Did You Know?

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ADVERSE POSSESSION - CLAIM OF RIGHT

In 1989, plaintiffs contracted with one Merritt to purchase premises 35 Anchor Drive, Massapequa, N.Y. A survey established that a triangular parcel of the defendants' adjacent premises were on the Merritt side of the fence that separated the backyards.

When advised of this situation, Merritt stated that he believed that he owned the triangular parcel because the fence had been erected prior to his taking title, in 1978.

At the closing, Merritt orally conveyed his rights to the triangular parcel to plaintiffs. In 1991, defendants contracted to sell their premises and thereafter learned about the fence not being on the property line.

Plaintiffs offered to buy the triangular parcel, but defendants rejected the offer and tore down the fence. Plaintiffs then commenced this action to obtain title to the disputed parcel, and defendants counterclaimed for damages.

Affirming, the Appellate Division reasoned that a party seeking to obtain title by adverse possession not founded upon a written instrument must show that the parcel was either "cultivated or improved, " or protected by Pt substantial enclosure," in addition to satisfying the common law requirements of demonstrating that the possession was hostile, under claim of right, open and notorious, and exclusive and continuous for a period of ten years (*Belotti v. Bickhardt*, 228 N.Y 296).

The appellate court bridged the gap of inconsistency between "hostility" and "claim of right" by concluding that while plaintiffs' occupancy from 1989 to 1991 was not adverse, since he did not know that he did not own the disputed parcel, Merritt's possession of the premises for over 11 years under "claim of right" was adverse and plaintiffs benefited from the same.

Citing *Brand v. Prince* (35 NY2d 634, 637), it concluded that since "possessory title" is entirely an incident of the adverse holder's possession. Transfer of that possession, even by parol, effects a transfer

of the possessory interest.

Oistacher v. Rosenblatt
631 NYS2d 935 (AD2d-1995)

BROKERAGE COMMISSION - PROCURING CAUSE OF SALE

In August, 1987, defendant seller went to plaintiff broker's office and listed certain property with him, specifying an asking price of $750,000.

One year later, the seller viewed the premises with co-defendant Galesi, but rejected his offer of $500,000. After another year, seller conveyed title to Galesi for $625,000. Seller appealed a trial court's award of a commission of $62,500 to plaintiff. Reversed.

The facts adduced showed that the seller and buyer [knew each other prior to the broker having showed the house to Galesi, the co-defendant, and that they had previously discussed the availability of the property. Finding that the broker did nothing of significance to assist in the negotiations between the parties, other than this one showing of the premises, and citing *Greene v. Hellman*, 433 NYS2d 75, the appellate court concluded that plaintiff broker could not be the "procuring cause" of the later sale.

This court also rejected the trial court's finding that the seller's alleged promise to protect the plaintiff-broker constituted a special agreement such as would relieve plaintiff of the need to demonstrate that he was the procuring cause of the sale, and thereby entitled to a commission (cf. *Helmsley-Spear, Inc. v. Melville Corp.*, 611 NYS2d 240 [AD]).

The court held that since the brokerage agreement specified no time duration, a reasonable duration must therefore be implied. It held that under the circumstances herein, it would not be reasonable to conclude a duration of over one year.

Hampton Realty of Bridgehampton v. Conklin
631 NYS2d 887 (AD 2d Dep't-1995)

CO-OPERATIVE OFFERING - BREACH OF CONTRACT

Purchasers of co-operative units brought an action against the sponsors, alleging that they had sustained money damages by reason of the fact that the offering statement filed with the Attorney General had concealed certain dangerous structural conditions.

The court concluded that although plaintiffs could have sought a common law remedy not available to the Attorney General, they did in fact bring a private cause of action under the "Martin Act" (General

Business Law, secs. 353 and 352-e [I) [b]).

The broad enforcement remedies available to the State under the Martin Act incorporate actions based upon the Attorney General's belief that an entity "has engaged in any of the practices or transactions hereto- fore referred to as and declared to be fraudulent practices."

Insofar as the purchasing public is concerned, an offering statement need only contain a description of the property.

Citing *Whitehall Tenants Corp. v. Estate of Onick* (633 NYS2d 585 [AD]), the court found that the plaintiff had no standing to bring a private action pursuant to the Martin Act.

15 East 11th Apartment Corp. v. Elghanayan
632 NYS2d 119 (AD 2nd Dep't-1995)

ENCROACHMENTS - REMEDY OF INJUNCTION

Defendant erected two concrete islands in violation of a recorded easement. Although the court found that plaintiff sustained only nominal damages, it also found the same constituted an unlawful appropriation and occupation of a portion of plaintiffs land and was a continuing trespass.

Citing *Goldfarb v. Freedman* (431 NYS2d 573 [AD]), the court held that RPAPL 871 expressly authorizes an action by the owner of any legal estate in land for an injunction directing the removal of a structure encroaching on such land.

Hullar v. Glider Oil Company Inc.
631 NYS2d 971

MECHANICS LIEN - NOTICE OF EXTENSION

August of 1992, plaintiff filed a mechanics lien for certain sums alleged to be unpaid in connection with improvements made on defendant's home. In July, 1993, plaintiff filed an extension of same and commenced this action to foreclose said lien within the extended period. Defendant moved to dismiss the complaint and discharge the mechanics lien on the ground that: **a)** The plaintiffs extension of lien without notice to defendant was improper and **b)** Plaintiff failed to timely file a notice of pendency of action.

a) Lien Law, sec. 11 specifically provides that a lien filed pursuant to sec. 17 must be filed on notice. A 1989 amendment to sec. 17 permits one extension by filing. Neither section has an express requirement that the extension by filing be made on notice to the property owner.

The court noted that while the provision for the initial filing (see 11) and for amendment (sec. 12-a) require that same be made on notice, the statute was silent on this point.

The court rejected defendant's reliance upon *In re Barnes Construction Corp* (499 NYS2d 867) finding that that case involved air application to a court for an extension of a mechanics lien.

b) Although sec. 17 does not explicitly require the flag of a lis pendens when an action is commenced to foreclose the lien during an extension period, it is well settled that the commencement of a foreclosure action alone, without the filing of a lis pendens, is insufficient to continue such lien (*Madison Lexington Venture v. Crimmins Contr Co.*, 552 NYS2d 251, citing *Noce v. Kaufman*, 2 NY2d 347, 161 NUYS2d 1).

In granting defendant's motion to dismiss the foreclosure complaint, the court concluded that to continue the lien and maintain the foreclosure action, such action must be commenced within the initial one year period or extension thereof, and a notice of pendency must be filed in connection with such action within the initial or extended period in order to keep the action alive.

Bianchi Constr. Corp. v. D'Egidio
630 NYS2d 904 (S. Ct. Kings Co-1995)

Note: In circumstances of carelessness, a mechanics lien expired by operation of law three years after it was extended by the contractor filing notice of pendency in a foreclosure action where the lis pendens was not further extended.

As set forth in the Bianchi case, a mechanics lien remains valid if an action to foreclose is begun while the lien is alive. It is a jurisdictional requirement for such foreclosure action that a notice of pendency be filed before the expiration of the lien.

Since a lis pendens has only a three-year life, an order would have had to be obtained extending the lis pendens to keep the action, and therefore the lien, valid. *L.M. Plumbing, Inc. v. Decker*, 631 NYS2d 393 (AD2 Dep't-1995)

MORTGAGES - PREPAYMENT INTEREST

In this action brought to recover interest that had been paid to obtain a satisfaction, this appeal was taken from the trial court's ordering such recovery.

Pursuant to the specific terms of the purchase money mortgage, plaintiff had no right to prepay the mortgage. When plaintiff sought to prepay this mortgage, defendant requested interest calculated to the maturity date of the mortgage note as a precondition to his acceptance of the prepayment and execution of a satisfaction. In light of the foregoing, the court held that it was not unlawful for the defendant-

mortgagee to demand such an interest payment.

Lyons v. Natl. Sav. Bank of City of Albany
113 NYS2d 695 [AD]

Note: The court rejected plaintiffs contention that the provisions of RPL, sec. 254-a were applicable. It held that the statute prohibits a mortgagee from collecting a prepayment fee from a mortgagor who sells his or her home, when the mortgagee necessitates prepayment by refusing to consent to a request that the purchasers assume the mortgage or take title subject to same.

Here, defendant-mortgagee did not refuse to consent to the assumption of the mortgage by the prospective purchasers, or their taking title to same, since such a request was never made. Judgment was granted to defendant, dismissing the complaint.