Did You Know?

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ADVERSE POSSESSION

In 1946, plaintiffs acquired 90 acres of property in Rensselaer County. The subject of this action is 56 acres. In 1964, plaintiffs commenced living in a 4.5-acre portion which included a one family residence and a garage/shed. A tax deed, issued to defendants in 1964, was lost, and a replacement tax deed was obtained in 1973.

Plaintiffs never vacated this house, never paid any rent on it, never conceded the validity of defendants' tax title and never acceded to defendant's demands that they vacate the premises. A series of legal skirmishes between the parties which took place over a period of years were not completed or settled. The proceedings were either withdrawn or abandoned.

All taxes due during this period of time were paid by defendants. Thereafter, plaintiffs brought this action to quiet title based upon their adverse possession. It is undisputed that defendants are the record owners, Cross appeals ensued from a lower court finding in favor of plaintiffs as to the 4.5-acre parcel and in favor of defendants as to the remainder of the 56 acre parcel. As to the 4.5 acre improved premises, adverse possession must be based upon possession that is hostile and under claim of right, actual, open and notorious, exclusive and continuous for ten years. (*Levy v. Kurpil*, 535 NYS2d 556, lv.den. 77 NY2d 808). Finding for plaintiffs, this Court held defendants' subjective belief that plaintiffs were residing in the premises with permission to be insufficient to defeat the required element of hostility, given plaintiffs' consistent and unambiguous claim of ownership. (cf. *Cong. Yetev Lev D'Satmar, v. 26 Addax N.B. Corp.*, 596 NYS2d 435 [AD]) Additionally, plaintiffs made various improvements to the premises including installation of an above ground pool; building a driveway; maintaining gardens; moving trees; and cultivating a lawn. Title to this parcel was found in plaintiffs.

As to the balance of the 56 acres, the Court rejected the plaintiffs' claim of title by adverse possession (statutory) based upon the written instrument (deed) of 1946. Citing *Goff v. Shultis* (309 NYS2d 329 [NY]), this Court found that plaintiffs did not possess at least the "arguably good" or "colorable" title pursuant to a written instrument required by RPAPL 511-12.

Since plaintiffs failed to fully challenge defendants' tax title within two years of the tax sale, such deed became presumptive evidence of their record title, and plaintiffs lost all ability to contest the validity of the same. Accordingly, plaintiffs are foreclosed from invoking RPAPL 511 and 512 to benefit from the constructive possession provisions contained therein. Title to this parcel was adjudicated in defendants.

McGuirk v. Feffan
635 NYS2d 794 (A.D.3rd.Dept-1995)

CONVEYANCE TO SPOUSE - IN FRAUD OF CREDITORS

In action by creditors to set aside a conveyance to a spouse as a fraud against them, a lower court dismissed the complaint.

Plaintiff had made a $20,000 loan to Berge for business purposes in August, 1991. In October, 1991, title was taken by Berge and his wife Sonya Gregian to a house for a consideration of $160,000. By deed dated and recorded a week later, Berge conveyed his interest in said house to Sonya. The transfer tax stamp on said latter deed recited no consideration.

In the interval between the acknowledgment and recording of this latter deed, plaintiff made a business loan to Berge of $40,000. The State of New York filed a tax warrant against Berge in February, 1993, for a period ending November, 1990.

In addition, a money judgment of over $400,000 was entered against Berge in June, 1993, arising out of a loan made to him in November, 1990, and Berge and Sonya entered into a separation agreement in February, 1994, which recited a Federal IRS audit of Berge for the years 1988 through 1991.

Reversing the lower court, this Court held that there were issues of fact as to whether at the time of the transfer, Berge was or would be thereby rendered insolvent (Debtor & Creditor Law, Secs. 271, 273, 274, 276), and whether Berge made this conveyance with the intent "to hinder, delay, or defraud either present or future creditors." (*Matter of AMEV Capital Corp. v. Kirk*, 580 NYS2d 422 app. dism. 80 NY2d 825). Citing *Berkowitz v. Berkowitz*, the Court noted that it was immaterial that a prior obligation had not matured, or even existed at the time of the transfer, and further, that it was not necessary that the grantee or transferee be a party to the underlying debt (*Goldstein v. Wagner*, 240 NYS2d 636 [AD].

The Court concluded that it was the purpose of the Statute to permit a plaintiff to establish his debt, whether matured or not, and to challenge the conveyance in the "compass of a single suit."

Kendzia v. Gregian
635 NYS2d 886 (A.D.4th Dep't-1995)

EASEMENT (IMPLIED) - CREATION & TERMINATION

In 1969, plaintiff purchased Lots 3, 4, 5, as shown on Map of Property of J.E. Gray, on the northerly side of Stewart Avenue. Between 1975 and 1982, defendants purchased Lots 6, 7, 8, 9 and 16 on the southerly side of Stewart Avenue and lot 2 on the northerly side. Stewart Avenue provides access between County Road 141 and White Lake.

In or about 1987, defendants erected a fence around the perimeter of their property which included a padlocked gate at the end of Stewart Avenue, blocking entrance to Stewart Avenue from the public highway.

In 1992, plaintiff commenced this action to permanently enjoin defendants from interfering with its right of access to Stewart Avenue, and compelling defendants to remove the fence insofar as it interfered with its access,

In 1993, defendants recorded a deed which purported to convey to them title to Stewart Avenue as shown on said subdivision map. Defendants appealed a lower court decision in favor of plaintiff, based upon its having an implied easement by grant over Stewart Avenue.

Whether an easement by implication has been created depends upon the intention of the parties at the time of the original conveyance, with the most important indicators of the grantor's intention being the appearance of the subdivision map and the language of the original deed" (*Clegg v. Grasso*, 588 NYS2d 948 [AD]).

Since the intention of the parties is determined in the light of the surrounding circumstances, whether or not a map is filed, and by whom, is merely one of the factors to be considered. (*DeRuscio v. Jackson*, 565 NYS2d 593 (AD]).

The Court concluded that in light of the deed language and the fact that the map was ultimately filed, plaintiff had an implied easement by grant (*Fiebelkorn v. Rogacki*, 111 NYS2d 898, aff'd. 305 NY 725).

As to defendants' claim that plaintiff abandoned its easement, the Court held that it was "well settled" that an easement created by grant may be terminated only by "unequivocal" acts by which the owner of the easement intended to "permanently relinquish all rights to the easement." (*Consolidated Rail Corp. v. MASP Equip. Corp.*, 499 NYS2d 647 [NY]).

It further held that defendants' reliance upon adverse possession failed because this action was commenced well within the ten-year period running from the date of the erection of the fence.

B.J. 96 Corp. v. Mester

634 NYS2d 843 (A.D, 3rd Dep't,-1995)

MARKETABILITY OF TITLE - ENVIRONMENTAL CLEAN-UP

In 1986, defendants entered into a contract for the purchase of premises upon which plaintiff had been operating a motor vehicle repair and tire sales business. Defendants took immediate possession of the same and continued to operate a similar type of business.

The contract provided that defendants make specified monthly payments, and upon payment in this fashion of the aggregate sum of $150,000.00, defendants were to execute and deliver to plaintiff a purchase money mortgage for the balance of the purchase price, at which time plaintiff was to convey title by full covenant and warranty deed.

In 1993, while attempting to obtain financing for this purchase, defendants learned that an underground oil storage tank, as well as a dry well designed to catch the runoff from several floor drains in the shop bays, constituted potential environmental hazards which might require remediation before the financing could be obtained.

When plaintiff rejected defendants' request that they share in the cleanup activities (having by that time paid $123,620 of the purchase price), defendants stopped making monthly payments, prompting plaintiff to commence this foreclosure action.

Defendants counterclaimed for rescission, and the return of the down payment monies. The lower court granted plaintiffs summary judgment and denied defendants' counterclaim that plaintiff was unable to deliver marketable title. This appeal ensued.

Affirming the lower court, this Court held that the presence on the property of possible sources of underground discharge of petroleum products, and the cost of cleanup of which may be imposed upon any owner of the premises, does not render the title worthless and hence unmarketable. (*Voorheesville Rod & Gun Club v.Tompkins Co.*, 606 NYS2d 132 [NY]).

Rather, the Court said, it is concerned with one's right to "unencumbered ownership and possession" of property, not its value. This Court also rejected defendants' additional contention of mistake and fraudulent misrepresentation on the basis that under the circumstances of the purchase they must have known of the condition of the premises.

Vandervort v. Higgenbotham
634 NYS2d 800 (A.D.3rd Dep't-1995)