REAL ESTATE

Top 10 Real Estate Laws of 2014

By Andrew Lieb

Now that 2015 is here it is important to be aware of the changes in the law for our industry. This is not a list about the best events from 2014, but, instead, a list that highlights the new legal landscape that you face as real estate attorneys in 2015. Being familiar with these laws, regulations and opinions may help you to better address your customer's / client's goals and to make you money while helping you to avoid malpractice.

New York Title Insurance Agent Licensing

New York is no longer one of only three states in the country that does not license or register title insurance agents. As part of the Governor's budget, Insurance Law §2139, in conjunction with the definition of "title insurance agent" found in §2101, requires both the business entity and the individual agents to be licensed and to complete continuing education. The best resource to learn about these licensing requirements is the New York State Land Title Association, Inc.'s website where they have a copy of the statute, the emergency regulation and a question and answer page, among other resources.

National Flood Insurance Program Reformed

Deep concerns about skyrocketing rates for those in flood-prone areas covered by the National Flood Insurance Program (NFIP) were addressed by The Homeowner Flood Insurance Affordability Act of 2014 (HFIAA). In modifying prior legislation, (i.e., Biggert-Waters), which sought to apply actuarial risk in assigning rates under the NFIP, the HFIAA was able to take the sting out. Most importantly, Biggert-Waters applied true actuarial rates to newly purchased properties instead of the prior homeowner's grandfathered rates and rendered many properties unmarketable. HFIAA eliminated this provision and many like provisions. The best resource to understand the HFIAA is the American Bar Associations' article "Rate Hikes and Litigation: Changes to Federal Flood Insurance Program," which in full disclosure was written by the author of this article.

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New York Estate and Gift Tax Reforms

Inspired by the increase in the Federal estate tax exemption, New York State has increased its state exemption and will continue to increase its exemption through 2019, at which time it will be equal in amount to the Federal exemption. Initially, the exemption for an individual is $2,062,500 as set forth in Tax Law §952. However, New York has also added two new tax generators together with this increased exemption. First, there is a three-year look-back on gifts where they are now included to calculate estate tax. Second, there is a cliff where an estate that is valued at more than 105 percent of the exemption limit will be taxed on the entirety of the estate, not just the amount over the exemption limit.

New York Leases Required to have Sprinkler System Notice

Residential tenants in New York State must now be noticed whether their residence has a fire safety sprinkler system by way of set statutory language, in bold typeface, and contained within a lease as required by Real Property Law §231-a. On its surface, the legislation seems relatively simple to implement with a lot of corresponding value for tenants. However, there is not a carve-out for cooperative apartments within the legislation and therefore all proprietary leases will likely have to be amended incident to this legislation as a costly secondary effect.

New York Real Estate Brokerage Updates on Rebates and Records

Real Property Law §442 was amended to expressly permit a real estate broker to issue rebates to attract new customers and clients. Now, a buyer's agent can offer a portion of their commission received by way of a co-brokerage agreement from the seller's agent to incentivize a buyer to work with the buyer's agent. Previously, only a No Action Opinion Letter by the Department of State, dated February 6, 2008, endorsed the practice, but it was questionably impermissible by a plain reading of the prior version of the statutory section.

The real estate brokerage regulations, at 19 NYCRR §175.23, were amended to permit real estate brokers, who have record retention responsibilities by law, to keep their records electronically.

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Nonetheless, real estate brokers are also required to maintain records by way of a separate regulatory section, 19 NYCRR §175.21(b), which was not similarly amended in conjunction with §175.23 and therefore brokers are still required to keep paper records. To fully understand the interplay between these two regulatory sections read *The Suffolk Lawyer's* "Real Estate Brokerage Records Go Electronic – Well Sort-Of," which in full disclosure was written by the author of this article.

Land Use and Off-Street Parking

The Court of Appeals, in *Matter of Colin Realty Co., LLC v. Town of N. Hempstead*, held that a variance to an off-street parking requirement should be evaluated as an area variance, not a use variance. In the case, the reason that parking was required in the first place was incident to the proposed use of the space, which was a permitted use in the district. Yet, "under the scheme of the Town Code," as the court expressly limited the precedential effect of its holding, the cause of the need for the variance was not relevant, instead the actual item needing the variance (i.e., area or use) was what was dispositive.

No Fracking in New York

First, the Court of Appeals, in the *Matter of Wallach v. Town of Dryden*, held that "towns may ban oil and gas production activities, including hydrofracking, within municipal boundaries through the adoption of local zoning laws" and thereby permitted fracking to be banned at the most local of levels. Then, the state's Department of Environmental Conservation (DEC) indicated that the DEC will issue a legally binding findings statement early in 2015 to prohibit High-Volume Hydraulic Fracturing (HVHF) in the State of New York and thereby fracking will be rendered illegal throughout the entire State of New York.

Foreclosure Updates: Conferences, Service Members and Phantom Income

The New York State foreclosure settlement conference program, which exists pursuant to CPLR Rule 3408, had its sunset provision (i.e., when the program ends) extended for an additional five years with respect to residential home loans. These conferences utilize court-appointed referees to ensure that lenders negotiate in good faith with mortgagors to modify the mortgage and avoid foreclosure. Effective December 1, 2014, these conferences also became available to homeowners seeking exit strategies through either a short sale or a deed-in-lieu of foreclosure.

The Federal Foreclosure Relief for Servicemembers Act of 2014 extends through "2015 the one-year period after a service member's military service during which: (1) a court may stay proceedings to enforce an obligation on real … property owned by the service member before such military service; and (2) any sale, foreclosure, or seizure of such property shall be invalid without a court order or waiver agreement signed by the service member[]" as per the Library of Congress Summary.

The tax exemption available to underwater homeowners who earn phantom income (i.e., cancellation of debt income), which arises when a debt is forgiven incident to a short sale or a deed-in-lieu of foreclosure, was extended through 2014, but not into 2015. This is basically a retroactive extension of the Mortgage Debt Forgiveness Relief Act of 2007 for the 2014 calendar year. Yet, into 2015 homeowners in foreclosure will once again have to live with uncertainty as to whether they will be taxed incident to agreeing to a short sale or a deed-in-lieu of foreclosure. The best resource to understand cancellation of debit income is the IRS' Publication 4681 or the IRS website.

Condominiums Exempt from Federal Registration and Disclosure Requirements

During the Great Recession the Interstate Land Sales Full Disclosure Act had become a tool to get out of deals by wary purchasers who had signed contracts to purchase condominiums preconstruction, but then, could not afford to go forward as a result of the financial crisis. This law resulted in instability for developers and stemmed their investments and is now no longer applicable to condominiums. Instead, New York State's Martin Act remains as the central disclosure regulation concerning condominium sales within the state. Nonetheless, the Martin Act does not contain a private right of action and therefore no tool to avoid a deal is left to a wary purchaser beyond common law actions for fraud. To fully understand how the Interstate Land Sales Full Disclosure Act had been used as a sword read *The Suffolk Lawyer's* "Interstate Land Sales Full Disclosure Act to be Inapplicable to Condominiums," which in full disclosure was written by the author of this article.

Rent Stabilized Lease is Exempt in Bankruptcy

The Court of Appeals, in the Matter of Santiago-Monteverde, held that Debtor and Creditor Law §282(2) "exempts a debtor-tenant's interest in a rent-stabilized lease" from creditors in bankruptcy as a "local public assistance benefit[] … because the value of the lease (in whole or in part) is traceable to the protections afforded to her under the [Rent Stabilization Code]." In the case, the apartment owner offered to buy the lease from the bankruptcy trustee and as a consequence the trustee would have monies to distribute to creditors. New York's highest court protected the lease in bankruptcy, prevented the sale to the trustee, and avoided the creditors' access to the proceeds.

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