

**Date:** December 10, 2002  
**To:** All Clients  
**From:** David Gorenstein  
**Re:** Various Subjects

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**Bulletin      Bulletin      Bulletin      Bulletin      Bulletin**

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1. Tax Sales - After entry of a judgment of foreclosure and sale of a tax lien, and three days before the auction sale, the property owner paid the amount due into the designated lockbox. The referee was not, however, notified of the payment until after the sale. The Appellate Division, Second Department, reversing the order of the Supreme Court, Kings County, reinstated the judgment of foreclosure and sale. Although the owner could have redeemed prior to the auction sale, it did not pay the amount due into court and obtain a stay of the sale as required under RPAPL Section 1341 ("Payment into court of amount due"). NYCTL 1996-1 Trust v. LFJ Realty Corp., decided August 11, 2003, is reported at 763 NYS 2d 836.

2. Adverse Possession/Prescriptive Easements - The Supreme Court, New York County, held that window air conditioners protruding into air space over the building on an adjoining parcel for more than ten years did not, in and of itself, establish a claim to adverse possession. The defendant had no legal right to encroach on the plaintiffs property and therefore it could not assert a claim of right. Further, adverse possession could not be based on RP APL Section 522 ("Essentials of adverse possession under claim of title not written ") as the defendant had not cultivated or improved the property encroached upon nor protected it by a substantial enclosure. The Court also held that there was no viable claim of a prescriptive easement. There was no evidence that the use of the air conditioners was hostile or adverse to the plaintiffs use of its property, and an easement of light and air cannot be established by prescription. Plaintiff had the exclusive right to the immediate use, possession and enjoyment of the air space above the building on its property. 1380 Madison Avenue, L.L.C. v. 17 East Owners Corp., was reported in the New York Law Journal on October 17, 2003.

3. Mortgage Foreclosure - The Appellate Division, First Department, reversing the holding of the Supreme Court, Bronx County, held that a foreclosure sale was invalid since the terms of sale deviated from the judgment. The lower court had denied a motion by the assignees of the successful bidder at a foreclosure sale for an order compelling the referee to transfer the property to them without requiring that they pay outstanding real estate taxes and assessments prior to the transfer of title as required by the Terms of Sale. The Supreme Court also conditionally granted the plaintiff - bank's motion for an order declaring the assignees in default and their down payment forfeited. It afforded the assignees 10 days to either pay the taxes and close, or not pay the taxes and receive back their down payment. The judgment of foreclosure and sale provided, however, as required by RPAPL Section 1354(2), that unpaid real estate taxes were to be paid by the referee from the proceeds of the sale. The Appellate Division vacated the sale, ordered the down payment to be

returned, and ordered a new auction held. According to the Appellate Division, "the terms of sale may not deviate from the judgment". *Bank of New York v. Love*, decided July 10, 2003, is reported at 763 N.Y.S. 2d 553.

4. New York State Real Estate Transfer Tax - The address to which Form TP-584 ("Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Tax") and payment of the State Transfer Tax is to be mailed when the transfer does not require recording or recording will take place after the tax is paid has been changed to NYS Dept. of Tax & Finance, Misc. Tax InSourcing Unit, WA Harriman Campus, Building #8, Room 600, Albany, New York 12227.

5. Foreign Investment in Real Property Tax Act ("FIRPTA") - On August 5, 2003 the IRS issued new FIRPTA regulations that are published at 68 FR 46081. Effective November 3, 2003, if the transferor's taxpayer identification number ("TIN") is not provided (i) the IRS will not process an application for a withholding certificate, (ii) Form 8288-A ("Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests") will not be stamped to show receipt and will not be mailed to the taxpayer, and (iii) the transferor will be unable to obtain a credit for, or a refund of, tax withheld and paid. In addition, effective September 4, 2003, a transferor which is a domestic entity must include in its certification of non-foreign status a statement that it is not a disregarded entity, as defined in 26 CFR Section 1.1445-2(b)(2)(iii). A disregarded entity is "an entity separate from its owner under Section 301.7701-3 of [26 CFR] [a business entity with a single owner, such as an LLC with only one member)...a qualified REIT subsidiary as defined in [IRC] section 856(i), or a qualified subchapter S subsidiary under [IRC] section 1361(b)(3)(B)". If the transferor is a disregarded entity, its owner must certify non-foreign status to avoid FIRPTA withholding. The regulations are available at [www.titlelaw-newyork.com/Mans/68FR46081.pdf](http://www.titlelaw-newyork.com/Mans/68FR46081.pdf).

The regulations also provide that the transferee in a Section 1031 tax-free exchange may not rely on a transferor's notice of non-recognition in a deferred exchange or when the transferor is receiving money or other property.

6. Lien Law - Plaintiff filed a mechanics lien and a notice of pendency to foreclose, both of which (and the foreclosure complaint) named 32 AA Associates, LLC ("AA Associates") as the property owner. Before the lien and lis pendens were filed, AA Associates transferred title to 32 Sixth Avenue Company LLC ("32 Sixth"), in which AA Associates was the sole member. 32 Sixth and the fee mortgagee (whose lien would not be adversely affected by the mechanics lien) moved to dismiss the action and vacate the lis pendens. The plaintiff cross-moved to amend its mechanics lien to add 32 Sixth as the owner and also to amend its foreclosure complaint and its lis pendens to add 32 Sixth as a defendant. The Supreme Court, New York County, denied the motion to dismiss the action and granted the motions to amend the notice of lien nunc pro tunc and to amend the complaint and notice of pendency. Naming AA Associates, the beneficial owner of the property, was only a "misdescription" of the name of the Owner of the property, and notice to 32 Associates constituted acceptable notice to 32 Sixth. (Both AA Associates and 32 Sixth had the same address and agent for receipt of service of process). Lien Law Section 7 provides that "failure to state the name of the true owner ...or a misdescription of the true owner shall not affect the validity of the lien". Lien Law Section 12a - authorizes the court to permit an amendment of a notice of lien if it does not "prejudice

an existing lienor, mortgagor or purchaser in good faith". Lien Law Section 32 states that the law relating to mechanics liens "is to be construed liberally" and "substantial compliance with its several provisions shall be sufficient for the validity of a lien". PM Contracting Co. Inc v. 32 AA Associates LLC was reported in the New York Law Journal on August 20, 2003.