

FEDERAL STANDARD ABSTRACT

TITLE NEWS

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Title News

Race-Notice Statute: Lis Pendens and Contract of Sale

Seller of real estate entered into contracts to sell the same property to Purchaser 1 and Purchaser 2, who didn't know about each other. Purchaser 1 closed, but before it could record its deed, Purchaser 2 recorded its lis pendens for an action for specific performance on its contract. Purchaser 2 argues that since New York has a race-notice statute and Purchaser 2 recorded its interest in the real estate before (and without knowledge of) Purchaser 1, Purchaser 1 is now subject to Purchaser 2's lis pendens.

The Appellate Division, 1st Department, disagreed. In *2386 Creston Ave. Rlty, LLC v. M-P-M Mgmt. Corp.*, 2008 NY Slip Op 09002 (decided 11/18/08), the Appellate Division held that Purchaser 2 could not benefit from the race-notice statute. The rationale, simply put, is that the race-notice statute applies only to interests in real estate, such as deeds, mortgages and executory contracts. A lis pendens is not an interest in the real estate (i.e. not a real property interest), therefore it cannot benefit from the race-notice statute. The lis pendens was also discharged because at the time it was filed, Seller, the defendant, didn't own the property. The moral of the story is

that when seeking specific enforcement of a contract of sale, the plaintiff should record the contract immediately as well.

Landmarks Preservation Commission Sued for Delays in Designation

We all understand that when working with public agencies, patience is paramount. But when an application to designate landmark properties or historic districts remains in review for seven years, then there is reason to suspect that the application isn't going anywhere. At least that's what the Citizens Emergency Committee To Preserve Preservation concluded when it sued the New York City Landmarks Preservation Commission as an attempt to force it to reach a decision regarding the extension of the Park Slope Historic District and other designations. The CECPP is an unincorporated private advocacy group and claims that applications for landmark consideration end up in a "black hole." It estimates that 500 such applications were received, but ignored. In its lawsuit against the LPC, the CECPP requested that the court order the LPC to implement a time limit of 120 days to decide on proposed landmarks, and to report all approvals and rejections publicly. The Supreme Court, New York County, agreed and granted the order on November 14, 2008.

Nevertheless, friends and foes of the LPC agree that the task might be too great. The LPC operates on one of the smallest City budgets and is reported to be over-burdened. Its basic duties are: designating landmarks, issuing work permits (for over 25,000 buildings within its jurisdiction), and enforcing permit violations. Its staff consists of 65 full time employees and 3 part-time ones. There is currently a bill circulating in the City Council addressing the landmark nomination process. It remains to be seen whether all of this will bring any changes.

Why Can't "Trusts" Be Title Owners of Property? Why Must The Owner Be "Someone, as Trustee"?

A recurrent question whenever a real estate transaction involves a trust is: why can't the Trust be the legal owner, or mortgagor, instead of someone "as Trustee"?

The answer is a historical accident. The common law recognized the validity of trusts for holding real property since the Middle Ages. Even in those days, trusts were largely used to avoid taxes; specifically, death and transfer taxes. Just as today, the owner would convey

the property to a trustee, and reserve the right to use it.

However, giving property "in trust" creates a legal relationship, but does not create a legal entity. We tend to think of trusts as legal entities akin to corporations and LLCs, but in reality, trusts are different because they do not create a legal entity. The law of trusts merely allows a trustee to hold property separate from his or her patrimony and for the benefit of someone else, so that the trustee's personal debts do not attach to it. But the legal owner of any such property "in trust" can only be a legal entity, such as a person, a corporation or an LLC. All actions in regards to the property "in trust" can only be undertaken by the legal entity holding the "trust corpus", but not by the trust itself. Another important point that bears a resemblance to corporations is that a trustee and his successor are deemed to be the same person. Actions and representations taken by one are binding on the successor. But this does not amount to the creation of a new entity. The right to create private legal entities without legislative action, like corporations, dates only from the 19th century.

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