

# **A.R.S. ABSTRACT, LTD.**

## **LEGAL BRIEF**

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**Mortgage Satisfactions** – Real Property Law ("RPL") Section 275 ("Certificate of discharge of mortgage required") requires a mortgagee to arrange for a certificate of discharge to be presented for recording within thirty days of the date on which the amount due the mortgagee is paid. Real Property Actions and Proceedings Law ("RPAPL") Section 1921 ("Discharge of mortgage") requires a mortgagee to arrange for a certificate of discharge to be presented for recording or, on request, delivered to the mortgagor or the mortgagor's designee within forty-five days of payment.

Chapter 467 of the Laws of 2005, effective November 7, 2005 amended RPAPL Section 1921 to require the certificate of discharge to be presented within thirty days of payment. In addition, both RPL Section 275 and RPAPL Section 1921 were amended to provided that the mortgagee shall be liable to the mortgagor in the amount of \$500.00 if the certificate of discharge is not presented for recording within 30 days, \$1,000.00 if the certificate is not presented for recording within 60 days, and \$1,500.00 if the certificate is not presented for recording within 90 days. For the purposes of these amendments, the term "mortgagee" does not include a person or entity making less than five mortgage loans in a calendar year.

**Notice of Pendency** – The Appellate Division, First Department, in its decision in *Campbell v. Smith*, reported at 747 N.Y.S. 2d 18 (which decision was "recalled and vacated" by its holding reported at 768 N.Y.S. 2d 182) held that a mortgage foreclosure may not continue when the notice of pendency filed in the action as required by the Civil Practice Laws and Rules ("CPLR") has expired without being renewed. Other state court decisions, also reported in *Current Developments*, dealt with the impact on a mortgage foreclosure of the failure to extend the CPLR notice of pendency and the cancelation of the lis pendens for the failure to comply with the service requirements of CPLR Section 6512. Under CPLR Section 6512 a lis pendens is effective only if, within thirty days after its filing, a summons is personally served on the owner-defendant or service is effectuated by court ordered publication and publication is

subsequently completed. The issue of whether the mortgage foreclosure can proceed in such instances has been resolved by the enactment of Chapter 387 of the Laws of 2005, adding Section 6515 ("Successive Notice of Pendency") to the CPLR effective as to RPAPL Article 13 mortgage foreclosures pending on and after August 2, 2005. Section 6515(a) provides that "(i)n a foreclosure action, a successive notice of pendency may be filed to comply with section 1331 of the [RPAPL], notwithstanding that a previously filed notice of pendency in such action or in a previous foreclosure action has expired pursuant to Section 6513 of this article or has become ineffective because service of a summons has not been completed within the time limited by section 6512 of this article, whether or not such expiration has been determined by the court. This subdivision is inapplicable to an action to foreclose a mechanic's lien..."

**Adverse Possession** - Plaintiffs sued for damages alleged to have resulted from the Defendants' demolition of a structure adjoining their building. They alleged that the removal of a wall of the Defendants' building rendered their building unusable since the now exposed wall of Plaintiffs' building was unfinished and not weatherproof. They claimed that they had a prescriptive easement in their building's use of the wall to protect their building's exterior wall from the elements. The Supreme Court, Washington County, granted the Defendants' motion for summary judgment, and the Appellate Division, Third Department, affirmed. ***Finding no adverse use of the wall, the Appellate Division held that the passive use of the wall of the adjoining building as a shield against the elements did not result in a prescriptive easement.*** Wade v. Village of Whitehall, decided by the Appellate Division on April 14, 2005, is reported at 793 N.Y.S. 2d 251.

**Cooperatives** - Plaintiffs, purchasers from the sponsor, brought an action for a declaration that they were the holder of unsold shares exempt from restrictions on subletting applicable to residential tenants. The Defendant cooperative corporation claimed that the Plaintiffs were not holders of unsold shares because neither they nor the Sponsor complied with regulations issued by the Attorney General at 13 NYCRR Part 18. The Supreme Court, New York County, granted the Defendant's motion for summary judgment, and the Appellate Division, First Department, affirmed. The Court of Appeals, reversing the Order of the Appellate Division and remanding the case for further proceedings, held that "***...whether plaintiffs are holders of unsold shares should be determined solely by applying ordinary contract principles to interpret the terms of the documents defining their contractual relationship with the cooperative corporation, such as the Defendant's certificate of incorporation and by-laws, and the proprietary lease.***" Part 18 applies to disclosures in the sale of an

apartment to the public. *Kralik v. 239 East 79th Street Owners Corp.*, decided June 16, 2005, is reported at 2005 N.Y. LEXIS 1261.

**Homeowner Association ("HOA")** - Plaintiff, the Board of Directors of an HOA, commenced an action against a homeowner to recover unpaid HOA dues. Defendant filed a motion to dismiss on the ground that his home was not part of the HOA; the HOA's Declaration was dated after the Defendant took title and recorded after the deed to him was recorded. The Civil Court, Richmond County, held the Defendant to be a member of the HOA and scheduled a trial to determine the amount due and owing Plaintiff for common charges, assessments, late fees and attorneys' fees. According to the Court, the Declaration for an HOA is effective when its filing with the New York State Department of Law is approved, not on recording, and Defendant, having had actual knowledge of the Declaration prior to taking title, is responsible for his proportionate share of maintenance costs. *Board of Directors of Millennium Homeowners Association v. Bosco* was reported in the New York Law Journal on June 8, 2005.

**New York City/Condemnation Clause** – A deed in 1966 from the City of New York included a so-called dollar condemnation clause, which provided that compensation to an owner of the property would be limited to one dollar in the event the City acquired by condemnation any part of the property lying within the bed of a street on the then-present City Map. In 1992 the property was conveyed to the claimant and in 1994 the City condemned the property. The Order of the Supreme Court, Richmond County, holding that the condemnation award as to that part of the property lying within the bed of a mapped street was limited to one dollar, was affirmed by the Appellate Division, Second Department, in *Matter of City of New York v. Packtor*, decided June 6, 2005 and reported at 796 N.Y.S. 2d 412.

**Recording Act** - Before it executed the mortgage being foreclosed, the mortgagor conveyed the property to a bona fide purchaser. The deed and the purchase money mortgage the new owner made to an institutional lender were recorded after the mortgage being foreclosed was recorded. The Supreme Court, Nassau County, granted the foreclosing lender's motion for summary judgment, holding that its mortgage was protected by the Recording Act (Real Property Law, Section 291). Distinguishing between a forgery, for which the Recording Act affords no protection, and fraud (as in this case), the Court declined to subordinate the mortgage being foreclosed to the deed and the purchase money mortgage. ***According to the Court, "where the prior conduct was fraudulent it must be shown that the subsequent grantee who recorded first knew or should have known of the fraud" but, in this case, "a good faith lender for value recorded its mortgage first and lacked notice***

***of facts which placed it under a duty to make further inquiry...".*** Washington Mutual Bank v. Peak Health Club was reported June 28, 2005 in the New York Law Journal.

**Restrictive Covenants** - Plaintiff, a law firm leasing four floors in an office building in Manhattan, filed a motion to enjoin the landlord from converting a number of floors in the building to residential use. The Plaintiff alleged that residential use was not allowed in the building under a section in its lease dealing with rent escalation providing that the building "will be run as a first-class office building". Noting that the restriction did not appear in the lease's section on permitted uses of the premises, the Supreme Court, New York County, denied the motion for an injunction. ***Insofar as sufficient evidence was not produced to establish that a restrictive use was intended, the text in the lease was deemed descriptive of the use of the premises and not a limitation on its use. The Court indicated that the Plaintiff could apply to enjoin any aspect of the conversion to residential use which it believed would violate any specific portion of its lease.*** Hawkins, Delafield & Wood v. RBNB 67 Wall Street Owner LLC, decided March 18, 2005, is reported at 794 N.Y.S. 888.

**Streets** - In contemplation of the subdivision of a property into four parcels, the property owners recorded an agreement for the creation of a private roadway within the subdivision over which the lot owners would have an easement and right of way for ingress and egress and the installation and maintenance of utilities. Deeds in the chain of title to each subdivided lot transferred to the grantees "all right, title and interest, if any...in and to any streets and roads abutting the above described premises to the center lines thereof". Plaintiff, the owner of one of the lots, commenced an Action against the other lot owners to determine the rights in the road. The Supreme Court, Nassau County, held that the Plaintiff had no right to use the road for parking. ***The Appellate Division, Second Department, modifying the Order of the lower court, held that the Plaintiff, as fee owner of the roadway to the extent it abutted her property to the center line thereof, had the right to use the road for parking so long as the use did not interfere with ingress and egress by the Defendants.*** Minassian v. Temares, decided by the Appellate Division on March 28, 2005, is reported at 795 N.Y.S. 2d 50.

**Marketability of Title** - An above-ground pool being installed collapsed into an undisclosed and hidden in-ground swimming pool. The building permit for the hidden pool was marked "void" on the Town's records. The new owner of the property brought an action against the former owner, the Town, the Agent, and the title insurer the Agent represented alleging, in part, that the Agent and the title insurance company were responsible

for damages incurred by the plaintiff as the result of the Agent's negligent examination of the Town's records. The action against the Agent was dismissed, but the Supreme Court, Nassau County, denied the title insurer's motion to dismiss the complaint for the failure to state a cause of action. According to the Court in *Sabbagh v. Pizzuro*, the title company "insured against the 'un-marketability of the title'... [and] given the circumstances herein, there may be a cloud on title because there now exists an illegal in-ground structure for which the building permit has been cancelled". (This decision, reported in the *New York Law Journal* on September 1, 2004, was criticized in "Title Insurers Sink in the Pool of Un-marketability", an article published in the *New York Law Journal* on November 26, 2004). On April 19, 2005, following re-argument, the Court issued an Order dismissing the action against the title insurer for the failure to state a cause of action. ***According to the Court, the title company "only insured against the un-marketability of title to the subject premises and not against the Town's regulation of the property; the questionable legality of the hidden in-ground pool and the lack of a valid building permit pertain only to public regulation of the use of the property which are not impairments on title that affect its marketability and are, thus, not within the scope of coverage afforded by the title policy"***.

**New York City Real Property Transfer Tax ("RPTT")** – Current Developments issued October 28, 2004 reported the holding of the Chief Administrative Law Judge of the New York City's Tax Appeals Tribunal in Matter of the Petition of Cambridge Leasing Corporation (TAT (H) 03-11(RP)) that the sale of multiple individual residential condominium units is a sale of residential real property subject to the lower RPTT rates. Current Developments issued December 27, 2004 reported that an Administrative Law Judge, in Matter of the Petition of Daniel and Sheila Rosenbaum (TAT (H) 01-31 (RP)), decided November 9, 2004, held that the sale of multiple individual residential condominium units is subject to the lower RPTT rates. The Deputy Chief Administrative Law Judge of the New York City Tax Appeals Tribunal has since also held, in Matter of the Petition of David Gruber (TAT(H) 03-7, 03-8 and 03-9), decided May 5, 2005, that the transfer of multiple residential condominium units is the sale of residential property subject to the lower rates. (The Judge also held that even if bulk sales were subject to the higher rates, the transfers of the units in this case were not a bulk sale since the units were to be used by the purchaser as a single residence). Matter of the Petition of Cambridge Leasing Corporation is on appeal. ***Notwithstanding these decisions, pending the determination of the appeal in Petition of Cambridge Leasing Corporation, the Department of Finance is applying the commercial transfer tax rates to so-called "bulk sales"***.

**Bankruptcy/Transfer Tax** – The United States Bankruptcy Court for the Southern District of New York held that the auction sale of twenty-three parcels of real property by a debtor in possession prior to confirmation of a plan of reorganization was ***exempt from imposition of New York City's Real Property Transfer Tax under Section 1146(c) of the Bankruptcy Code since the sale was "necessary and integral to the anticipated confirmation of a chapter 11 plan in this case"***. The Court indicated that its ruling would also apply to application of the mortgage recording tax if the debtor needed to arrange a financing prior to confirmation of a plan of reorganization. In *Re Beulah Church of God in Christ Jesus, Inc.*, decided October 18, 2004, is reported at 316 B.R. 41.

**Contracts of Sale** - The Supreme Court, Nassau County, granted the defendants' motion for summary judgment and dismissed an action brought by the seller of real property seeking to retain the contract deposit as liquidated damages. Although the contract of sale was signed, and the down-payment was delivered to the seller's counsel, material terms were not agreed upon. A letter agreement modifying material terms of the contract was signed, and then modified, by counsel for the parties. The Court held that there was no binding contract and granted the Defendants' motion for summary judgment dismissing the action. ***The contract, as amended by the letter amendment, did not comply with the Statute of Fraud's (General Obligations Law Section 5-703(2)) which requires that a contract for the sale of real estate be in writing signed by the party to be charged. Defendants' counsel did not have written authorization from his clients to agree to the change in terms.***

**Restrictive Covenants** – In exchange for donations made by two private, charitable foundations to enable the purchase of property in Westchester County in 1979 the entity that purchased the property with those funds agreed that the property would remain used as a nature preserve. The Supreme Court, Westchester County, in an action brought to determine claims to the property, held that the restrictive covenant did not run with the land and, as noted in a companion case, was "invalid. ***According to the Appellate Division, Second Department, in affirming the decision of the lower court, "(t)he agreement was not part of the grantor's deed and the defendant's predecessors in interest did not own property which would be benefited by the enforcement of the covenant"***. *Cappelli Armonk, LLC v. Village/Town of Mount Kisco*

**Contracts of Sale** – Current Developments dated September 25, 2003 reported on *Uzan v. 845 UN Limited Partnership* in which the plaintiffs, who had defaulted on their purchase of four condominium units, sued to

recover contract down payments of 25% of the purchase price. The Supreme Court, New York County, granted the defendant-sponsor partial summary judgment allowing it to retain the initial 10% down payments, but the Court withheld decision on whether retaining the balance of the deposits under the contracts was enforceable under New York law applicable to liquidated damages. The Appellate Division, First Department, granted the sponsor's motion for summary judgment and dismissed the complaint, holding that the plaintiffs forfeited all rights to the entire contract deposits. ***The purchase agreements were executed by parties of equal bargaining power following lengthy negotiations. The Court also noted that it is customary for pre-construction luxury condominiums in New York City to price the risk of default at 25% of the purchase price.*** The decision of the Appellate Division on June 15, 2004 is reported at 2004 N.Y. App. Div. LEXIS 8362.

**Contracts of Sale/Marketability** – Under a provision in a standard residential contract of sale, title was to be conveyed subject to encroachments of stoop, areas, cellar steps, trim and cornices upon the street or highway. Under a paragraph in a Rider to the contract the property was to be sold subject to any state of facts an accurate survey would disclose, provided that such facts did not render title unmarketable. Any conflict between the standard provisions of the contract and the Rider was to be resolved in favor of the Rider. A survey disclosed that a leader, vent pipes and window guards of the building on the property also encroached on the street. ***The Supreme Court, New York County, held that the contract provisions were not inconsistent; title was to be conveyed subject to the encroachments enumerated in the contract and, as to the three types of encroachments disclosed by the survey not agreed to be taken subject to, since the building is covered by the Landmarks Protection laws the purchaser's risk as to them is negligible. The Court therefore concluded that the seller was able to convey marketable title, subject to the encroachments that were waived.*** AXYS LLC v. Ng was reported in the New York Law Journal on June 16, 2004.

**Eminent Domain/\$1.00 Compensation Clause** – The City of New York moved for an Order awarding the condemnee \$1.00 for the taking of a portion of the property within the bed of a mapped street. A deed from the City in the chain of title to the property limited an award to \$1.00 if the City acquired by condemnation or otherwise any portion of the premises conveyed lying “within the bed of any street, avenue, parkway, expressway, park, public place or catch-basin...(as) shown on the then present City Map”. The City condemned the property for “the conveyance and storage of storm water”. The Supreme Court, Kings County, issued

the Order, holding that ***while “the City has acquired the claimant’s property for a different purpose than originally planned, it has acquired it for the legitimate public purpose of the preservation of wetlands, and the dollar clause remains applicable”***. Matter of Richmond Creek Staten Island Blue Belt System was reported on June 22, 2004 in the New York Law Journal.

**Homeowners’ Associations** – The Supreme Court, Sullivan County, denied a motion for an order to vacate a Real Property Law Section 339-z condominium common charge lien filed by a property owners’ association against a single-family home within the development. ***The subdivision’s governing documents authorize the enforcement of a lien for unpaid charges and recording of a lien for unpaid charges by the property owners’ association in the County Clerk’s office has been an accepted practice for many years***. Emerald Green Property Owners Association Inc. v. Fischer was reported in the New York Law Journal on May 26, 2004.

**Mechanics Liens** – Under Lien Law, Section 10 a mechanics lien for work done on a single family dwelling is to be filed within four months of the last date on which materials for an improvement were furnished. In Griffin v. Ward Lumber Co. Inc. the Notice of Lien was received at the St. Lawrence County Clerk three days prior to the last date on which the Lien could be filed; but the Clerk filed the Lien two days after expiration of the four month period. The Civil Court, Kings County, denied a motion for the discharge of the mechanics lien. Since no intervening lienors would be adversely affected, ***the timely delivery of the notice for filing substantially complied with the Lien Law which “should be liberally construed so as to secure its beneficial interests and purposes”***. This case, decided April 22, 2004, is reported at 775 N.Y.S. 2d 824.

**Mechanics Liens** – A subcontractor sued the condominium sponsor and the Board of Managers for work done in connection with the conversion of the building, claiming that the amount due it should be paid by the Board from common charges under the trust fund provisions of New York’s Condominium Act. Under Real Property Law Section 339-1 “all common charges received and to be received by the board of managers, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor or materials performed or furnished at the express request or with the consent of the manager, managing agent or board of managers”. The Supreme Court, New York County, granted the defendants’ motions for summary judgment and dismissed the complaint. According to the Court, ***absent contrary provisions in the offering plan, Section 339-1 should generally be applied where the “express request” or “consent” [for labor to be***

***done or materials to be furnished]... is provided by a board selected by the unit holders.*** Northeast Restoration Corp. v. K & J Construction Co., L.P., decided May 4, 2004, is reported at 776 N.Y.S.2d 780.

**Mortgage Foreclosure** – Current Developments dated October 28, 2003 reported on the decision of the Appellate Division, First Department, in Bank of New York v. Love (763 N.Y.S. 2d 553). In that decision, the Court ordered a new foreclosure sale since the Terms of Sale deviated from the foreclosure judgment on whether the purchaser or the Referee was to pay the outstanding real estate taxes. The judgment, in accordance with RPAPL Section 1354(2), provided that the referee was to pay the taxes from the proceeds of the sale. The Terms of Sale required the successful bidder to pay any outstanding taxes. The assignees of the successful bidder sought an order compelling the Referee to transfer the property without requiring that they pay the open real estate taxes. ***The Appellate Division has recalled and vacated its earlier ruling, now holding that the terms of a judgment of foreclosure and sale control and, accordingly, the Referee can not require the purchasers to pay the real estate taxes without receiving a credit.*** The Bank of New York v. Love, decided January 6, 2004, is reported at 772 N.Y.S. 2d 645.

**Partnerships** – The general partners of a limited partnership sold the building owned by the partnership to an entity controlled by the son of the general partners for a price alleged to be below fair market value. The limited partners brought an action against the general partners for breach of fiduciary duty. The Appellate Division, Third Department, held that ***the sale was permitted since under the partnership agreement the limited partners consented to any sale “on such terms and conditions as may be determined by the General Partners...notwithstanding that any party hereto may have an interest therein”.*** Carella v. Scholet, decided March 25, 2004, is reported at 773 N.Y.S. 2d 763.

**Restrictive Covenants** – Plaintiff appealed from a judgment of the Supreme Court, Chautauqua County, holding that the plaintiff's residence violated a restrictive covenant that “only one single family dwelling not more than one and one-half stories in height...shall be placed on any lot”. The Appellate Division, Fourth Department, reversed and entered a judgment that the plaintiff's residence did not violate the height covenant. ***Since the words “not more than one and one-half stories in height” are ambiguous they would not be enforced.*** Ludwig v. Chautauqua Shores Improvement Association, Inc., decided March 19, 2004, is reported at 774 N.Y.S. 2d 240.

**Escrows** - A contract vendee made only the first of two down-payments and did not appear at the closing. After the down-payment was made, but prior to the date when his defaults could be cured, the vendee was arrested and an action was brought against him and his related entities by the Securities and Exchange Commission for securities fraud. The United States District Court for the Southern District issued an order freezing his assets. It also issued a preliminary injunction giving the Court exclusive jurisdiction over the Defendants' assets and restrained others from taking any action seeking to affect the Defendants' assets. The seller moved to modify the Order to exclude the down-payment from the receivership so that it could retain it as contract damages but the District Court denied the motion. The time to cure the contract defaults had not expired when the restraining order was entered. ***Therefore, the vendee retained legal title to the down-payment and those funds are receivership property.*** Securities and Exchange Commission v. Ashbury Capital Partners, L.P. was reported in the New York Law Journal on September 22, 2004.

**Mortgage Foreclosure** - The Appellate Division, Second Department, affirmed the ruling of the Supreme Court, Suffolk County, denying the appellants' motion to vacate and set aside a foreclosure sale on the ground that they had not received notice of the sale which took place after their default under a forbearance agreement. ***Since the appellants had not appeared in the action they were not entitled to notice of the sale, and the forbearance agreement did not provide for them to receive notice.*** Execution of the agreement was not an appearance in the action. Olympia Mortgage Corp. v. Ramirez, decided July 12, 2004, is reported at 780 N.Y.S. 2d 611.

**Mortgage Foreclosure** - The wife of the record owner of property in Queens County moved to vacate a judgment of foreclosure and sale based on her having filed a voluntary bankruptcy petition prior to the foreclosure sale. The Appellate Term, First Department, denied the motion holding that the sale was not conducted in violation of a bankruptcy stay since she had no vested legal or equitable interest in the property when the bankruptcy petition was filed. ***That the property may have been "marital property" under Section 236 of the Domestic Relations Law, potentially subject to equitable distribution, does not mean it was property of the bankruptcy estate.*** Chase Manhattan Mortgage Corporation v. Nieves.

**New York City Real Property Transfer Tax** - Since August 28, 1997, pursuant to Chapter 314 of the Laws of 1997, a continuing lien deduction from consideration for pre-existing mortgages has been allowed in computing the RPTT if the property being transferred is a one-to-three family house, a residential cooperative or condominium unit, or

an economic interest in such property. Subsection (k) of 19 RCNY Section 23-03, added to the City's Administrative Code in August 1999, provides that the continuing lien deduction will be disallowed when a mortgage has been materially altered or has been placed on a property in connection with or in anticipation of a transfer, as provided in Subsection (k). An Administrative Law Judge of the New York City Tax Appeals Tribunal's Administrative Law Judge Division has upheld the authority of the City to issue this regulation and to apply it retroactively to transfers that took place in this matter between August 1998 and April 1999. Matter of the Petitions of M.S.B. Development Company Inc., Determination TAT(H)00-34 (RP), et al., was issued July 30, 2004.

**New York City Real Property Transfer Tax** - A shareholder of the property owning entity entered into a Subscription Agreement to purchase shares of stock to be allocated to a loft apartment and receive a proprietary lease on conversion to cooperative ownership. Subsequently, he assigned his rights under the Subscription Agreement. In a Ruling dated August 9, 2004, the Department of Finance determined that transfer tax would be computed on the consideration paid by the Assignee rather than on the amount payable under the Subscription Agreement. The Assignor was effectively the owner of the apartment and, therefore, the Assumption Agreement executed with the assignee was a contract of sale rather than an assignment.