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REAL ESTATE

Top 11 Real Estate Laws of 2011

By Andrew Lieb

Now that 2012 is here it is important to be aware of changes in the law in order to properly represent our clients. This is not a list about the best events from 2011, but, instead, a list that highlights the new legal landscape that you face as real estate practitioners. Being familiar with these laws, regulations and opinions may help you to better address your clients' matters, save your license and make you money.

Property Tax Caps

Local government is now prohibited from raising property tax levies by more than the lesser of 2 percent or the rate of inflation (excluding New York City). An exception to this cap occurs if local government enacts a law or resolution explicitly overriding the cap by a two thirds vote. Currently, New York property taxes are the second highest in the country and are 96 percent higher than the national median.

Marriage Equality

Same-sex couples may now marry and as an incident thereto may now be deemed title as tenants by the entirety. Yet, while New York now provides same-sex couples with many new rights, the practitioner must be mindful that the Defense of Marriage Act prevents same-sex married couples from realizing the full extent of rights enjoyed by opposite-sex married

couples because it prohibits the availability of federally recognized rights.

Mortgage Modifications

Mortgagees/servicers who participate in the federal Home Affordability Modification Program (HAMP) and accept a borrower's application for a loan modification under that program must fully abide by the rules of the program in New York. Specifically, the Appellate Division held in *Aames Funding Corp. v. Houston* that a foreclosure sale would be stayed until the borrower was fully evaluated under the HAMP program. Practitioners should therefore familiarize themselves with all HAMP rules, which can be learned by accessing the Making Home Affordable Handbook.



Andrew Lieb

Electronic Recording

Real estate recordings are going digital. County clerks will begin accepting documents in electronic format on September 22, 2012. Don't fret; you can still bring the clerk your paper versions if you please. Yet, the justification for the bill argues that "owners of real property, real estate professionals and local government taxpayers would benefit from the more accurate and efficient land records system that this bill would facilitate" so you should consider the upside of going digital.

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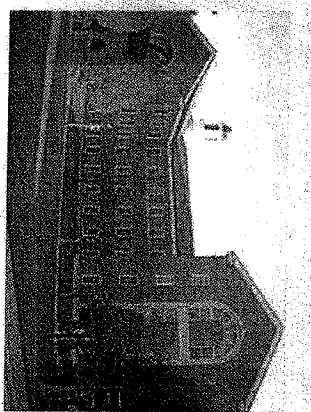
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MERS' Foreclosure Obstacle

Where Mortgage Electronic Registration Systems, Inc. (MERS) is nominee and mortgagee for purposes of recording, it cannot assign the right to foreclose upon a mortgage to a plaintiff in a foreclosure action absent MERS's right to, or possession of, the actual underlying promissory note. So says the Appellate Division in *Bank of New York v. Silverberg* where a foreclosure was dismissed for lack of standing as a result of MERS' involvement. The decision coupled with the introduction of governmental electronic recording seems to signal the end of mortgagees' practice of outsourcing their recordings to MERS in New York.

Ethical Seller's Concession Rules Reinforced

The New York State Bar Association is at it again by clarifying its Opinion #817 which addressed the duty to disclose in a transaction involving a Seller's Concession and a corresponding Gross-Up. Opinion #822 states that "all transaction documents containing the grossed-up sales price must disclose that the sales price has been increased by a sum equal to the seller's concession" in order for the practitioner to comply with Ethics Rule 8.4(c).

Expanded Hardship Criteria for Real Property Redemptions

The Suffolk County Code has been amended to expand the definition of "immediate family" to include grandchildren residing with the applicant where an applicant seeks to enlarge its time period to redeem its tax foreclosed property past 6 months based upon an illness to a member of its "immediate family."

Elimination of Recommended Attorney Lists by Title Agencies

In analyzing Insurance Law §6409(d), the New York State Insurance Department opined that a residential real estate broker may not refer its clients to attorneys on an "approved" or "recommended" list if the attorney's, in turn, refer those clients to the broker's affiliate title agent. Yet, the opinion clearly states that it is premised upon the assumption that "attorneys that do not make the referral quota are removed from the list," so a list is likely permissible so long as membership within the list is objectively independent from referral. Nonetheless, affiliated real estate brokerage and title companies are now eliminating their use of these recommended attorney lists.

On-Bill Recovery Loan Program

As part of the Power NY Act of 2011 and beginning January 30, 2012 homeowners can take out low-interest loans from NYSERDA

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for energy efficiency measures, to be paid back on their utility bills. Moreover, the payments may be tax deductible and are transferable if the property is sold. A great aspect of this program is that homeowners can watch their savings offset the cost of their energy efficiency measures on the very same bill.

Home Improvement Contractors can't act on behalf of Mortgage Brokers

Unnecessary repairs are thwarted as home improvement contractors and their agents are prohibited from promoting or arranging for the services of a mortgage broker or its affiliate. Also, referral fees are strictly prohibited under this legislation as are contractors acting as co-signers or guarantors of a loan for home improvements.

Private Transfer Fees are Eliminated

In furthering the public policy of the marketability of real property, new legislation prohibits private transfer fee obligations from running with title to property or

otherwise binding subsequent owners of property. Also, the legislation provides a procedure to remedy existing obligations. Private transfer fees have traditionally been utilized as a creative means for developers to realize an income stream long after the finalizing of their projects.

This list only provides a small blurb on each new law, regulation and opinion. There may be further discussion on these topics going forward as they get fleshed out in the courts. So stay tuned.
Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a family-owned law firm with offices in Center Moriches and Manhasset, New York. Mr. Lieb is also the founder and lead instructor of the firm's New York State licensed Real Estate School, which serves as the Pro Bono arm of Lieb at Law offering continuing education courses to Real Estate Agents and Brokers. He is the Co-Chair of the SCBA Real Property Committee

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