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ADVERSE POSSESSION - AFFECTED BY TENANCY IN COMMON

Bartholomew and Craft acquired title to premises in 1959 as tenants in common. When Bartholomew died in 1979, his undivided one-half interest devolved to his wife and daughters, as tenants in common. Later that year, Craft and her husband moved into the premises. When Craft died in 1980, her husband, the plaintiff, became vested with her undivided one- half interest as a tenant in common. In 1993, plaintiff commenced this action to establish his ownership of the premises.

RPAPL Sec. 541 provides that there is a presumption that a tenant in common in possession of property hold the property for the benefit of all tenants in common. (cf. *Kraker v. Roll*, 474 NYS2d 527 [AD]) This presumption ceases only after the expiration of ten years of "continuous exclusive occupancy by such tenant or immediately upon ouster." (*Perez v. Perez*, 644 NYS2d 168 [AD])

In the case at bar, plaintiff's possession was permissive from its inception, and he did not create a condition of "ouster" by distinctly asserting his right hostile to other co-tenants. The Court found that payment of property expenses and upkeep did "not sufficiently apprise his co-tenants that he claimed 'exclusive ownership'" as against their interest.

Accordingly, since an "ouster" had not been established, the period of adverse possession did not commence to run until the expiration of the ten year period of exclusive occupancy, to wit- until 1989, at the earliest. (RPAPL Sec. 541) Since the ten year period of adversity commencing in 1989 had not run, judgment affirming the dismissal of plaintiff's complaint was granted.

Myers v. Bartholomew
649 NYS2d 723 (A.D.2.D.-1996)

CONDOMINIUM - PROTECTION OF COMMON CHARGE LIEN

As the highest bidder, and pursuant to an order and judgment of foreclosure and sale in a foreclosure action, defendant Lavy Corp. acquired title to 13 condominium units by a referee's deed dated in 1995. At that time, there were unpaid real property taxes going back to 1991, which were not satisfied out of the proceeds of the foreclosure sale, contrary to the direction in the order and judgment of foreclosure entered 7-5-1994, that the referee "on receiving the proceeds of sale, forthwith pay therefrom in accordance with their priority according to the law, the taxes, assessments and water and sewer rents which are or may become liens on the premises at the time of sale." The referee had paid the entire purchase proceeds to the mortgagee; and Lavy took title subject to open real property taxes.

At that time, plaintiff-Condominium Board was owed $570,000.00 for unpaid common charges by defaulting owner; and the plaintiff's lien therefor was extinguished by the foreclosure sale. Consequently had no recourse against the prior owner. Defendant, Lavy, also failed to pay the common charges from the date of their acquisition of title; and plaintiff filed a lien against them for these items.

In October, 1995, plaintiff moved in the foreclosure action to compel Lavy to pay the outstanding real property taxes. Plaintiff then argued, inter alia, that in any attempt by plaintiff to foreclose its lien for unpaid common charges, the lien for unpaid real property taxes would take priority, and its lien for unpaid common charges would be extinguished for a second time.

In February, 1996, learning of an impending sale of these units, and said motion having not yet been decided, plaintiff commenced this action to foreclose its common charge lien; and in connection therewith, sought a preliminary injunction enjoining Lavy's prospective sale of the units until the outstanding real property taxes were paid; - plaintiff contending that otherwise it would suffer irreparable harm. This appeal followed a denial of same. [Plaintiff represented on appeal that its motion (above referred to) had been denied.]

Rejecting the doctrine of *Trefoil Capital Corp. v. Creed Taylor, Inc.* (504 NYS2d 112 [AD]) relied upon by the lower court, this Court found that the referee improperly paid the mortgage debt before paying the real property taxes, in violation of RPAPL Secs. 1354(1) & (2). Citing *Ma v. Lieni* (604 NYS2d 94, lf. to ap. Den. 83 NY2d 847), this Court held that plaintiff's within motion seeks only to maintain the status quo via injunctive relief, under circumstances where the denial of same would render any final judgment "ineffectual"; and should be granted. Accordingly, this Court determined to protect plaintiff's only security for a past due debt in the event is was ultimately successful.

Board Of Managers of 235 E. 22nd Condominium v. Lavy Corp.
649 NYS2d 668 (A.D.1.D.-1996)

EVIDENCE - ADMISSION OF DEEDS & SURVEYS

The parties owned adjoining parcels of real property. In 1992, plaintiff commenced this action alleging,

that the westerly boundary of defendant's property encroached some 100.00' inside his property. Plaintiff sought, inter alia, judgment directing defendants to remove the encroachment from plaintiff's property; and prohibiting defendant from selling or transferring the parcel in question until a corrected subdivision map could be prepared. At the conclusion of plaintiff's case at a non-jury trial, (plaintiff representing himself), the Court found that based upon the admissible evidence, plaintiff had failed to offer proof establishing that he had title to that portion of the premises in question. Plaintiff appeals.

Essentially, this case may have been lost by a litigant who represented himself, because he was able to obtain admission into evidence, only 2 of 13 documentary exhibits. For a deed to be admissible, the party offering it must submit proof of its execution, authenticity and relevance. (cf. 58 N.Y.Juris. 2d, Evidence & Witnesses, Sec. 534, at 151). Additionally, in order to prove a boundary by survey, there must be proof of the identity, competency, authority and purpose of the survey being submitted. (1 N.Y.Juris. 2d. Adjoining Landowners, Sec. 151, at 645).

In conclusion, the Court held that plaintiff's failure to offer any compelling testimony or other evidence detailing the authenticity and relevance of the deeds and surveys or other evidence to help interpret and explain the deeds and surveys offered, supported the Court's refusal to accept these exhibits into evidence. On the basis of the admissible evidence, this appellate Court likewise concluded that plaintiff failed to sustain his burden of proof.

Sloninski v. Weston
648 NYS2d 823 (A.D.3.D.)

NOTE: This case illustrates the obvious evidentiary fact, that expert testimony by a title expert and/or surveyor, is required to fit the documentary proofs together in a coherent manner to allow for proper interpretation. Deeds and surveys, unconnected and/or explained, prove nothing.

CONTRACT DEFAULT - VENDOR ENTITLED TO RETAIN DOWNPAYMENT

When purchaser failed to close on the essence date, plaintiff- vendor resold the premises to a third party for a higher price than that which was contracted for with the defendant-purchaser. Plaintiff commenced this action against defendant-escrowee for the turnover of escrow monies in the sum of $15,000.00. Plaintiff appeals from the denial of their motion for summary judgment to obtain these monies.

This Court cited *Maxton Bldrs. v. Lo Galabo* (68 NY2d 373, 378, 509 NYS2d 507), to the effect that "[F] for over a century it has been the law in this State that, notwithstanding that a seller's actual damages may be less than a given down payment, 'a vendee who defaults on a real estate contract without lawful excuse, cannot recover the down payment' (*Lawrence v. Miller*, 86 NY 131,140)." This Court reversed the lower Court, holding that there was no doubt that defendant had breached the contract, and that no legally "cognizable" excuse had been proffered for such breach. Citing the Maxton Case, this Court

accordingly held that plaintiff was entitled to retain the contract downpayment.

Barton v. Lerman
649 NYS2d 107 (A.D.3.D.)

STATUTE OF FRAUDS - EXCHANGE OF CORRESPONDENCE

In an action brought by plaintiff for specific performance of an alleged contract, defendants contest the existence of same on the basis of non- conformity with the statute of frauds. Plaintiff alleges that a bona fide contract exists on the basis of an exchange of correspondence between plaintiff's attorney; and an agent for defendant-fee owner. The first dated 8-25-94 from plaintiff's counsel to Consolidated, offered to purchase premises 1944 Bayberry Avenue, Merrick, N.Y. for $1,550,000.00 , less the sum of $200,000.00, paid on the signing of an earlier contract between predecessor parties. The answering letter dated 8-31-94 by Consolidated (as agent) for the fee owner, advised that said defendant accepted such offer.

The Court cited the *Cohen v. Swenson* (528 NYS2d 110, 111 [AD]), interpretation of Gen. Oblig. Law, Sec. 5-703 at to the requirements of the Statute of Frauds, as follows: "a memorandum subscribed by the party to be charged, must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement." The Court found that the letters sent sufficiently identified the property, the parties, purchase price, financing commitment; that the property will be purchased in an "as is" condition; and that marketable title will be transferred (cf. *Kursh v. Verdarame*, 449 NYS2d 500 [A.D.]; ap.den. 57 NY2d 608). The Court noted that while Consolidated's letter stated that "it expects plaintiff to make every effort to close prior to 9-15- 94", the absence of an established closing date is not an impediment to the enforcement of a real property contract.

The Court rejected defendant's argument that in the absence of an allegation that Consolidated's authority was in writing, a fact which it claimed plaintiff could not prove, the plaintiff's complaint must be dismissed. The Court held that such authority was adequately pleaded, and could be resolved by proof adduced at a trial. As to the issue of not setting a closing date, it pointed to language contained in Consolidated's letter that "your offer has been accepted as presented," which it found overhead such concerns.

Maggio v. Leeward Ventures, Ltd.
939 Fed.Sup. 1020 (E.D.N.Y.-1996)