March 1996

ADVERSE POSSESSION

Defendant purchased her premises in 1974, and in 1986, plaintiffs purchased their premises (which abutted defendants' land along the defendant's easterly line).

Defendant continuously maintained her premises since that time. In November 1977, defendant began construction of an attached garage intending to follow said easterly property line. It was completed in 1980. A fence had been previously erected along the easterly line in 1970, but was not completed in the was of the garage until 1989. For the entire period of their ownership, defendants have maintained their property up to their easterly line by mowing the grass, and erecting these improvements.

In 1993, plaintiffs commenced this action, alleging that the garage and fence encroach upon their property to the extent of about three feet. After discovery, defendant moved to dismiss the complaint, and for a declaration that she was the owner by adverse possession. Plaintiffs cross-moved to establish their ownership, and to compel defendants to remove the alleged encroachments. Judgment was granted to defendant; and plaintiff appealed.

The Court found that defendant had submitted clear and convincing proof of her entitlement to this strip of property by adverse possession. *Garrett v. Holcomb*, (627 NYS2d 113,114 [A.D.]) The garage was completed in 1980, and her use of the property from that time forward was open, notorious and continuous for the statutory period.

The presumption of hostility raised by these facts was not overcome by plaintiffs. *Sinicdropi v. Town of Indian Lake*, (538 NYS2d 380 [A.D.]) The requirements of RPAPL 522(l) of a substantial enclosure and/or structure, was amply satisfied by the construction of the garage.

As to the easterly portion of the fence, constructed at the rear of the garage, both the elements of Common Law and statutory requirements were sufficient to establish the claim of adverse possession. Although the construction of the latter portion of the fence was not completed until 1989, and is insufficient in time to meet the requirements of the statutory period, the mowing of the yard in the

mistaken belief of ownership meets the statutory requirements of open utilization and maintenance of the promises of RPAPL 522(1). (*Birnbaum v. Brady*, 548 NYS2d 691 [AD].)

Phillips v. Sollami
632 NYS2d 859 (A.D.3.Dep't.-1995)

MECHANIC'S LIEN - OWNER MISIDENTIFICATION

Defendant Lakeville is a subcontractor hired by the general contractor, DM Development Co., to install heating and ventilation equipment in a building being constructed on property owned by defendant, Southampton Medical Properties. Southampton and DM are related entities--the two general partners of Southampton being the principals of DM. Lakeville in turn subcontracted some work to plaintiff.

Upon completion of the work, and non-payment by Lakeville, plaintiff filed a mechanic's lien, identifying the property owner as Old Towne Medical Village. In fact, while the property described in the lien was owned by Old Towne, it was adjacent to property owned by Southampton upon which the work was actually done.

Old Towne and Southampton are else related entities: the two general partners of Southampton are also the principals of Old Towne. Originally, both parcels were commonly owned by still another related entity with the same general partners as Southampton.

Plaintiff commenced a mechanic's lien foreclosure naming Lakeville, the general contractor; and Old Towne, as the property owner. Later, plaintiffs sought to amend the mechanic's lien as to the name of the true owner, and to accurately describe the liened property when they learned of their error. They also sought to amend their complaint by nursing the true parties in interest: Southampton (owner); and DM (developer).

The lower Court denied plaintiffs motion to amend the lien; dismissed the cause of action to foreclose the same and granted it permission to add the additional parties and a new cause of action against Old Towne pursuant to Lien Law, Article 3-A. This appeal followed.

Citing *Contelma's Sand & Gravel Co. v. J & J Milano* (467 NYS2d 55 [AD]), the Court held that "while a failure to state the line owner or contractor or a "misdescription" of the true owner will not affect the validity of a notice of lien (Lien Law Sm. 9[71), a "misidentification" of the true owner is ajurisdictional defect which cannot be cured by an amendment nunc pro tunc. Here the Court found the error to be a "misidentification," and therefore the lien was jurisdictionally defective, and incapable of amendment.

While the appellate court agreed with the Iower Court's refusal to amend the mechanic's lien and the pleadings the addition of the requested parties was appropriate. It dismissed the action against Old Towne since it was not the owner of the premises.

Tri-State Sol-Aire Corp. v. Lakeville Place Mechanical Inc.
633 NYS2d 834 (A.D.2.D.-1995).

[**Note:** The apparent basis for the distinction made by the Court in this case appears to rest upon the fact that the property described was incorrect, in addition to the misnaming of the owner.]

MECHANIC'S LIEN - APPORTIONMENT OF PAYMENT

Plaintiff entered into a contract with defendant to repair certain fire damage to defendant's premises, which contract provided for a "contract sum" of $29,000.00. One paragraph in the contract indicated that $9,000.00 was due from defendant and the balance from defendant's fire insurance carrier. Defendant paid $3,000.00 on account. Plaintiff filed a mechanic's lien and later a foreclosure action when the balance due was not forthcoming./

The lower court, after a non-jury trial, interpreted this connect as a limitation of defendant's liability to $6,000.00 and granted plaintiff judgment for that sum. It also dismissed plaintiffs action for the foreclosure. This appeal followed.

Although Lien Law, See. 4 provides that an owner cannot be compelled to pay more than contracted for (Hownor Assocs. v. Washington Square Prof. Bldg., 402 NYS2d 582 [A.D.]), the Court questioned the contractual apportioning of the liability as between the defendant and the insurance carrier. [**Note:** Them was no contractual relationship between plaintiff and the carrier.]

Citing *Wahle, Phillips Co. v. Fifty-Ninth St. Madison Ave. Co.*, 138 NYS2d 13, aff. 214 NY 684 (involving Landlord & Tenant), the Court held that such a prevision does not reduce defendant's liability to plaintiff. Rather, it is an attempt to apportion liability between the defendant and mother. Accordingly, the Court found that the contract was fully and satisfactorily performed and that defendant had consented to the improvement. The lower Court rulings were modified, and judgment of foreclosure was granted for the full unpaid meant.

Larry Alvaro, Inc. v. Chow
633 NYS2d 643 (A.D.3.D.-1995)

MORTGAGE FORECLOSURE - ACTION ON NOTE

Plaintiff brought action to foreclose its mortgage. After entry of judgment of foreclosure and sale, an in Rem tax foreclosure judgment was entered against the premises, and a tax deed given, by reason of a real property tax delinquency.

On this ground, defendant moved to dismiss plaintiffs complaint; and plaintiff cross-moved to amend its complaint to convert its judgment of foreclosure into a money judgment against defendant. This appeal followed the lower court's granting to plaintiff the relief sought.

Since the foreclosure action was rendered moot and the security of the mortgage was destroyed by reason of the tax foreclosure and deed, the only recourse open to plaintiff was to bring an action in law to recover on this note. Citing Bond v. Jarvis (426 NYS2d 142), this Court held that it was an error to "convert" the original mortgage foreclosure judgment into a judgment against defendants. A de novo action was required to obtain the relief sought..

European American Bank v. Perspective Development Corporation
633 NYS2d 341 (A.D.2 Dep't.-1995)

MORTGAGE FORECLOSURE - FRAUDULENT INDUCEMENT

Plaintiff sold a parcel of land to defendant St. James, secured in part by a purchase money mortgage and note. Upon defendant's alleged default, plaintiff commenced this foreclosure action. Plaintiff alleged, inter alia, by way of a counterclaim, that it was fraudulently induced to enter into the note and mortgage. Plaintiff moved for summary judgment; defendant cross-moved to rescind the note and mortgage; or to reform the contract.

The basis of defendant's fraud claims is that plaintiff induced defendant to enter into the note and mortgage on the basis of assurances that the necessary approvals from the Department of City Planning could be obtained within a few month period.

Citing *Brown v. Lockwood* (432 NYS2d 186 [AD]), the Court enumerated the eight (8) elements required to support a cause of action for fraud, as follows: (a) A representation had been made (b) As to a material fact; (c) That it was false; (d) Known by its maker to have been false; (e) That it was made with the intent that it be relied upon; (f) That it was relied upon; (g) That the reliant was ignorant of its falsity; and (h) That by such reliance, a party was injured.

Absent an intent to deceive, mere unfulfilled promissory statements as to what will be done in the future, are not actionable as fraud. (*P. Chimento Co. v. Banco Popular de Puerto Rico*, 617 NYS2d 157 [AD]) Therefore, a cause of action based upon a statement of future intention must allege facts to show that defendant, at the time they were made, never intended to honor or act upon his statements. (*Lanzi v. Brooks*, 388 NYS2d 946, affd. 402 NY2d384)

Holding for plaintiff, and granting the foreclosure, the Court found that defendant failed to offer my proof that plaintiff knew that its representations were false.

Crafton Building Corp. v. St. James Construction Corp.

633 NYS2d 795 (A.D.2.Dep't.-1995)