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LEGAL BRIEFS

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“Wishing everyone a happy, healthy & prosperous New Year!”

Bankruptcy – The United States Bankruptcy Court for the Eastern District of New York granted a mortgagee's motion for relief from the automatic stay to enable it to foreclose on property owned by the Chapter 13 Debtor. **Under Bankruptcy Code Section 362(d)(1) the Court "shall" lift the automatic stay "for cause". According to the Court, "the Debtor's failure to pay in excess of \$50,000 of post-petition mortgage payments over an eleven month period constitutes more than ample cause to lift the automatic stay in a Chapter 13 case".**

A stay of the Order pending an appeal was denied, the Court finding there was no likelihood of success on the merits of the appeal and a stay pending appeal in this case would not further "the public interest in the integrity of the bankruptcy process". In Re: Uvaydov, decided October 17, 2006, is reported at 2006 WL 2975442 (Bankr. E.D.N.Y.).

Condominiums – Plaintiff sued to recover her down payment under a contract of sale for the purchase of a condominium unit in Manhattan. She alleged that she was not required to complete the purchase when the title company would not insure title to the unit, since the condominium's Board of Managers would not waive its right of first refusal to purchase the Unit, or provide other documents unless Plaintiff paid two years of common charges in advance. The Supreme Court, New York County ordered that the down payment be returned. **The Plaintiff, not being obligated to pay common charges in advance, had not breached the contract of sale, and the Seller was not able to deliver an "insurable title" as required by the contract.** Lisenenkov v. Kasziner, decided October 17, 2006, is reported at 2006 WL 2969665 (N.Y. Sup.).

Contracts of Sale – A contract of sale for fire damaged property provided that the Seller was not required to cure violations and the Purchaser could make repairs to the property prior to closing only with the Seller's consent. When the Supreme Court, Queens County, issued an order

directing the Buildings Department to demolish part of the building, the Purchaser refused to repair the building until title was transferred to him. The Seller paid for repairs and refused to deliver title until it was reimbursed by the Purchaser. The Purchaser commenced an action for specific performance at the contract price. The Supreme Court, Queens County, directed that the Seller return the down payment with interest, and the decision was affirmed by the Appellate Division, Second Department. According to the Appellate Division, **"the Supreme Court providently exercised its discretion in determining that an award of specific performance would have resulted in undue hardship or injustice to the Seller"**. The Purchaser sought to compel the conveyance of a renovated property at the original price and the contract did not require the Seller to absorb the cost of repairs. *Marinoff v. Natty Realty Corp.*, decided November 28, 2006, is reported at 206 WL 3439402 (N.Y.A.D. 2 Dept.).

Easements – A landlocked parcel, having no means of access to a public street, may have the benefit of an easement by necessity for access over an adjoining property if the parcels had been owned by the same person, there was an absolute necessity for the easement when common ownership ceased, and the absolute necessity continued. Plaintiff, the owner of a landlocked parcel (Parcel A) without access to a public street, moved for an Order enjoining the owners of two adjoining lots fronting on public streets, Parcels B and C, from blocking easements Plaintiff claimed were established by adverse possession or necessity. The Court dismissed the adverse possession claims, due to the absence of ten years of hostile use, and dismissed the claim of an easement of necessity over Parcel B on finding that the owner of Parcel A also owned Parcel C when the common owner of the three properties conveyed Parcel B. **The Court did find that Parcel A had an easement by necessity over Parcel C but denied the motion as to Parcel C, finding that injunctive relief was not appropriate and Plaintiff could be adequately compensated by monetary damages.** Parcel C is improved by an attached multiple dwelling which would have to be demolished for Parcel A to have access to the public street, and Parcel A is not a buildable lot under Section 27-291 of the Administrative Code of the City of New York, which requires that a parcel, to be built upon, have at least 8% of its total perimeter fronting directly on a street or at least 30 feet of frontage on a street. Damages, measured as the diminution in value of the property caused by the loss of the easement, would be determined at trial. *Hosssain v. A to Z Properties*, decided October 19, 2006, is reported at 2006 WL 2988443 (N.Y. Sup.)

Mortgage Assignments – The Sales Agreement for the transfer of a note and mortgage, and the Assignment Agreement, stated that tax arrears of \$83,168.58 had been paid by the Assignor "to cure tax arrears for the

years 2002 and 2003". After Closing the Plaintiffs, who were the assignees of the Assignment Agreement, discovered and paid an additional \$38,740.56 in real estate taxes for 2002 and 2003. They sued, claiming breach of contract, and sought money damages. The Supreme Court, Nassau County, granted Defendant's motion for summary judgment. **According to the Court, even assuming that the Defendant intentionally misstated the taxes, of which there was no proof, the Plaintiffs had the "duty to make a diligent search of the public record to determine the amount of taxes at the time of the transfer". The Court noted that under the Sales Agreement the mortgage was sold "as is" and subject "to all existing liens, claims and encumbrances, if any" and expressly excluded any representations as to "the asset's freedom from liens and encumbrances, in whole or in part".** Home Sales Realty, Inc. v. Unity Bank, decided November 17, 2006, was reported in the New York Law Journal on December 5, 2006.

Notice of Pendency/Recording Act – Plaintiffs entered into contracts to purchase two properties from the Defendant-Seller, which contracts were not recorded. There being a disagreement over terms of the contract and no closing taking place, the Purchasers commenced an action for specific performance, filing a notice of pendency on each property. Before the notices of pendency were filed, the Seller conveyed the properties to another purchaser, also a Defendant in this case, and the deeds were recorded after the notices of pendency were filed. The Supreme Court, Nassau County, enjoined the Defendant-Purchaser from leasing, renting or otherwise encumbering the property during the pendency of the Action, finding that since the notices of pendency were filed before the deeds were recorded the Defendant-Purchaser was not a good faith purchaser without notice of the Plaintiffs' interest in the property. **The Appellate Division, 2nd Department, reversed, holding that as between two buyers contracting for the same property, priority is given to the buyer whose conveyance or contract is first duly recorded. That the lis pendens were filed before the deeds were recorded "does not negate [the Purchaser's] status as a bona fide purchaser without notice..."**. Avila v. Arsada Corp., decided November 21, 2006, is reported at 2006 WL 3378439 (N.Y.A.D. 2 Dept.).