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LEGAL BRIEFS

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Contracts of Sale/Statute of Frauds - Plaintiff brought an Action for specific performance of an agreement to sell real property alleged to have been reached in an exchange of emails between principals of the Plaintiff-Buyer and the Defendant-Seller. The Defendant moved to dismiss the complaint for failure to comply with New York's Statute of Frauds (General Obligations Law Section 5-703, "Conveyances and contracts concerning real property required to be in writing"), subsection (2) of which states that "[a] contract...for the sale, of any real property or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized in writing". **The Supreme Court, Queens County, granted the motion to dismiss, holding that the recognition of electronic communications as an exception to the requirement of a writing under GOL Section 5-701 ("Agreements to be in writing") applies only to a "qualified financial contract" (as defined in that Section), not to contracts and conveyances concerning real property.** Vista Developers Corp. v. VFP Realty LLC, decided October 8, 2007, is reported at 2007 WL 2982259.

Home Equity Theft Prevention Act - Chapter 308 of the Laws of 2006, the "Home Equity Theft Protection Act" effective February 1, 2007, amending Banking Law Section 595-a ("Regulation of mortgage brokers, mortgage bankers and exempt organizations") and adding Section 265-A ("Home Equity Theft Prevention") to the Real Property Actions and Proceedings Law ("RPAPL"), added Section 1303 ("Foreclosures; required notices") to the RPAPL. **Section 1303 requires the plaintiff in a mortgage foreclosure to deliver with the summons and complaint a notice, on a separate page in bold, fourteen-point type printed on colored paper that is a color other than that of the paper on which**

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the summons and complaint are printed, captioned (in bold twenty-point type) "Help for Homeowners in Foreclosure", containing text set forth in the Act. Chapter 154 of the Laws of 2007 limits this requirement to mortgage foreclosures involving residential real property consisting of owner-occupied one-to-four family dwellings.

The Supreme Court, Suffolk County, has denied with leave to renew a foreclosing Plaintiff's Motion for an Order of Reference due to its failure to comply with RPAPL Section 1303 in an Action commenced after the effective date of the Act. The Court also denied the Motion due to the failure to submit "...proof of the facts constituting the claim, the default and the amount due..." as required by CPLR Section 3215(f) ("Default judgment") and, as noted in this Legal Brief under "Mortgage Foreclosures/Standing", the Plaintiff's lack of standing. *Countrywide Home Loans, Inc. v. Taylor*, decided September 20, 2007, is reported at 2007 WL 2744892,

Mortgage Foreclosure/Standing – On November 21, 2006, the Plaintiff commenced an Action to foreclose a mortgage executed to MERS as nominee for Lehman Brothers Bank, FSB. The Supreme Court, Kings County, granted the Defendant's motion to dismiss the complaint for lack of standing and vacated the notice of pendency in the Action since the note and mortgage were assigned by MERS to the Plaintiff on November 29, 2006. According to the Court, **"[a]bsent a valid assignment of both the note and mortgage at the time the foreclosure action is commenced, a plaintiff does not have standing to maintain the action"**. Plaintiff had been servicing the mortgage before it was assigned by MERS. *Aurora Loan Services v. Grant*, decided August 29, 2007, is reported at 2007 WL 2768915.

Similarly, the Supreme Court, Suffolk County, in *Countrywide Home Loans, Inc. v. Taylor*, discussed above, held that the **Plaintiff lacked standing because the mortgage was assigned to it after the date on which the notice of pendency and complaint were filed, notwithstanding that the assignment recited that it was "deemed effective" as of a date before the Action was commenced.**

New York City/Automated City Register Information System ("ACRIS") – The City Register has announced the following changes to the recording process being made in ACRIS Release 4.0 for documents first submitted on or after December 3, 2007. As stated in the announcement:

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- All documents within a transaction (which contains both accepted and rejected documents) will be returned to the "Presenter" parties of the transaction - as happens today.
- The accepted documents in the transaction will remain locked in ACRIS, and their status will show as "Accepted". No changes can be made to the accepted documents and should [they] not be returned to the City Register. The documents can not be deleted or re-sequenced in the transaction.
- Once the necessary corrections have been made to the rejected documents, return only the rejected documents to the City Register.
- Only the resubmitted rejected documents will be scanned and re-examined.
- When these resubmitted rejected documents have been accepted by the City Register the entire transaction will be recorded.
- The resubmitted documents will be mailed to the "Return To" parties with recording and endorsement pages for all of the documents in the transaction, and a letter summarizing the returned information for all of the documents in the transaction.
- An email will be sent to the ACRIS customer who created the Cover Pages notifying them [the customer] that the transaction has been recorded.
- The "Presenter" party can then return the accepted documents to the "Return To" party.

New York City/Condominiums – The Department of Finance has instituted a "Document Review Process for New Condominiums and Amendments". This procedure requires an architect, an engineer and an attorney to certify on a "Condominium Review - Architect, Engineer and Attorney Certification" that certain information "is in agreement" in each of the Offering Plan, the Condominium Declaration, the Architect's Report and the Floor Plans. The form also requires them to identify the page numbers where the information can be found. According to the "Overview" issued by the Department, "[t]he new Condominium Review Process Architect, Engineer and Attorney Certification will assure consistency, eliminate errors and the

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possibility of delay in the approval of submissions". According to the City Register, this Process will not be required until late December, but "attorneys can start submitting their condo filings [using this Process] immediately". Although not yet available on the Department's website, the Overview and a copy of the Certification can be obtained at <http://www.titlelaw-newyork.com/CondoReview.pdf>.

Title Insurance – The trial court held that an adjoining owner had acquired title by adverse possession to one of two parcels which were a part of the insured premises. The title insurer, having defended its Insureds for seven years, declined to appeal, and tendered to its Insureds, the Plaintiffs in this Action, an amount representing the diminution in the value of the parcel lost by adverse possession. The Insureds, however, appealed the lower court's decision to the Second Department, which held that the adjoining owner had acquired title to both parcels by adverse possession. The Plaintiffs then sued the title insurer to recover the value of both parcels and the costs of the appeal. The title insurer's motion to dismiss was denied. **According to the Supreme Court, Kings County, "the duty to defend [under a title policy] includes the duty to appeal where there are reasonable grounds to do so". The Insureds' position that the adjoining owners did not occupy the parcels under a claim of right, an unsettled area of the law when the appeal was brought, was then a reasonable basis to appeal.** Schneider v. Commonwealth Land Title Insurance Company, decided September 11, 2007, is reported at 2007 WL 2628782.