FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

NYC Real Property Transfer Tax Aggregation: Let the Seller Beware!

On residential sales involving two tax lots, the City of New York has increased the transfer tax liability by applying the commercial rate regardless of the legal use and occupancy of the premises. For example, a two-family house standing on two tax lots would be charged transfer tax at the commercial rate. The City has allowed for an exception to this rule when: (1) the second lot is either vacant land or a garage, or (2) both lots are part of a condominium and only one of them has a kitchen. The commercial tax rate is 1.425% where the consideration is up to $500,000.00, and 2.625% where the consideration is over $500,000.00. For your reference, the residential rates are 1.00% and 1.425%, respectively.

Accommodating Parties on Mortgage Financing

Consider the following fact pattern: A wants a mortgage loan to buy a house, but A cannot qualify because A has no credit history. A asks his mother, B, to join him as a buyer so that the bank grants the loan based on her credit history. Speculating that B will probably pass away before A, they take title as joint tenants with right of survivorship. The years pass, A pays all maintenance and expenses, but eventually dies leaving a son, C. B immediately starts eviction proceedings to expel C from the premises. C claims an interest in the premises as sole heir at law of A. Does C have any chance against the surviving joint-tenant B?

The use of accommodating parties to qualify for loans is a desperate resort particularly incident among immigrants for want of credit history. The Supreme Court in Rich v. Rich, 2005 NY Slip Op 51780 (U) facing the fact pattern above has recently decided that C has a defensible claim, albeit a "heavy burden" to meet. In other words, the court may recognize the right of an accommodated party even if the accommodating party is the only owner of record. This newsletter will monitor the development and report the final decision of the case.

Vacate Orders and Similar Notices

In First American Title Insurance of NY v. Boyajian and Olympia Mortgage Corp., 2005 NY Slip Op 51834(U) the Supreme Court decided that a vacate order is not a lien until a specific amount is posted. Hence, the referee had no duty to settle a vacate order when the property was sold at foreclosure, and the seller was not responsible for the lien that may develop, unless the absence of liens was guaranteed. The court also rejected the plaintiff's claim of unjust enrichment as being “speculative at best,” since the seller cannot be said to have been enriched by the amount imposed, if there was no certainty that a lien would be imposed after the sale.

Vacate orders and sidewalk liens operate in a similar fashion: The administration detects a violation and posts a notice to induce the owner to perform certain work. If the owner fails to comply, the administration proceeds to correct the problem itself and later posts a tax bill with the Department of Finance (if the property is in New York City). This lien that may develop has priority over all private liens, including pre-recorded mortgages.

Is Your Business Liable for Sending Junk Faxes?

The Telephone Consumer Protection Act as modified by the Junk Fax Prevention Act of 2005, imposes a penalty of $500, which by application of treble damages may be $1,500 (or the actual damage caused, if greater), for every unsolicited fax advertisement transmitted. The courts have interpreted every page sent to constitute a separate violation; a three page fax could result in $4,500.00 dollars in liability. The act does not apply where: (1) the parties have an established business relationship, (2) the recipient voluntarily offered its fax number by express consent or advertising, or (3) the fax contains a satisfying opt-out option (see the Junk Fax Prevention Act for details). Whoever believes this is a simple matter for small claims courts should bear in mind Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287 (11th Cir.), where a class of 1,321 fax recipients was granted a judgment against Hooters in the amount of $11,889,000. Hooters of Augusta, Inc. subsequently filed for bankruptcy.

Perfecting the Closing

The Need for Frozen Letters

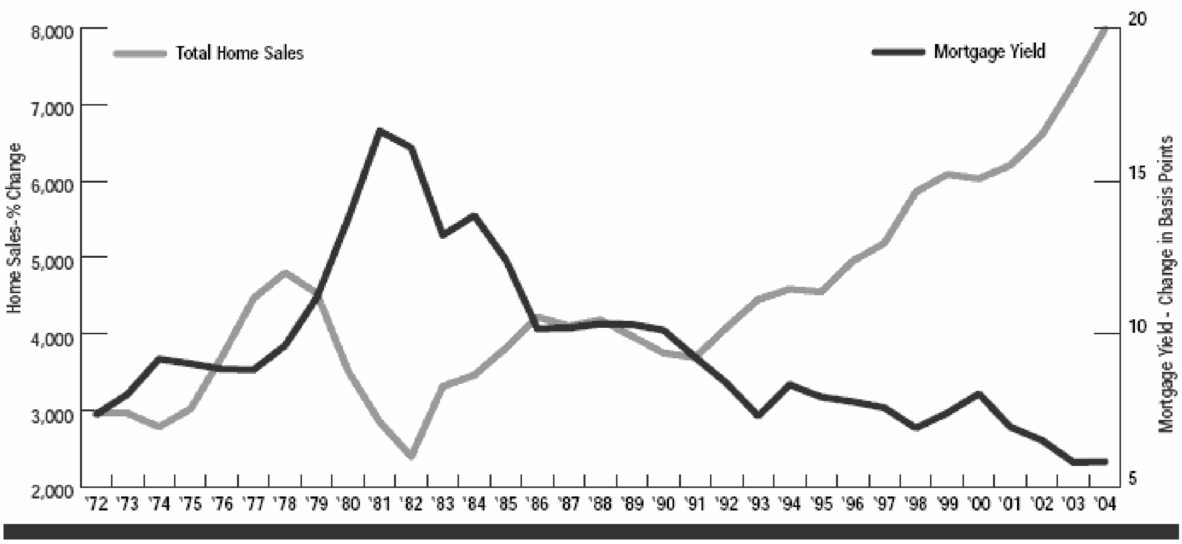
The title closer sees a first mortgage and a credit line mortgage in the title report and asks the seller’s attorney for the payoff letters. The attorney diligently opens his file and hands her two pieces of paper. The title closer reads them and says “this credit line doesn’t appear to be frozen, do you have a frozen letter?” The seller’s attorney protests “I gave you the payoff letter, what else could you possibly want?”

With the lending industry’s aggressive marketing of credit line mortgages this situation has become the single most recurrent problem at real estate closings. A credit line mortgage is a line of credit. Borrowers are allowed to draw and repay during a certain term (usually ten years), after which time the debt consolidates into a fixed amount to be repaid by monthly payments of principal and interest (usually over the course of twenty years). The problem lies in the so-called “draw period”: If the borrower can draw money on the line, and every draw takes a few days to post, how can anyone be sure that the amount shown on the payoff letter is accurate? For example, if the payoff letter was obtained the day before the closing, and the seller decided to draw money on the morning of the closing, the payoff will appear to be accurate and up to date, but will fail to close the account. Worse still, the seller may decide to draw money on the line after the closing but before the payoff check is received and cleared. In the absence of a representation from the payoff bank that the account has been “frozen,” "blocked," or "closed," it is impossible to ascertain a specific amount owed on a line of credit. No attorney for the purchaser will rely on an affidavit from the seller swearing that no amount has been drawn or will be drawn.

Once the need for a frozen letter is recognized, the next hurdle becomes getting one. Banks generally refuse to issue such letters. Banks like to encourage their clients to draw, not to prevent them from it. However, a diligent attorney can get frozen letters from any bank. Sometimes it requires persuading, asking for a supervisor, sending the client to the branch where she knows the staff, or reminding the bank that the borrower is entitled to a payoff statement –according to Real Property Law Section 274a- and that an active account payoff fails to meet the requirements of the law. Lastly, if all else fails, contact the Consumer Help Unit of the New York State Department of Banking at 1-877-BANKS-NYS, who will agree to partake in a conference call with the reluctant bank. Federal Standard Abstract, Inc. has experience obtaining these letters and will be ready to assist you.

Industry Curiosities

As much as low interest rates are cherished by purchasers of homes, one should question whether the actual beneficiaries of those rates are the purchasers or the sellers of real estate. It is commonly accepted that low interest rates increase purchases of real estate and have some incidence in the price, simply because there is more money available, hence more money to be bid on homes. The graph below is surprising in the accuracy of that thought and in the sensitivity reflected by the diptych reaction of the market to the slightest variation in interest rates. The Total Homes Sales line refers to the total value sold, as opposed to the actual number of homes. Since 1992, whom would you say benefited the most from low interest rates? The purchasers or the sellers?



Source: A.M. Best Special Report on the Title Industry, October 2005. Find the complete report at http://www.alta.org/industry/best.cfm