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To: **All Clients and Friends**

From: **Cliff Bernstein**

Re: **Current Developments**

TITLE INSURANCE BULLETIN – NEW YORK
CURRENT DEVELOPMENTS

Adverse Possession – the Plaintiffs brought a quite title action seeking a judgment that they owned a fenced in area up to 14 feet wide within the property deeded to them. The Defendants claimed that they had title to the fenced in area by adverse possession. The Supreme Court, Westchester County, granted the Plaintiffs' motion for summary judgment. According to the Court, "[w]hile the record at bar clearly establishes that a fence encroaching on plaintiffs' property had been in place in excess of the 10-year required period of time for establishing a property right by adverse possession, and that defendants and their predecessors in title continuously had maintained this enclosed property… and that defendants and their predecessors' use of the same had been actual, exclusive, open and obvious; nevertheless, there is no evidentiary support for the critical and dispositive finding that defendants and their predecessors had occupied this disputed property under a claim of right and without permission from plaintiff's predecessor". Perfito v. Einhorn, decided March 5, 2008, was reported in the New York Law journal on April 8, 2008.

Contracts of Sale – Plaintiffs sought specific performance of a contract of sale executed in October, 2007 for the purchase of a residential condominium unit in Manhattan. When the check delivered for the down payment, mistakenly dated October 3, 2008, was rejected by the Defendant-Seller's bank, Seller's counsel requested a replacement check but, instead of depositing the replacement check, the Seller agreed to sell the unit to a different buyer for a greater price. The replacement check was returned with a letter stating that the Plaintiffs' offer was rejected. The Supreme Court, New York County, granted the Plaintiffs' motion for a preliminary injunction restraining the defendant from transferring title while the action was pending, conditioned on the posting of a $100,000 undertaking. The Defendant's motion to dismiss was denied. By requesting a replacement check, the Seller's counsel "waived the defendant's right to rescind the contract and offered the plaintiffs an opportunity to comply with their contractual obligation by the prompt delivery of a replacement check. By delivering a replacement check the following day, the plaintiffs accepted this offer before it was withdrawn." The Plaintiffs were likely to succeed on their claim that the Defendant, who was aware that a replacement check was being requested by her counsel, waived her right to rescind the contract. Robison v. Ohnell, decided February 25, 2008, was reported in the New York Law Journal on March 20, 2008.

Corporations – in 2001 Decana Inc. ("Decana"), the owner of an apartment building in

Manhattan, executed two mortgages. Its Director, acting under the authority of a corporate resolution executed by him as the Director and Secretary of Decana and as the holder of all of the shares of stock of its parent company, executed the mortgages. He was not, however, the corporate Secretary or a shareholder of the parent company, and he diverted the loan proceeds to his own account. Decana and its parent company sought an Order declaring that one of the mortgage loans was not payable and all amounts paid should be refunded, and enjoining the lender from charging any interest rate penalties or foreclosing on the property. The Plaintiffs claimed that the lender had an obligation to investigate his authority. The Supreme Court, New York County, dismissed those causes of action. According to the Court, "it is beyond cavil that Contogouris was a principal of Decana, with actually authority to bind Decana". Decana, Inc. v. Contogouris, decided October 9, 2007, is reported at 2007 WL 2993617.

Judgments – Under Civil Practice Law and Rules ("CPLR") Section 5203 ("Priorities and liens upon real property"), a judgment is a lien for ten years on real property of the debtor in the county in which the judgment is docketed. The judgment may be renewed for an additional ten years pursuant to CPLR Section 5014 ("Action upon judgment"), which provides that "[a]n action may be commenced… during the year prior to the expiration of ten years since the first docketing of the judgment. The lien of a renewal judgment shall take effect upon the expiration of ten years from the first docketing of the original judgment".

In a case decided by the Appellate Division, First Department, the Plaintiff's judgment was docketed in New York County on October 23, 1991. Before the ten year lien period expired, the judgment creditor brought an action to obtain a renewal judgment. An Order renewing the judgment *nunc pro tunc* dated as of October 23, 2001 was docketed in 2005. In 2003, however, after the ten year lien period for the judgment had run and before the renewal judgment was docketed, the judgment debtor executed two mortgages on a condominium unit he owned in Manhattan. The mortgagees sought an order either vacating the nunc pro tunc treatment of the renewal judgment or declaring that the liens of their mortgages were prior to the lien of the renewal judgment. The Supreme Court, New York County, denied their petition, and the mortgagees appealed.

The Appellate Division reversed the Order of the lower court, granted the petition, held that the renewal judgment was entered as of the date it was granted, and declared that the liens of the mortgages were prior to the judgment. According to the Court, "[o]nce the county docket book reflected only [the judgment debtor's] expired lien, other creditors were fully entitled to rely upon that fact and make mortgage liens on the assumption that thie mortgage liens would have priority". Gletzer v. Harris, decided March 13, 2008, is reported at 2008 WL 678589.

Mechanic's Liens – Petitioner sought an order discharging a mechanic's lien filed seven months after the last date on which the respondent had furnished materials for the making of an improvement in cooperative apartment "4D/4E" in a building in Manhattan. Under Lien Law Section 10 ("Filing of notice of lien"), a mechanic's lien may be filed within four months of the date of the final completion of the work or the final furnishing of the materials at real property improved or to be improved by a single family dwelling; for all other property, the lien must be filed no later than eight months from the last date on which work was done or materials were furnished. The Supreme Court, New York County, vacated the lien, holding that the combined cooperative apartments qualified as a single family dwelling and the four month period to file applied. Matter of Golds Plumbing & Heating Co. Inc. v. North Shore Plumbing Supply Co. Inc., decided March 18, 2008, was reported in the New York Law Journal on March 31, 2008.

Mortgage Foreclosures – Under Real Property Actions and Proceedings Law Section 1301 ("Separate action for mortgage debt"), "[w]hile the [foreclosure] action is pending… no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought". According to the Appellate Division, Second Department, leave of court is not required to commence an action on a note when the action to foreclose the mortgage securing the note has been dismissed, notwithstanding that the order of dismissal was later reversed. The Court noted that the mortgaged property had been sold at a tax sale. NC Venture I, L.P. v. Complete Analysis, Inc., decided March 4, 208, is reported at 851 N.Y.S. 2d 888.

Mortgage Foreclosures – A Notice to Quit and a copy of the referee's deed were served on the occupants of the foreclosed premises, who included a prior owner of the property (who transferred title to the mortgagor), her mother, her sister, and her sister's minor son. The Supreme Court, Nassau County, held that only those who had been named party defendants in the foreclosure and served could be evicted, and by means of a writ of assistance. The rights of those who had not been served could only be cut off, and they could only be evicted, by naming them as party defendants, and by serving them with notice, in either a strict foreclosure under Real Property Actions and Proceedings Law ("RPAPL") Section 1352 ("Judgment foreclosing right of redemption") or a re-foreclosure under RPAPL Section 1503 ("Action to determine claims where foreclosure of mortgage was void or voidable"). MERS, Inc. v. Bernard, decided February 19, 2008, is reported at 18 Misc. 3d 1134 and at 2008 WL 465288.

Mortgages/"Foreclosure Rescue" Schemes – The owner of a home in Brooklyn was in default on her mortgage. She was approached by a principal of Lost and Found Recovery, LLC ("LFR"), who offered to arrange a refinancing of the mortgage which would also provide her with a "significant cash out". At closing of the refinance, however, she was informed that the loan needed to be made to another person with better credit. Plaintiff therefore conveyed the property to a "straw buyer" who executed a mortgage for $562,500 to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Greenpoint Mortgage Funding, Inc. ("Greenpoint"). After satisfying the existing mortgage, funds were disbursed to LFR "for services rendered" and to pay allegedly "bogus" costs and settlement expenses. Plaintiff alleged that she was told that LFR would make the mortgage payments for one year, at which time the property would be deeded back to her. No payments were made on the mortgage and an action to foreclose was commenced.

Plaintiff contended that the note was unenforceable and the mortgage void due to Greenpoint's and MERS' gross negligence in underwriting the loan and fraud in the transfer of title. Defendants Greenpoint and MERS moved for an Order to dismiss, Judge Jacobson of the Supreme Court, Kings County, denied the motion to dismiss. According to the Court, "[c]onsidering the present difficulties faced in the subprime mortgage market, a lender underwriting a mortgage has a duty to investigate and ascertain the economic status of the purchaser/mortgagor and whether the purchaser/mortgager may be committing a fraud against the seller in the underlying transaction". Mathurin v. Lost & Found Recovery, LLC, decided February 18, 2008 is reported at 2008 WL 783982.

Mortgage Recording Tax/New York State Transfer Tax – The New York State Department of Taxation and Finance has announced that the interest rate to be charged for the period April 1, 2008 - June 30, 2008 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 those taxes will be 7% per annum compounded daily. The interest rates are published at http://www.tax.state.ny.us/press/2008/int0308.htm.

Mortgage Recording Tax – The New York State Department of Taxation and Finance issued Advisory Opinion TSB-A-08(1)R, dated February 15, 2008, which takes the position that a mortgage being recorded by the Brooklyn Navy Yard Corporation, a local development corporation formed under Section 1411 ("Local development corporations") of the State's Not-for-Profit Corporation Law, is exempt from the payment of mortgage recording tax. Under Section 1411(f), "(t)he income and operations of corporations incorporated or reincorporated under this section shall be exempt from taxation". The Advisory is on the Department's website at http://www.tax.state.ny.us/pdf/advisory_opinions/mortgage/a08_1r.pdf.

New York City/Recordings – At a meeting with a committee of the New York State Land Title Association, the City Register announced a new policy for the return of original recorded documents. This policy will be in effect for all documents submitted for recording after June 1, 2008, including all documents rejected prior to that date which are re-submitted for recording after June 1. It has been the practice of the City Register's offices to return all recorded documents by mail that are not picked-up by the company which submitted them, or by its designee, without further charge.

A documents submitted for recording (or re-recording) after June 1 that is not picked-up within ten business days of recording will be returned to the person noted on the ACRIS Recording and Endorsement Cover Page as the addressee for the return of the document only if the Register's Office is provided when the document is submitted either (i) a stamped, addressed return envelope or (ii) an overnight delivery service envelope with a label (such as a Federal Express "US Airbill") completed with the address of the recipient and a billing account number. Otherwise, after ten business days from the date of its recording, the original recorded documents will be destroyed by the Register's Office.

Partnerships – Absent an agreement to the contrary, a partnership dissolves on the death of a partner and the partnership, if it continues to do business, does so as a partnership at will. The Plaintiffs, heirs of general partners or two partnerships owning real property, claimed that they became partners with the other, surviving partners, and they brought an action to enforce their partnership rights. The Supreme Court, New York County, held that the Plaintiffs had only beneficial interests in partnerships at will; they were not partners because there was no agreement under which the Plaintiffs succeeded to the partnership interests. They only have the right to collect earnings, to a declaration of dissolution, and to an accounting. Sperber v. Rubell, decided February 27, 2008, was reported in the New York Law Journal on March 21, 2008.

Recording Act – The Defendant-Seller did not appear at closing under a contract of sale recorded on January 26, 2008. Instead, he conveyed the property to his wife and himself and they executed a mortgage. The mortgagee's assignee filed a notice of pendency to foreclose and the contract vendees commenced an action for specific performance. The vendees asserted that their rights under the contract of sale were prior to the lien of the mortgage. The Supreme Court, Richmond County, held that the mortgage had priority. The recorded contract did not have the protections of New York's Recording Act, Real Property Law ("RPL") Section 291 ("Recording of conveyances"), since signatures on the contract were not properly acknowledged. In addition, under RPL Section 294 ("Recording executory contracts and powers of attorney") recording of a

contract of sale is effective against subsequent purchasers "up to and including the thirtieth day after the date fixed by the contract for the conveyance of title", unless an agreement extending the closing date is recorded. No document extending the closing date was recorded. Gibaldi v. Daniel, decided March 12, 2008, is reported at 19 Misc. 3d 1101 and at 2008 WL 659814.

Service of Process – Appellant held a money judgment entered in the United States District Court for the Eastern District of New York. The entry of the judgment in the Kings County Clerk's docket mistakenly listed the property address as the appellant's address and the appellant's residence as the address of the judgment debtor. The process server in an action to foreclose a mortgage on the judgment debtor's vacant land was unable to effect personal service, and service was therefore made on the debtor and the appellant by publication. The appellant moved to vacate the judgment of foreclosure and the sale or, alternatively, for damages, on the ground that the Supreme Court erroneously directed service upon him by publication. The lower court denied the motion and the Appellate Division, Second Department, reversed, vacating the sale as to the appellant for the lack of personal jurisdiction. The process server should have ascertained the appellant's address from the records of the Court where the judgment was entered. "Service by publication alone was not reasonably calculated under the circumstances to apprise him [the judgment debtor] of the pendency of the action". Contimortgage Corporation v. Isler, decided February 26, 2008, is reported at 853 N.Y.S. 2d 162.

Tax Sales – in an action to foreclose a tax lien purchased from the City of New York, the Defendant property owner moved for an Order either vacating the judgment of foreclosure or staying the foreclosure sale for thirty days to enable the property to be sold under an existing contract of sale which would enable the tax lien to be paid in full. Although CPLR Section 2201 ("Stay, motions, order and mandates") provides that "…the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just", the motion was denied by the Supreme Court, Kings County. According to the Court, there was no showing that the closing under the contract would occur within thirty days if the stay was granted, and, on the other hand, there was no indication that the closing under the contract could not be accomplished before the date of the scheduled foreclosure sale. NYCTL 1998-2 Trust v. McGill, decided March 7, 2008, was reported in the New York Law Journal on March 7, 2008.

Tax Sales – A foreclosure sale of a tax lien on property improved at that time by an abandoned gas station took place in 1999. The successful bidder ("Bidder") did not close when its title company refused to insure the property free of environmental liens. Over several years, the environmental conditions were remedied by the State's Department of Environmental Conservation. In October 2007, the NYCTL 1996-1 Trust ("Trust"), the beneficial owner of the tax lien, and the Bank of New York ("Agent"), the holder of the tax lien as collateral agent for payment of the bond issued by the Trust, (collectively, the "Plaintiffs") moved to compel the referee to transfer the deed. However, two issues needed to be resolved before the closing could take place. First, who was responsible to pay the real estate taxes that accrued between the date of the auction sale and delivery of the deed? Second, should the purchaser pay interest on the purchase price from the date of the sale to closing?

As to the first issue, the Plaintiffs, which would receive sale proceeds after the real estate taxes were paid, contended that RPAPL Section 1354(2) ("Distribution of proceeds of sale"), requiring the payment of real estate taxes from the proceeds of sale, does not require the payment of taxes due after the auction sale from the sale proceeds. The Bidder, conversely, argued that Section 1354(2) requires taxes imposed between the date of the sale and the closing to be paid out of the

sale proceeds. The Supreme Court, Bronx County, held that the statute requires the referee to pay from sale proceeds only the real estate taxes accruing prior to the foreclosure sale. According to the Court, during the period between the auction sale and the delivery of the deed, "the successful bidder is the equitable owner of the premises that was subject to the foreclosure".

As to the second issue, in an equitable action such as a foreclosure, under CPLR Section 5001(a) ("Interest to verdict, report or decision") "interest [on a sum awarded] and the rate and date from which it shall be computed shall be in the court's discretion". The Court held that although the delay in closing was not exclusively the fault of the Bidder, "it would be unconscionable to hold [Plaintiffs] responsible for the prolonged delay in the deed transfer". Accordingly, interest charged to the Bidder was to be computed at a rate of 5%.

The Court accordingly denied the Bidder's motion to compel the referee to transfer title without charging him any post-sale interest or real property taxes, granted the Plaintiffs' motion to compel the referee to vacate the foreclosure sale if the Bidder did not pay such charges, and directed the referee to transfer title within 30 days of service of a copy of the Order on the Bidder. Failing to close, the referee was instructed to retain the down payment and to re-advertise the property for an auction sale to be held on March 10, 2008. NYCTL 1996-1 Trust v. EM-ESS Petroleum Corp., decided February 7, 2008, is reported at 19 Misc. 3d 240 and at 2008 WL 341442.

Westchester County Recordings – On April 4, the New York State Land Title Association advised its membership that the following procedure was announced by the Deputy County Clerk of Westchester County for any document executed after [and presumably on,] April 7, 2008 pursuant to a power of attorney:

> "All conveyance documents that reference a Power of Attorney, or are signed and executed by a signature under Power of Attorney, whether individually or by attorney-in-fact for a corporate entity, must comply with the following in order for a conveyance to be accepted for recording:
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> 1. For both individual and corporate executed documents, a Power of Attorney must be of prior record, or submitted simultaneously therein, with the conveyance tendered for recording;
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> 2. For a conveyance submitted for recording with reference to a prior filing of a Power of Attorney, the conveyance must contain reference to the liber and page, control number and file date of the Power of Attorney;
>
> 3. For conveyances submitted for recording with reference to a prior filing of a Power of Attorney not filed in the Land Records Division, the conveyance must be accompanied by a certified copy of the prior recorded Power of Attorney".

According to the Land Title Association, the Westchester County Clerk "will accept documents without a power of attorney being submitted with the document (for individuals) if executed prior to April 7th and the document contains a note indicating 'executed prior to 4/7/08. Power of Attorney not required to be submitted'".

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