February 1998

CONTRACT - DAMAGES FOR BREACH

Plaintiffs entered into a contract for the purchase of a certain residence which contained a provision entitled “Roof and Leaks”, which provided that the defendant was to repair “all broken, rotted, and split shingles” on the roof prior to closing. Subsequent to the closing, the roof leaked and caused water damage to the interior of the premises. Plaintiff commenced this action to recover for breach of contract.

The evidence adduced at the trial, demonstrated that the defendants replaced only about 100 shingles on the front portion of the roof so as to obtain an esthetically pleasing result. No work was done on the remainder of roof, nor was any of the work carried out to prevent water leaks into the premises. The Trial Court concluded that the cited provision was “plain and unambiguous”; and that defendants had complied with them. Since the contract language was found to be unambiguous, it held that the trial testimony was irrelevant and immaterial.

This Court opined that “it is the primary rule of construction of contracts, that when the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties’ reasonable expectations. (*Slamow v. Delcol*, 571 NYS2d 335 [AD]) In view of the fact that the provision in question, entitled “Roof and Leaks”, called for the repair or replacement of all defective shingles, “the logical interpretation of this provision, as well as plaintiff’s reasonable expectations, was that the defendants were required to repair the roof so as to prevent leakage. Judgment was granted to plaintiff, reversing the lower court.

Weisberger v. Goldstein
662 NYS2d 544 (A.D.2.D.-1997)

COVENANTS & RESTRICTIONS - SUBSEQUENT OWNERS BOUND BY ZONING IMPOSED COVENANTS

Columbia University acquired the Delafield Estate, and subsequently sold the same to Delafield, Ltd. subject to a Declaration of Covenants and Restrictions which they drafted and recorded. The Declaration was executed in consideration of the City of N.Y. Planning Board (CPC) and the Bd. of Estimate authorizing Delafield to construct 33 residential units on the former estate. The Declaration required Delafield, to preserve and protect the estate mansion; retain existing trees, restore trees damaged in the construction; and regrade and landscape the surface terrain disturbed by the construction of an underground garage. In the event certain target dates were not made, the CPC was given the right to direct completion or removal of the incomplete components; and the restoration the destroyed lands. In 1981, the City and Delafield entered into a further Agreement which was approved by the CPC and the Bd. Of Estimate, and recorded, in which the City demapped a portion of the estate and accepted a sewer easement; and Delafield agreed to improve certain streets, and install sewers, hydrants, etc. Both the Declaration and Agreement required Delafield to post performance bonds referable to these covenants and obligations, which was done.

By 1986, having built only 5 units, Delafield Ltd. sold the premises to Delafield Assocs., which built only 6 more units; and sold 9 of the 11 existing units. In Nov., 1988, by which time the condition of the property had deteriorated due to the unfinished construction; there were open foundation pits, an open excavation pit for the never- completed underground garage; and numerous destroyed trees. The City issued notices requiring the receiver (appointed in a pending foreclose action) to cure its obligations pursuant to the Declaration and Agreement; and placed violations on the premises for failure to erect fences around the open pits. In July, 1989, the City commenced an action to enforce the Declaration and Agreement; the sureties' obligations under same; and sought relief from the breeches of the various Declarations and Agreements.

In August, 1991, the property was sold at a mortgage foreclosure sale to Abraham Zion, who conveyed same to his corporation, Delafield 246 Corp'n. Zion does not deny receiving actual notice of the covenants and agreements prior to the sale. He also had constructive notice of the same. Nevertheless, Delafield 246 contends that it is not bound by these documents because they were affirmative covenants that did not touch or concern the land; and because Delafield 246 was not in privity with the original signatories to said instruments.

The City defined the covenants and obligations in terms of a municipality's "exercise of its zoning power;" while Delafield treats them as merely "private covenants." Arguing that this declaration and covenants were a proper exercise of its zoning powers, the City relies upon a line of cases holding that it is accepted practice to impose appropriate conditions in conjunction with a zoning change, or grant of a variation; which conditions must be "directly related to and incidental to the proposed use of the property;" ie. fencing, safety devices, landscaping, screening, outdoor lighting, maximum area of property improvement; requirements as to planting of shrubbery. (cf. *Matter of St. Onge v. Donovan*, 527 NYS2d 721 [NY]) Fundamentally, the condition "must relate to the land; and not the person who owns or occupies it.

The municipality may condition the zoning amendment upon the execution of a declaration restricting the use of the property by the persons seeking the rezoning. Once these conditions are incorporated into the amending ordinance, those conditions effectively become part of the zoning law. (cf. *Collard v. Inc. Vill. of Flower Hill*, 439 NYS2d 326 [NY]) So long as the conditions imposed are consistent with the purposes of zoning, they are binding upon successor owners. (*Eagle Tenants Corp. v. Fishbein*, 582 NYS2d 218 [AD])

Contrary, Delafield 246 and the IAS court analyzed the question of the binding effect of the Declaration and Agreement in terms of the law governing private covenants. Generally, affirmative covenants will not be binding on subsequent owners unless the following long established conditions have been met. They are: 1) The imposers intention that the covenants run with the land; 2) Privity of estate between the party claiming its benefit and its enforcement; and the party upon whom the burden of the covenant is to be imposed; and 3) That the covenant "touches and concerns" the land with which it runs. (*Neponset Prop. Owners' Assn. v. Emigrant Indust. Sav. Bank*, 278 NY 248)

The common thread which runs through these divergent theories, is "the greater degree the covenant imposes obligations unique to the covenantors, which cannot exist independently of them, the less likely the covenants will be a valid condition of the zoning resolution, or a covenant that touches and concerns the land. Conversely, the greater the effect of the covenant on the land itself, without regard to who owns it, the more likely it will be binding on successor owners."

Since IAS court found that that the intention of the covenants was to preserve and protect the terrain; install certain safety features and create time requirements for their installation; it follows that a mutual benefit was intended. These elements have traditionally been found to be binding on successor owners, and constitute a valid condition on zoning permits.

Finally, the Court noted that the covenants do not impose a "burden in perpetuity," recognizing a concern of the Court of Appeals regarding affirmative covenants. It cited the fact that once the owner fulfilled its obligations under the Declaration and Agreement, the duty is fulfilled. It further noted that the Declaration could be amended or canceled with the approval of CPC and the Bd. of Estimate. The Court concluded that the covenants were binding on Delafield 246.

City of New York v. Delafield 246 Corp'n.
662 NYS2d 286 (A.D.1.D.-1997)

EASEMENT - ACQUISCIENCE AS TO LOCATION

Plaintiff, owner of the dominant tenament, sought judgment declaring an existent driveway over the

servient tenament property of defendant, to be an easement for his benefit. Evidence adduced at the trial indicated that while plaintiff's deed from prior owners does not specifically describe the easement, the record did establish that the portion of defendant's property known as the "main driveway", has been utilized by plaintiff for over 37 years, without objection by the servient tenant, thereby establishing the location of the same. (*Green v. Mann*, 655 NYS2d 627 [AD])

The Court went on to note, that once a grant, or right in the nature or an easement has been established, and the location and definite course is so fixed, it cannot be changed or substituted without the acquiescence or consent of both parties. (cf. *Dowd v. Ahr*, 577 NYS2d 198 [NY])

Citing *Zuckerman v. City of N.Y.* (427 NYS2d 595 [NY]), this Court affirmed the finding of this lower court in favor of the plaintiff, holding that where plaintiff has established that he did not consent to a relocation of the easement; and defendant failed to offer any evidence raising an issue as to this fact; the easement would exist continue and be established in the location of the many years of use.

Lewis v. Young
661 NYS2d 51 (A.D.2.D.-1997).

MORTGAGE FORECLOSURE - FAILURE TO COMPLY WITH CPLR 306-b(a)

In an action to foreclose a mortgage on premises owned by defendant, plaintiff filed the summons and complaint on October 2, 1992, with proof of service filed two weeks later. Defendant-appellant responded to plaintiff's motion for summary judgment, by interposing an answer in which he alleged defective service as an affirmative defense. Eighteen months later, in April, 1944, the lower court determined that service had not been properly made pursuant to CPLR 308(2), and that plaintiff had failed to acquire jurisdiction over defendant.

One month later, plaintiff re-served its summons and complaint upon defendant. Two years later, upon plaintiff's renewed motion for summary judgment, defendant cross-moved to dismiss the complaint, alleging that plaintiff had failed to effect personal service upon him within 120 days of the original October, 1992 service, as required by CPLR 306- b(a); and that the same could not be revived by reserving the summons and complaint in the same action, and under the same index number. The lower court rejected this argument; accepting plaintiff's argument that the commencement of a new action was unnecessary.

Under the new New York commencement-by-filing system, plaintiffs are required to file proof of service with the court clerk within 120 days after the filing of the summons and complain. Failure to make such filing results in an automatic dismissal of the action. (*Srsich v. Newman* 648 NYS2d 132 [AD]). However, a plaintiff is given an additional 120 days to commence a new action on the same action or occurrence pursuant to CPLR 306-b(a).

Although the lower court failed to enter an order dismissing the original action after determining that the defendant had not been properly served with process; it no longer had authority to retain jurisdiction over the defendant. (*Matter of Gershel v. Porr*, 653 NYS2d 82 [AD]) Accordingly, the original action was effectively dismissed as against defendant in April, 1994, and plaintiff could not properly commence a new action without filing a second summons and complaint, and paying for an additional index number. (*Venditti v. Town of Alden*, 659 NYS2d 628 [AD])

The Court noted that although lack of proper service can be waived, such was not the case here. Defendant raised the failure of proper service in his answer to the original complaint; raised the propriety of the re-service under the original index number at the second hearing on proper service; and in the cross-motion to dismiss the complaint. Citing *Hertz v. Schiller*, (657 NYS2d 652 [AD]), this Court concluded that there was no waiver by defendant of the plaintiff's failure to comply with the filing requirements.

Midamerica Fed. Sav. Bank v. Gaom
662 NYS2d 562 (A.D.2.D.-1997)

PURCHASER FOR VALUE - ACTUAL KNOWLEDGE PREVENT STATUS

Defendant's Taormina hold two mortgages on warehouse property in Queens, N.Y., owned by 142-82 Rockaway Blvd. Corp. After defaulting on these mortgage obligations in 1987, Cirami, the sole stockholder of the named corporation, to forstall foreclosure, essentially turned over possession and management of the warehouse to Taormina. In 1990, Cirami commenced action # 1, seeking inter alia, a declaration of the parties' respective interests in the corporation and its assets.

Four months later, Cirami conveyed to Feshold, the corporation's only unencumbered asset, a vacant lot across the street from the warehouse. At this time, she concededly was aware of the aforesaid litigation.

Given Feshold's knowledge of the litigation, the trial court properly authorized the receiver appointed in Action #1, to take possession of all corporate assets, and render an accounting. This action was taken notwithstanding that no lis pendens had been filed until after the conveyance of this unimproved parcel to Feshold. Citing *Da Silva v. Musso* (560 NYS2d 109 [NY]), the Court held that a "purchaser of real property is bound by the consequences of a lawsuit of which he has knowledge". Clearly, since Feshold was not a bona fide purchaser for value, the Court then found that there was no merit to her contention that the parcel conveyed to her, should not be subject to the judgment in action # 1.

As to Action # 2, this Court noted that the lower court should have declared the rights of the parties to this parcel of vacant real property, instead of dismissing the complaint therein as to Feshold, without

declaring such ownership.

Cirami v. Taormina
662 NYS2d 812 (A.D.2.D.-1997)

STATUTE OF FRAUDS - RELIANCE UPON ORAL REPRESENTATIONS

Purchaser brings this action for specific performance and other relief, pertaining to a contract for the purchase of commercial real property. The contract provided for a 60 day due diligence clause during which time plaintiff could terminate the contract without penalty upon notice to DRT Construction, the owner; and further, that any modification of same could be made only in writing. Following several extensions, plaintiff exercised its right to cancel the contract, and DRT subsequently sold to property to entities which are now the other parties to this action.

Plaintiff alleges that subsequent to its termination, of the original contract, DRT made repeated oral assurances to plaintiff that the deal remained in place, and that it would agree to modify the terms of the sale. Plaintiff seeks alternatively, to enforce the original contract; the original contract as orally modified; or the new oral contract. Opposition by DRT and the other parties defendant, was predicated primarily on the operation of the Statute of Frauds.

To avoid the operation of the Statute of Frauds plaintiff must demonstrate that it justifiably relied upon DRT's alleged oral representations that an oral agreement remained in effect. (*Chadirjian v. Kanian*, 506 NYS2d 880 [AD]) The Court found that such reliance would not have been justified in the light of the expressed provision in the agreement that it may not be modified except through a signed writing. (*Bank of N.Y. v. Spring Glen Assocs.*, 635 NYS2d 781 [AD]) DRT's delay in returning the down payment is insufficient to support plaintiff's claim of detrimental reliance. (cf. *Papakostas v. Harkins*, 563 NYS2d 427 [AD]) The Court concluded that "nothing occurred in the situation at issue would render it unconscionable to enforce the Statute of Frauds," against the plaintiff.

F B Transit Rd. Corp. v. DRT Constr. Co., Inc.
661 NYS2d 367 (A.D.4.D.-1997)