FEDERAL STANDARD ABSTRACT
TITLE NEWS

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Title News

New IT-2663 and IT-2664 Forms

The New York State Department of Taxation and Finance has issued new IT-2663 and IT-2664 forms to be used in 2009. These forms must be filed with the TP-584 Transfer Tax return whenever the property sold is residential and the seller is an individual non-resident of New York. The IT-2663 is used to pay the estimated minimum income tax from the sale of residential property; the IT-2664 applies in the case of cooperative apartment units.

Equitable Mortgages

In *Surace v. Stewart*, 2009 N.Y. Slip Op 00370 (N.Y.A.D. 2nd Dep't; decided 1/20/09) two mortgagees competed for a first priority lien. The borrower took a mortgage from Lender A which was mostly used to pay off a pre-existing mortgage against the premises. Lender A's mortgage was not recorded until seven months later. In the interum, the borrower took another mortgage from Lender B, who being unaware of Lender's A loan, thought it would be in first position. Lender B's mortgage was promptly recorded, five months before Lender A's mortgage appeared of record. The borrower defaulted on both loans, and the foreclosure action followed. Lender B

sought the protection of the recording statute claiming to be a *bona fide* purchaser for value since Mortgage A was not of record at the time of Lender B's closing and since Lender B had no notice of it. Lender A argued that even if its mortgage was not recorded, it was at the very least entitled to an equitable mortgage in the amount used to pay off off the prior mortgage. Since most of Lender A's proceeds went to satisfy a prior recorded mortgage, Lender A argued it could step into the shoes of the prior lender as if it had purchased the lien. The Appellate Division agreed with Lender A and granted it an equitable mortgage in the amount used to pay off the prior lien, which was roughly 73% of its principal. The court did not explain how Lender B could have safeguarded itself from this result. Presumably, the prior mortgage was still unsatisfied of record since Lender B's closing only occurred two months after Lender A's. This fact pattern would be consistent with prior caselaw on equitable mortgages, but was not visited in the case under review.

Rights of Persons in Possession

Owner's title insurance policies (but not loan policies) always take exception of "Rights of persons in possession". The reason for this exception is that under New York law possession of real property can be notice of real property rights. For example, if someone is in occupancy of a portion of the property (such as an apartment, garage or store) then there is notice that such party may have interest in the property, such as a lease. That means that the purchaser has a duty of inquiry to ascertain the rights of the parties in possession; e.g. whether there is a lease, right of first refusal, life-tenancy, and the allocation of utilities, expenses, etc. Since title companies do not carry physical examinations, notice that may result from parties being in possession is routinely excepted from coverage. It should be noted, however, that if the same interest is recorded (such as by memorandum of lease), then the interest is insured against, unless specifically excepted from coverage in schedule B of the policy.

In *Shaw Funding, LP v. JOAM LLC*, 2009 N.Y.Slip Op 50019(U) (decided 1/06/09), a party in posssession claimed a superior interest against a foreclosing lender. The lender, Shaw Funding, brought a foreclosure action against the defaulting borrower, JOAM LLC. The lender noticed that a deed to Clear Blue Water, LLC had appeared on record subsequent to the recordation of the mortgage and served notice to Clear Blue as well. Clear Blue argued that the deed had been delivered to it by JOAM prior to the making of the mortgage to Shaw, and therefore Clear Blue's interest was not subject to Shaw's mortgage. The deed had been rejected by the city register because of a formal requirement and therefore could not be recorded until later. At any rate, Clear Blue argued that even if its deed was not of record, Clear Blue was in possession of the entire property at the time of Shaw's closing, and therefore Shaw was charged with inquiry notice. The court agreed with Clear Blue and continued the case to determine, as a matter of evidence, whether Clear Blue was in open and notorious possession of the property at the time of the Shaw's closing.

MERS Attacked Again

In *US Bank NA v. White*, 2009 N.Y. Slip Op 501100(U) (decided 1/23/09), the supreme court once again cancelled a foreclosure on a mortgage warehoused by MERS. The court described the documents presented before it and noted many defects. Most importantly, the court noted that the action was commenced by the plaintiff "as trustee" several months before it received an assignment of the mortgage from MERS. Since the plaintiff had no interest in the property at the time the action was commenced, therefore it had no standing to bring action. "It is the law's policy to allow only an aggrieved person to bring a lawsuit ... A want of 'standing to sue,' in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a 'jurisdictional' dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack 'standing' is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it." (cited by the court from Prof. David Siegel, in N.Y. Prac. § 136, at 232, 4th Ed.).

The court also expressed dissatisfaction at the foreclosing attorney because of a possible conflict of interests. His staff, under a corporate capacity and with his office address, had executed the (late) assignment of mortgage from MERS to the plaintiff and MERS was also a defendant in the lawsuit because it was the nominee on a second mortgage. It appeared from the face of the assignment of mortgage that the plaintiff's attorney had a relationship with MERS who was also a defendant.

Specfic Performance

In *Yuan v. Zhang*, 2009 N.Y. Slip Op 00373 (N.Y.A.D 2nd Dep't.; decided 1/20/09), an action was brought for specific perfomance on a contract of sale, among other claims. During the course of the litigation, the defendants transferred the property to another party. The new owner of the premises was never joined in the action. Hence, when the court was asked by summary judgment to decide on the specific performance claim, that claim was dimissed because the defendant did not own the property and therefore it was impossible for it to perform. "The remedy of specific performance is thus an impossible one in the circumstances of this case, where the only named defendants have parted with the subject property (citations omitted). The plaintiffs would have had to amend the complaint to join the new owners whenever the property was transferred.

If you have any questions or comments, contact us at fsa@federalstandardabstract.com