

FEDERAL STANDARD ABSTRACT

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Recording Unusual Transactions: An Assignment of Leases and Rents without Mortgage

Every now and then parties have a need to record documents that vary from standard transactions. The possibility that the local recording clerk might raise objections about the documents submitted should never be underestimated, even if there are provisions in the Real Property Law that specifically allow for their recording. For example, RPL §296 allows for the duplicate filing in the title records of corporate records filed with the State that affect holding entities. If a holding entity files for a merger or name change with the Secretary of State the name of the title owner will change. In order for the change to be reflected in the title records, RPL §296 allows for the filing of a certificate. Yet, this is so seldom done that recording clerks receiving a RPL §296 certificate put up resistance because they do not have a procedure in place for its filing.

The point is most interesting with Assignments of Leases and Rents (“AL&Rs”). Recording clerks have a checklist for the recording of every recurrent document. For example, recording a deed requires TP-584, TP-5217, if nonresident, IT-2663, housing registration, check for transfer taxes, etc. Since AL&Rs are typically part of a commercial mortgage transaction, the

checklist for the recording for an AL&Rs calls for a mortgage and a 255 Affidavit. The problem arises when there is no mortgage. Even though the clerk may record AL&Rs with mortgages in a regular basis, if one is submitted without an underlying mortgage and 255 Affidavit, it may be rejected because there is no procedure for recording it.

The typical first reaction of the clerk is to ask for a 255 Affidavit. However, a 255 Aff. merely says that the mortgage recording tax has already been paid. To sign the affidavit when no mortgage tax was paid is perjury. Besides, the recording of an AL&Rs is not subject to the mortgage recording tax, unless the property is in the City of New York. Tax Law §250(2)(a).

The typical second reaction of the clerk is to reject the AL&Rs because there is no procedure for recording it. At this point, it is important to bring to the clerk’s attention that there is a provision in the RPL allowing for the recording of “Assignments of Rents,” which says nothing about having to be filed with a mortgage. RPL §294-a. After reconsideration, the clerk will probably agree and reply something like this: “I can’t file it as an Assignment of Leases and Rents because it doesn’t meet the checklist. But I can file it as a miscellaneous document if you remove the words ‘Leases and’ so it reads

‘Assignment of Rents’ (just like RPL §294-a says, and not like my checklist), and I will also need a TP-584.”

Whether this works or not would depend, of course, on the parties’ willingness to execute a TP-584 after the closing, which is not a situation anyone wants to be in. In addition, it should be noted that the clerk’s solution may not be as good as it seems. Many counties (like Suffolk and Westchester) keep a separate record for mortgages (a “mortgage book”). If the AL&Rs is entered as a miscellaneous document, it seems it would not be entered in the mortgage book. If that happens, the AL&Rs might not come up on certain searches. For example, a so-called “attorney search” consists of the last deed of record and all open mortgages. An AL&Rs that is not in the mortgage book might not be discovered in an attorney search.

The most important lesson from this is that if you plan to record a transaction out of the ordinary, there is no telling how the recording clerk will react to the document. Hence, it is highly advisable to give us an unexecuted version of the document prior to closing.

Waterfront Permitted Exceptions for Real Estate Contracts

Buyers and sellers entered into a contract to sell real estate fronting on Orient Harbor. The contract called for “insurable title” and contained the regular “permitted exceptions.” The purchasers ordered a title report. The purchasers’ title company raised a number of underwater exceptions covering the water itself and the land under the water. Since this exceptions could not be removed, the purchasers sought to cancel the contract. After the purchasers failed to appear at closing, the seller brought a declaratory action to declare breach of contract and its entitlement to the downpayment. The Supreme Court, Suffolk County, decided for the seller and the Second Department affirmed. The court noted that although it was true that the “underwater exceptions” were not among the “permitted exceptions” under the contract, this was irrelevant. It is well-settled law that when private real estate fronts on navigable waters, the owner only owns up to the high-water mark; i.e. the high-tide mark. Water below the high-water mark belongs to the State of New York. Therefore, the parcel intended to be sold did not encompass the land under water. Hence, the exceptions raised by the title company were irrelevant as they did not affect the land that was subject to the contract. *Stenda Realty LLC v. Kornman*, 67 A.D.3d 996 (2nd Dept, Nov., 2009).

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