Did You Know?

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BROKERAGE - ENTITLEMENT TO COMMISSION

Defendant had commenced an action to foreclose a certain mortgage, had obtained a final judgment of foreclosure and sale, and was awaiting the scheduled sale. The brokerage agreement between the parties provided that for plaintiff to be entitled to a commission, a prospective buyer must executive a certain agreement under which defendant would bid for the property, and if successful, would assign that bid to the prospective buyer; and such assignment would actually be made. This buyer whom plaintiff introduced to defendant, did not sign such an agreement; but was the successful bidder when the foreclosure sale was actually held. This appeal arose from the denial by the IAS court of plaintiff's claim for a brokerage commission.

Citing *Lane-Real Estate Dept. Store v. Lawlet Corp.*, (319 NYS2d 836 [NY]), the Court held that since the prospective purchaser was not willing to execute defendant's agreement, that plaintiff had in fact not produced a buyer "ready, willing and able" to consummate the transaction. Additionally, the Court found that the specific terms of the brokerage agreement.

Mautner-Glick Corp. v. The Dime Savings Bamk of Williamsburgh
647 NYS2d 782 (A.D.1.D.-1996)

Note: The Court likewise rejected plaintiff's claim of "economic duress". (cf. *Benjamin Goldstein Prods. Ltd. v. Fish*, 603 NYS2d 849 [AD])

EASEMENTS - CREATED BY ADVERSE POSSESSION

Action by alleged beneficiary of an easement over defendants' land to the Atlantic Ocean, based upon a 1980 conveyance by plaintiff to said defendants, which reserved an easement "for a right of way, 5 feet in width, along the entire westerly boundary of the premises to the Atlantic Ocean." In 1981, defendants

constructed a fence which, among other things, crossed the portion of the property burdened by the easement. In 1993, plaintiff discovered the same, and in 1994 demanded its removal to permit his access to, and use of, the said easement. Prior thereto, the easement had not been used. This action followed defendants' refusal to so remove.

On appeal from the lower Court's granting plaintiff summary judgment, this Court upheld the trial court's finding that the easement had not been extinguished by adverse possession. The Court reasoned, that "a 'paper' easement, not located and developed through use, may not be extinguished by adverse possession absent a demand by the owner of the easement that the easement be opened, and a refusal by the party in adverse possession." (cf. *Spiegel v. Ferraro*, 543 NYS2d [NY] 15; *Conway v. Hahn*, 617 NYS2d [AD] 52; and *Castle Assoc. v. Schwartz*, 407 NYS2d [AD] 717). Accordingly, the ten year period required for adverse possession to ripen, commenced in 1993, and had not expired as of the commencement of this action.

Wunderman v. Nelkin
647 NYS2d 535, (A.D.2.D.-1996)

LEASE CANCELLATION BY SENIOR CITIZEN

RPL Sec. 227-a(2) permits a senior citizen entering an adult care facility, residential health care facility or a subsidized housing project to terminate their lease by notice in writing delivered to lessor, owner or their agent. The effective date of such termination is "no earlier than thirty days after the date on which the next rental payment subsequent to the date when such notice is delivered is due and payable." Additionally, the notice must be accompanied by a "documentation of admission or pending admission" to the designated facility.

In the instant case the notice was sent subsequent to its September 1, 1994 date, and advised that plaintiff would be vacating her premises as of October 1st. Defendant responded that the notice of termination would not be effective as of October 1st, and applied the rental security to the rent which was due for the month of October. Accordingly, this Court reversed a lower court judgment which returned such security deposit to plaintiff.

Cucinotta v. Hamulak
647 NYS2d 625 (A.D.4.D.-1996)

LEASE OPTION-TO-PURCHASE - CONSTRUCTION

In 1987, pursuant to a lease agreement, plaintiffs-lessees exercised an option to purchase property from defendant-owner, some four months prior to the expiration of the lease. After years of litigation which

resulted from defendant's refusal to honor plaintiffs' exercise of their option, this Court determined that plaintiffs had properly exercised their option. (*Rodriquez v. Baker*, 582 NYS2d 754 [AD] The matter was then remitted to the trial court for the entry of an appropriate judgment, prior to which, such trial court appointed a referee to determine what portion of the purchase price had already been paid by plaintiffs, in accordance with such option agreement.

During the period of litigation, plaintiffs continued to pay "rent" on the premises which consisted, inter alia, of the making of payments on an existing first mortgage, and taxes, all as required by the option agreement. The purchase price was stated to be not more than $286,000.00, and to consist of $61,000.00 cash, the assumption of the unpaid balance on the first mortgage, and a subordinate purchase money mortgage for the balance of the purchase price, less the $61,000.00 cash payment, and "all monies paid by plaintiffs as 'rent'". This appeal followed the referee's refusal to attribute to the purchasers all of the monies paid by them for the first mortgage and taxes.

The referee relied upon paragraph 1[H] of the option agreement which stated that the lessees' obligation to pay rent under the lease, ceased after the consummation of the sale; and accordingly found that the mortgage payments and taxes made during and after the lease period, and until the consummation of the sale, were not attributable to the purchase price; but were payable to defendant as rent under the lease. In this manner, the referee failed to credit plaintiffs with a considerable sum of money, and found that plaintiffs still owned defendant money on account of the purchase price.

Rodriguez v. Baker
647 NYS2d 835,(A.D.2.D.-1996)

Note: Inherent in the court's finding, is their refusal to interpret the option agreement in a manner which would allow defendant to continue to collect rent after he unlawfully delayed the conveyance beyond the lease term.

LIS PENDENS - SERVICE PURSUANT TO CPLR 6512

Plaintiff filed a notice of pendency of action on October 14, 1994, in connection with an action to set aside a certain conveyance of Suffolk County real property made to Beechwood by deed dated September 9, 1994, and recorded September 15, 1994; but failed to serve Beechwood as the record owner, within 30 days after the filing of the lis pendens. Since the provisions of CPLR Article 65 had not been complied with, this Court reversed the lower court, and canceled the lis pendens. (cf. *Skoller v. Rimberg*, 246 NYS2d 147 [AD]) It chose to ignore what it called an "unsubstantiated" assertion that a "last owner search" made a week prior to the filing of the lis pendens, failed to return the deed into Beechwood. Given the state of record keeping in the Suffolk County Clerk's Office, this was undoubtedly true; although without consequence, since title of record was then already in Beechwood.

Citing *Slutsky v. Blooming Grove Inn*, (542 NYS2d 721 [AD]), this Court concluded, also contrary to the determination of the lower court, that although other defendants were timely served pursuant to CPLR 6512, as these defendants had no ownership interest in the premises, service upon them did not preclude the cancellation of the lis pendens.

Rabinowitz v. Larkfield Building Corp.
647 NYS2d 820 (A.D.2.D.-1996)

RESTRICTIVE COVENANTS - PROHIBITION OF CONDOMINIUMS

Plaintiff brought an action for a Declaratory Judgment declaring that certain covenants and restrictions imposed by a common owner upon lands of plaintiff and defendant, which limited development on each lot or portion thereof, to one dwelling house, did not prohibit the erection by plaintiff of a condominium, in accordance with a certain plan of development. The trial court not only denied this motion; but went on to decree that such restrictive covenants prohibited the erection of any condominium thereon. Plaintiff appeals.

The appellate court affirmed the finding that plaintiff's development plan was in clear violation of the condominium plan submitted; however, it held that the lower court erred in construing same as barring condominiums in general. Holding that it was inappropriate for the lower court to issue "advisory" opinions, the appellate court was clearly not prepared to say that any and all plans of condominiums development that might be submitted in the future, would of necessity violate these covenants.

Carlisle v. Spatola
648 NYS2d 466 (A.D.2.D.-1996)

STATUTE OF FRAUDS - LAW OF CASE

After extended negotiations for the purchase by plaintiff of certain premises owned by Cynlip, the contract tendered to it by Cynlip, was executed by plaintiff; and returned to Cynlip together with a deposit downpayment check for $50,000.00. The contract was never signed by Cynlip, nor was the check deposited. Two weeks later, and one day before a scheduled closing whereby Cynlip was to sell the same premises to Rivpen, plaintiff's attorney caused a lis pendens to be filed against the premises. As a result thereof, the Rivpen closing never took place; and ultimately Cynlip lost the premises in a foreclosure action. This appeal follows a jury verdict for plaintiff; and denial of a directed verdict to Cynlip upon its claim against plaintiff for abuse of process.

A primary issue herein, was the trial court's failure to charge the jury as to the relevant law in this case, ie. as to the effect of the State of Frauds. Citing *Onorato v. Lupoli*, (522 NYS2d 593 [AD]), this Court

noted, that the Statute of Frauds provides that a contract for the sale of real property is void unless memorialized in a writing subscribed by the party to be charged. The law further provides that part performance of an oral contract for the sale of real property can remove it from the bar of the Statute; and give rise to a cause of action for specific performance. (cf. Onorato)

Based upon a course of conduct between the parties, plaintiff's counsel testified as to his belief, and his advise to his client, that they had a contract. Accordingly, the appellate court held that the issue as to whether plaintiff and its counsel could reasonably belief that they had a legally enforceable contract, was crucial to an evaluation of their conduct in filing the lis pendens. A new trial was ordered at which the jury was to be charged as to the effect of the Statute of Frauds.

Maimonides Medical Center v. Cynlip Boro Park Associates
647 NYS2d 843, (A.D.2.D.-1996)

TIME OF THE ESSENCE - UNILATERALLY IMPOSED

Even where the original contract as drawn, does not contain provision for time of the essence, one party may unilaterally notify the other that such is the case, provided that the notice is clear, distinct, unequivocal, fixes a reasonable time in which to perform, and informs the other party that a failure to perform will result in default. (cf. *James v. James*, 614 NYS2D 907 [AD]) In the subject case, the Court found that the notice given by the purchasers, was unequivocal, the time fixed, was reasonable, and the consequences of a failure to close, clear; that time of the was properly made of the essence.

The Court further found that the record amply demonstrated that on the date set for closing by the essence notification, Seller was unable to deliver title in accordance with the terms of the contract. Therefor, judgment was rendered for purchasers to recover damages which included the return of their downpayment and title costs as provided for in the contract.

Charchan v. Wilkins
647 NYS2d 550 (A.D.2.D.-1996)