominium units from the same seller to the same buyer could ever be subject to the Higher Tax Rate Schedule. Under the facts in the matter at bar it is not necessary for us to address that issues at this time and, thus, we decline to do so…."

The Decisions are posted on the New York City Tax Tribunal's site at http://www.nyc.gov/html/tat/html/determinations/recent_decisions.shtml.

NYC Real Property Transfer Tax ("RPTT") – The New York City Tax Appeals Tribunal held that the RPTT, applicable to the transfer of a controlling interest in an entity owning real property, was properly collected on the transfer of all of the stock of five international business companies formed in the British Virgin Islands which owned all of the stock of five Delaware corporation which held the interests in a Delaware limited liability company owning the Four Seasons Hotel in Manhattan. The Decision in Matter of Corwood Enterprises, Inc., Et Al, Petitioners (TAT (E) 00-39 (RP), Et Al.), dated June 2, 2006, can be obtained at http://www.nyc.gov/html/determinations/recent_decisions.shtml.

NYC Street Maps – In 1918 the City of New York adopted a map widening Amboy Road in Richmond County which, as widened, cuts through the Plaintiffs' property. A surveyor testified that 2,185 square feet of the property, which has a gross area of 5,042 square feet, was within the bed of the widened street. A house on the property, part of which is within the widened street, was built in 1925. In 1926 General City Law Section 35 was enacted which prohibits, except when land within a mapped street is not yielding a fair return on its value to its owner or the proposed street widening has been shown on the official map for ten years or more and the City has not acquired title, the issuance of a permit to allow building in the bed of a mapped street. Plaintiffs brought an action seeking to declare as void so much of the map as affected their property or for compensation for the loss of value to their property. They claimed that the map restrictions rendered the property unsaleable and without value. The Supreme Court, Richmond County, granted the City's motion to dismiss without prejudice to Plaintiffs' commencement of another action. A planning map that produces such substantial damage as to render a property useless for any reasonable purpose is an unconstitutional taking. However, Plaintiffs did not offer any proof of the diminution in value resulting from the filing of the map or any proof that they were unable to sell their property because the street as widened went through their property. Royal v. City of New York was reported in the New York Law Journal on October 11, 2006.

Notice/Tax Lien Foreclosure – In an action to foreclose a tax lien, Plaintiff moved for an Order allowing service by publication against The Seamen's Bank for Savings ("Seamen's"), claiming

that service could not otherwise be made. The Supreme Court, Kings County, determined *sua sponte* from the Internet that the Federal Deposit Insurance Corporation ("FDIC") had seized the bank's assets and thus denied the motion. The Court directed the Plaintiff to perform a thorough investigation through the FDIC to determine the status of the lien that was held by Seamen's and provide notice, as appropriate, to the FDIC or its assignee within ninety days. The Court noted that the FDIC might have arranged for the sale of Seamen's assets to another bank. NYCTL 2004-A Trust v. Mesivta Yeshiva Rabbi Chaim Berlin, decided September 7, 2006, is reported at 2006 WL 2572002 (N.Y. Sup.).

Partnerships – In 1992 R&L Realty Associates (the "Partnership") was the Sponsor of an offering plan to convert a building in Manhattan to cooperative ownership. The Plaintiff and one of the Defendants were its partners. The Partnership was in financial distress, a mortgage on the building was being foreclosed, and the Defendant-partner ("Partner") was not making her full contributions. To raise money, the Plaintiff consented to the below market sale of four units to a Trust and a corporation in which the Partner or her husband, also a Defendant in the Action, held all of the beneficial interests, which was not disclosed to the Plaintiff. Within two years of discovering the fraud (which fraud tolled the running of the statute of limitations under CPLR Section 213.8), Plaintiff sued to rescind the sales. The Supreme Court, New York County, found that the Partner breached her fiduciary duty to the Plaintiff and declared the sale of the units to be void. The Partnership was, in turn, directed to return to the Defendants the amounts paid for the units, but without interest. The Court also awarded the Partnership, as the beneficiary of a constructive trust, the rents and profits realized by the Partner and her husband as owners of the units from the time of the sale until the present. Further, the Partnership was to be dissolved and the assets divided equitably. Shomron v. Fuks, decided September 27, 2006, was reported in the New York Law Journal on October 17, 2006.

Tax Sales – Consolidated appeals were taken from judgments entered in the United States District Court for the Northern District of New York and the United States District Court for the District of Vermont dismissing actions in which the Plaintiffs claimed that notices in four tax foreclosures were constitutionally inadequate. Three of the Actions were dismissed for lack of subject matter jurisdiction by reason of the Tax Injunction Act (the "Act"), 28 U.S.C. Section 1341. Under the Act, "(t)he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law when a plain, speedy and efficient remedy may be had in the courts of such State". The Second Circuit Court of Appeals reversed and remanded each of the cases for further consideration of the adequacy of the notices in light of Jones v. Flowers, 126 S.Ct. 1708 (2006). As to the issue of subject matter jurisdiction, the Appellate Court held that the Act "does not preclude federal courts from determining whether the notices of foreclosure sent to taxpayers satisfy due process". According to the Court, the Act is meant to prevent using federal courts to challenge the validity of amount of a particular tax assessed. Lussenhop v. Clinton County, New York, decided October 11, 2006, was reported in the New York Law Journal on October 17, 2006.

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