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To: All Clients and Friends

From: Cliff Bernstein

Re: Current Developments

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

Adverse Possession – Defendants own three residential parcels abutting property owned by a Plaintiff and leased to the other Plaintiff. A fence is located within the Plaintiffs' parcel three feet to the west of the property line, running the length of each Defendant's property. The Plaintiffs notified the Defendants that the Plaintiffs were going to replace the fence with a new fence which would be on the property line. The Defendants objected, and the Plaintiffs commenced an Action to quiet title and for ejectment. The Defendants counterclaimed in adverse possession. The Supreme Court, Nassau County, granted the Plaintiffs' motion for summary judgment and dismissed adverse possession claims. There was no proof that the land between the fence and the property line was "usually cultivated or improved" by the Defendants or "protected by a substantial inclosure", as required by Real Property Actions and Proceedings Law, Section 522 ("Essentials of adverse possession under claim of title not written").

According to the Court, "substantial and obvious alteration is required" to establish that the land was "usually cultivated or improved…Even the placement of a structure, such as a garage, is not enough to establish hostile possession by improvement if that structure lies mainly on the claiming party's land and the encroachment on the disputed property is slight". In addition, "the mere presence of a fence is insufficient [to show a 'substantial inclosure']. There must be a showing that it was a substantial barrier erected by the party claiming adverse possession, without the consent of the owner". RSVL Inc. v. Portillo, decided September 11, 2007, is reported at 16 Misc.3d 1137 and 2007 WL 2669463.

Bankruptcy – In a suit for divorce and spousal maintenance, the Supreme Court, Columbia County, ordered the Petitioner-husband to "bring the mortgage current and make monthly payments until further order". The Petitioner filed a Chapter 7 bankruptcy petition and ceased making mortgage payments. His wife, the Respondent, moved in Supreme Court to have the Petitioner held in contempt for failing to comply with the Order. The Petitioner argued that the filing of the bankruptcy petition automatically stayed his obligation to pay the mortgage, and he moved in Bankruptcy Court for the Respondent to be held in contempt for violating the automatic stay. The Bankruptcy Court held that the Respondent did not violate the stay. Under

Section 362 of the Bankruptcy Code there is no automatic stay "of the collection of a domestic support obligation from property that is not property of the estate…" and, according to the Court, the mortgage payments in questions were in the nature of support and maintenance which the Respondent was attempting to collect from non-estate assets of the Petitioner. The United States District Court for the Southern District of New York affirmed. According to the District Court, "the finding that a debt is a domestic support obligation is 'a factual determination of the bankruptcy court…subject to reversal only if clearly erroneous'", and "(t)he bankruptcy court's findings that the state court order is in the nature of a support payment and that respondent is not seeking to collect from the debtor's estate are not clearly erroneous". Chase v. Chase, decided January 22, 2008, is reported at 2008 WL 203622.

Condominiums – A unit owner sought to enjoin the individual members of the condominium's board of managers and Omnipoint Communications Inc., a lessee of portions of the roof and basement storage area, from erecting and maintaining a cell phone antenna in any common elements of the condominium. The Supreme Court, Westchester County, denied the motion for a preliminary injunction, finding that the Plaintiff had not demonstrated a likelihood of success on the merits. The Board of Managers "is protected by the "business judgment rule" in its management of the common elements, and it was not alleged that the installation of the antenna on the roof and the placement of related equipment in the basement would affect the Plaintiff's unit. The Court granted cross-motions to dismiss the complaint on three grounds. As only injunctive relief was sought there was a failure to state a cause of action; a unit owner does not have standing to sue individually for injury to the common elements; and the Board of Managers was not a defendant. Di Fabio v. Omnipoint Communications Inc., decided January 25, 2008, was reported in the New York Law Journal on February 7, 2008.

Contracts of Sale – A contract of sale provided that the premises "will be delivered vacant and clean" at closing. The Defendant-seller did not comply, and the Plaintiff-purchaser expended $17,000 after closing to remove storage bins, container and other items. The Plaintiff sought to recover damages it incurred due to the seller's failure to deliver the premises as required. The Supreme Court, Queens County, granted the Defendant-seller's motion to dismiss the Plaintiff's trespass claim and granted summary judgment to the Plaintiff of its breach of contract claim. The Appellate Division, Second Department, affirmed the dismissal of the trespass claim but reversed the lower court's ruling on the contract cause of action. According to the Appellate Division, the seller's obligation to deliver the premises "vacant and clean" did not survive the closing of title. It was not a collateral obligation extraneous to the sale of realty which could survive the delivery of title. The trespass cause of action was a contract claim pleaded as a tort. Novelty Crystal Corp. v. PSA International Partners, L.P., decided January 15, 2008, is reported at 2008 WL 141502.

Easements – A driveway easement was extinguished in 1978 when the benefitted and burdened parcels were acquired by a common owner. In 1982 the property was subdivided, and the two resulting parcels of land were subsequently conveyed. The deed to the land that had been burdened by the easement did not mention a driveway easement; the later deed and the subsequent deed to the Defendants, conveying the land that had been benefitted by the easement, referenced the driveway easement and noted that it burdened the servient land. In 2003 the owners of the purportedly dominant land, the Defendants in this case, removed a tree and fencing

to enable them to have access to their garage using the easement. The owners of the purportedly servient parcel commenced an action for a declaration that the easement was no longer in force and effect, and to restrain the Defendants from using any part of the Plaintiffs' property. The Defendants counterclaimed for a declaration that their land was benefitted by the easement.

The Supreme Court, Staten Island, granted the Plaintiff's motion, holding that the easement was not re-created, because the deed conveying the Plaintiffs' property did not reference the easement. The Appellate Division, Second Department, reversed, concluding that the extinguished easement was re-created by the reference to the easement in the deed to the benefitted property, because the then owners of the burdened parcel knew of its existence. The Court of Appeals reversed the Order of the Appellate Division and reinstated the judgment of the Supreme Court.

According to the Court of Appeals, interpreting its holding in Witter v. Taggart, 78 N.Y.2d 234, "(w)e held that an encumbrance must be 'record[ed] in the servient chain [of title]…so as to impose notice upon subsequent purchasers of the servient land'. We did not hold that a subsequent purchaser's notice of an extinguished encumbrance, that once burdened the servient estate, was sufficient to re-create that encumbrance…It is irrelevant that plaintiffs may have had notice of an earlier easement, since the easement was not in existence at the time they purchased the property…". Simone v. Heidelberg, decided November 17, 2007, is reported at 9 N.Y.3d 177.

Eminent Domain – Property owners whose homes and businesses in downtown Brooklyn are to be condemned to enable the construction of the Atlantic Yards Arena and Redevelopment Project claimed that the taking would violate the Public Use Clause of the Fifth Amendment to the United States Constitution, under which "private property [shall not] be taken for public use, without just compensation". They alleged that the public uses advanced for the Project were pretexts for a private taking. The Second Circuit Court of Appeals has affirmed the District Court for the Eastern District of New York's Order dismissing the complaint. According to the Appellate Court, "the Project bears at least a rational relationship to well established categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of public open space, and various mass-transit improvements". The Supreme Court's decision in Kelo v. City of New London (545 U.S. 469) does not " require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various governmental officials who approved it". Goldstein v. Pataki, decided February 1, 2008, is reported at 2008 WL 269100.

Foreign Sovereign Immunities Act/Real Estate Taxes – The United States Supreme Court, in The Permanent Mission of India to the United Nations v. City of New York (127 S. Ct. 2352), had affirmed the decisions of the Second Circuit Court of Appeals and the United States District Court for the Southern District of New York holding that the federal district court has jurisdiction 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 the Principal Resident Representative of the Mongolian People's Republic to the United Nations.

In a decision issued on February 8, 2008, Judge Rakoff of the United States District Court for the

Southern District of New York held that real estate taxes were due on the buildings housing the New York consulates and missions to the United Nations of India and Mongolia to the extent to which those properties were used as residences of employees below the level of head of mission. Under the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations, the residential exemption from real estate taxes is limited only to the "residence of the career head of consular post" and the "residence of the head of the mission".

As to the use of part of the property housing the Consulate of the Republic of the Philippines for the operation of a restaurant, a bank and an airline office, the Court held that the exemption from taxation in the Vienna Convention did not extend to the spaces the building leased to the bank and the airline offices since they were to commercial tenants which did not exclusively serve the diplomatic purposes of the Mission. The restaurant, however, being used exclusively for a consular purpose, the Court dismissed the City's claims for taxes on that portion of the property occupied by the restaurant. City of New York v. Permanent Mission of India to the United Nations was reported in the New York Law Journal on February 15, 2008.

Mortgage Foreclosure/Standing – An action was commenced to foreclose a mortgage made by the Defendants to the Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the Plaintiff-lender. While the Plaintiff's ex parte motion for an Order of Reference was pending, the Defendants sold the property and paid off the mortgage; MERS, as the Plaintiff's nominee, recorded a mortgage satisfaction. Judge Schack, of the Supreme Court, Kings County, having noted the recorded satisfaction on the Department of Finance's ACRIS website, denied the motion, dismissed the complaint, and ordered that the lis pendens be canceled. According to the Court, the Plaintiff lacked standing to sue from the time at which it became aware that its mortgage had been paid off. The Court also scheduled a hearing to determine if the Plaintiff's counsel's making of the motion, instead of discontinuing the action, would be sanctioned as "frivolous" under 22 NYCRR Section 139-1.1. Fremont Investment & Loan v. McBean, decided November 26, 2007, is reported at 17 Misc.3d 1132 and 2007 WL 4165344.

Mortgages/Predatory Lending – The Supreme Court, Richmond County, denied a foreclosing mortgagee's motion for summary judgment and stayed the proceeding on finding that the original lender violated New York's "predatory lending" statue, Banking Law, Section 6-L ("High-cost home loans"). The Court scheduled a hearing to determine damages incurred by the Plaintiff and indicated that relief may, under Section 6-L, include the voiding of the mortgage, the return of all mortgage payments, the expenses of obtaining the loans and attorneys' fees. Among the acts in question were (i) lending in excess of the purchase price to enable payment of points and closing fees, leaving the borrowers with negative equity in the property; (ii) financing of fees and points in excess of three per cent of the principal amount of the loan; (iii) the failure to undertake the "due diligence" required regarding the borrower's ability to pay a "high cost home loan"; and (iv) not issuing to the borrower a required "Consumer Caution and Home Ownership Counseling Notice". LaSalle Bank NA v. Shearon, decided January 28, 2008, was reported in the New York Law Journal on February 7, 2008 and is reported as 2008 NY Slip Op 28032.

New York City/Alternative Enforcement Program ("AEP") – Under Local Law No. 29 of 2007 effective November 11, 2007, adding article ten to subchapter five of chapter two of title

twenty-seven of the Administrative Code, the Department of Housing Preservation and Development ("HPD") will annually identify 200 "distressed buildings" for the AEP. After receipt of notice that a property is included in the AEP, the property owner has four months to correct 100% of the violations directly related to providing heat and hot water and no less than 80% of all Class "B" and "C" violations, to pay all outstanding charges for emergency repairs performed by HPD, and to submit to HPD a current and valid property registration statement. If the owner does not comply, HPD may hire a contractor and bill the owner for the repairs. Administrative Code Section 27-2153(q) provides that "[a]ll amounts for expenses incurred and fees imposed by the department pursuant to this article that remain unpaid by an owner shall constitute a debt recoverable from the owner and a lien upon the building and lot, and upon the rents and other income thereof". Information on this new program is posted at http://home2.nyc.gov/html/hpd/html/owners/aep.shtml.

Pending State Legislation/Filing Fees - A Budget Bill (S6809/A9809) under consideration in the New York State Legislature if enacted will, *effective April 1, 2008*, increase the filing fee for Forms RP-5217 and RP-5217NYC, the State Board of Real Property Services Real Estate Transfer Report forms (also known as the Equalization and Assessment forms), up to $575.00 for a transaction with a "reported sales price" of more than $1,000,000. The amount of the filing fee will vary based on the "reported sales price" and whether or not the property is "qualified residential property" or "qualified farm property".

The Budget Bill applies the same, new fee schedule to the filing of a NYC-RPT for a conveyance for which an instrument of transfer is not recorded, including the transfer of a cooperative unit or a controlling interest in an entity owning real property. When an instrument is being recorded and a Form RP-5217 or RP-5217NYC is filed, there will be no additional charge to file the NYC-RPT, if the Budget Bill is enacted.

Information on the new fee schedule set forth in the legislation is posted at http://www.cbtitlegroup.com/files/articles/20080226_NY_Exh_A.pdf.

Under Real Property Law Section 333, "qualifying residential property" includes property classified on the latest final assessment roll as a one-to-three family house, a rural residence, a residential condominium, or a one-to-three family residential property newly constructed on vacant land. "Qualifying farm property" is property classified on the latest final assessment roll as being in the agricultural category.

The filing fee is now $75.00 on the transfer of "qualifying residential property" or "qualifying farm property", and $165.00 when a transfer is of any other type of property.

Note that the increased fees may apply to documents which are submitted prior to the Budget Bill's effective date but which are rejected by recording offices, requiring that they be re-submitted after that date.

All efforts are to be taken to record documents prior to April 1; but, to ensure that sufficient funds are in hand if recording cannot be completed by then, the applicable increased fee must be collected at all closings on and after March 1, 2008.

If closing documents are finally recorded before April 1, and the increased fee is not required to be paid, the additional amount collected must be promptly refunded to the customer who paid the additional charge.

Streets – Two owners of property abutting Flushing Avenue in Brooklyn sued New York City and its contractor to recover for economic loss allegedly incurred due to a major reconstruction of the Avenue over a three year period. They claimed that the project reduced vehicular traffic on the Avenue and deprived motorists of access to their properties, which were leased for use as a gas station, a car wash and a convenience store. The Supreme Court, Kings County, granted the Defendants' motion to dismiss. Absent negligence, there is no liability for interference with access to private property during a public construction project unless the interference is both total and permanent; the Plaintiffs did not allege that there was a permanent loss of access. Further, insofar as the work impacted the Plaintiffs' property, the Defendants made a sufficient showing that the manner in which the work was done was reasonable and necessary; the Plaintiffs did not provide evidence to the contrary. Mishgy, LLC v. City of New York, decided November 27, 2007, is reported at 17 Misc.3d 1132 and 2007 WL 4178598.

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