Did You Know?

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BROKERAGE COMMISSION - TERMS OF EXCLUSIVITY

Plaintiff (broker) entered into a series of listing agreements with defendant (developer) granting her exclusive right to sell building lots in defendant's development, from July 15, 1992 to July 15, 1993. Plaintiff procured three buyers, each of whom agreed with defendant that they would pay $5,000 to take a specific lot off of the market for their subsequent purchase in 1994; that they would execute a construction contract with defendant by 7-12-1994, with construction to begin no later than 10-1-1994. Although the said buyers thereafter fulfilled all their obligations under their various agreements, defendant refused to pay plaintiff commissions for these sales.

The brokerage agreement provided for the payment of a commission, if, during the period of this agreement, or any extension thereof, "a transaction of sale or exchange of the property is made affected or agreed upon with anyone." Further, the commission was to be paid if during the period contemplated by the agreement, a purchaser was procured "at a sales price and terms acceptable to the OWNER or during this period, the OWNER himself sells or agrees to sell the property." The evidenced adduced revealed that each of the buyers executed a memo of agreement in October, 1992 (prior to the termination date of the listing agreement), whereby they agreed in conformance with defendant's memo of agreement, that he and only he could construct a house for the buyers.

The Court rejected defendant's contention that no commission was earned because the buyers were not "ready, willing and able" to execute the combination purchase and construction agreement in October, 1992. Defendant expressly agreed to take these lots off the market and permitted the buyers to make their purchase at a later date. Citing *Boyer Realty v. Perry* (617 NYS2nd 393), this Court stated that it did not find anything in the listing agreement that made plaintiff's entitlement to a commission subject to the execution of a sales or construction contract in October, 1992, or any time prior to the expiration of the listing agreement.

Balfour v. Passarelli
665 NYS2nd 749 (A.D.3.D.-1997)

COLLATERAL ESTOPPEL - BOUNDARY DISPUTE

The dispute between the parties derives from 1853, when a partition action was commenced to clarify a 1796 division of a tract into Great Lots. As part of that action, a surveyor prepared a map which identified a lot numbering system which became known as the “Fish Map”; which was adopted by the partition court. This map formed the basis for the descriptions of parcels which were sold at auction in 1869. As part of this partition, some 32 acres were excepted from Great Lot 28; and 18 acres from adjacent Great Lot 29; which excepted parcels when taken together, constituted a rectangular parcel of some 50 acres (the “Satterlee Lot”); and resulted in the line between Great Lots 28 and 29.

As the result of another survey made in 1949, defendant unilaterally changed the original partition numbering system; and placed the original boundary for lots 28 and 29, well west of and outside of the Satterlee Lot, thereby encroaching upon Great Lot 28. On this basis, in 1959, defendant claimed a portion of Great Lot 28 which was located north of County Road 11. In an Article 15 action then commenced by Lucille Leisure relating to these lands, defendant claimed that the Satterlee Lot was actually derived from Great Lots 29 and 30; and that earlier references as to the Satterlee Lot being composed of Great Lots 28 and 29, were an error which had been perpetuated over time. At that time, the Court sustain the proposition that the original division line between Lots 28 and 29, passed through the Satterlee Lot; and ruled against the defendant. Defendant never appealed from this ruling. When in 1995, defendant asserted its claim to certain lands in Great Lot 28, lying south of the County Road, they took the same position as they had taken in the Leisure action, when they asserted that it was the division line between Lots 29 and 30 which ran through the Satterlee Lot. Plaintiff, commenced the within Bar Claim Action, alleging that the Leisure action barred defendant’s claim as to lands lying south of the County Road.

This Court sustained the lower court’s application of the Doctrine of Collateral Estoppel, to preclude defendant from attempting to re-litigate the location of the boundary line between Great Lots 28 and 29. In order to invoke this doctrine, there must be “’… an identity of issue which has necessarily been decided in the prior action, and …is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling.’” (*Shanley v. Callanan Indus.*, 54 NY2nd 52, 55, 444 NYS2d 585) As plaintiff is seeking the benefit of this doctrine, she has the burden of establishing the identification of issue, while defendant has the burden of establishing the absence of a full and fair opportunity to litigate the issue. (cf. *Kaufman v. Lilly & Co.*, 65 NY2nd 449, 456, 492 NYS2nd 584)

Here, as in the Leisure action, the dispute involved the location of Lots 28 and 29; and that court squarely rejected the same factual contention now again advocated by defendant, ie. That the boundary line was somewhere other than within the Satterlee Lot. The fact that in the earlier action the lands involved were on the north side of the County Road; and now are on the other side of the road, is of no moment. Clearly, the defendant in the earlier case had the full opportunity to present its arguments, and the

opportunity to appeal the determination therein, although it did not choose to do so. Judgment for the plaintiff was affirmed.

Clute v. State of New York
664 NYS2d (A.D.3.D.-1997)

COVENANT ENFORCEMENT - POSSESSOR OF LAKE PRIVILEGES

Plaintiff claims that a primary element determining his purchase of a two acre lot near Tillson Lake, was its proximity to the lake. A 35 acre tract owned by defendants Unanue on the west side of the lake, was acquired from Tillson, who in turn acquired this parcel six years earlier from one Porco. This Porco-to-Tillson deed, contained the following covenants and agreements between the parties: "Tillson Lake shall be forever maintained and kept full of water at the present water level" and if the dam controlling the water level of the lake "shall become damaged or destroyed from any cause whatsoever, or shall be in need of repairs, it shall be repaired or rebuilt promptly so as to restore and preserve the present level of the lake." This covenant was said to run with the land, "upon which the dam was located and that part of the land adjacent to said dam."

To comply with the Dept. of Environmental Conservation directive to repair the dam, Unanue drained the lake entirely, in 1983. Several times over the course of the next six years, they had to repeat this process because of third party vandalism. Plaintiff commenced this action in 1989, and refiled a second amended complaint in 1995, for damages; and for an order, requiring Unanue to maintain the waters of the lake at the 1969 level.

This Court affirmed the lower court's dismissal of the complaint, on the ground that the covenant upon which this action is premised, does not affect or benefit plaintiff's chain of title. The plaintiff's chain of title is silent with respect to the provisions in the covenant regarding dam maintenance and lake level. Further, plaintiff has failed to show any factual or legal basis for his claim that his parcel was benefited by said covenant. (*Eagle Enters. v. Gross*, 39 NY2nd 505, 507,508; 349 NYS2nd 717)

Additionally, defendants Unanue provided unrebutted evidence that no portion of the land adjacent to said dam as described in said covenant, came anywhere near plaintiff's parcel, and, therefore, the covenant does not run with the land. Citing *Lake Claire Homeowners Assn. v. Rosenberg* (626 NYS2nd 540, lv. dism, 86 NY2nd 838), this Court held that while "plaintiff may have lake privileges, a right not specifically provided in his deed, does not give him the right to enforce this covenant. It therefor sustained the dismissal of plaintiff's complaint, and concluded that the subject covenant relating to level of the lake waters was not intended to benefit plaintiff.

Guglielmo v. Unanue
664 NYS2nd 662 (A.D.3.D.-1997)

HAZARDOUS WASTE SITES - STATUTE OF LIMITATION

Land filling and other waste disposal occurred from 1958 until 1974 at the “Tantalo Site” owned by plaintiff, Seneca Meadows, Inc (SMI) since 1968; adjacent to other lands acquired by Macedon Homes, Inc (MHI) and SMI in 1994 and 1995, respectively. In 1980, the N.Y. Dept. of Environmental Conservation DEC), listed this site on its registry of “Inactive Hazardous Waste Disposal Sites.” SMI entered into a Consent Order in August, 1992 with DEC to investigate the site contamination, and develop remedial alternatives.

This action was brought in August, 1995 by plaintiffs, SMI and MHI, against the principal generators of Hazardous Wastes pursuant to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Declaratory Judgment Act; and the New York common law theories of negligence, private and public nuisances, strict liability and trespass. Defendants moved for summary judgment on plaintiffs’ common law claims, alleging that plaintiff SMI was barred by the applicable three year statute of limitations, from the date that SMI discovered or with reasonable diligence should have discovered the injury to the Tantalo Site; and similarly, as to both plaintiffs, as to the adjacent parcels. [CPLR 214-c(2) pertains to actions to recover damages for injury to property caused by latent effects of exposure to any substance or combinations of substances.]

Plaintiffs argue that CERCLA [USC Sec. 9658] delays the running of the statute of limitations not only as to its discovery, but also its cause. This section states that the statute of limitations should run from the discovery of “the hazardous substance or pollutant or contaminant concerned. [See Note A following, as to constitutionality of Sec. 9658.]

Citing *Reichhold Chemicals, Inc. v. Textron, Inc.*, (888 Fed.Supp. 1116, 1126 [N.D.Fla.]), this Court determined that it is not necessary for a plaintiff to know the identity of each defendant’s specific contaminants before the statute of limitation begins to run. It is only necessary for plaintiff to know “the fact of the contamination.” Neither is it necessary that actual knowledge of each specific hazardous substance, pollutant or contaminant, is necessary to trigger the accrual of the cause of action. (*Presque Isle Harbor Dev. Co. v. Dow Chem. Co.*, 875 Fed.Supp. 1312, 1319, n. 11 [W.D.Mich.]) Accordingly, SMI’s claims were barred as to their N.Y. common law claims regarding the land fill site.

As to the defendants’ motions regarding the adjacent properties, this Court noted that defendants failed to cite any authority for their position that plaintiffs were barred because they bought such properties with knowledge of the site contamination, and that same had or would soon migrate to these adjacent properties. This Court held that while such knowledge might be factor to be taken into consideration by a jury, it refused to find that such knowledge would constitute “an absolute bar” to plaintiffs recovery, on their common law claims, as a matter of law.

Seneca Meadows, Inc. v. ECI Liquidating, Inc.
983 Fed.Supp. 360 (U.S.D.C., W.D.N.Y.-1997)

Note A: In *ABB Indus. Sys., Inc. v. Prime Tech., Inc.* 120 Fed.3 351, 360, n.5 (2d.Cir.-1997), that circuit court noted that as Sec. 9658 "appears to purport to change state law, it is therefore of questionable constitutionality."

Note B: In any event, this action was found to be barred as to the site itself, by plaintiff SMI'S knowledge.

MORTGAGE FORECLOSURE - ATTORNMENT FOR PRE-PAID RENT

In November, 1982, non-party tenant European American Bank (EAB) entered into a lease agreement with Montaco Realty which provided for a ten year lease, terminating on May 31, 1987. Prior to April, 1987, Montaco sold the premises to defendant, Montague Street Realty, who made a mortgage to plaintiff. This mortgage expressly prohibited defendant from accepting prepayments of installments of rent to become due, without the plaintiff's written consent. The mortgage also provided that each new lease was subject and subordinate to that mortgage.

In October, 1992, EAB executed an "Amendment to Lease" with defendant, which, inter alia, extended the lease for five additional years to May, 1998; and which required EAB to prepay rent in the amount of $160,000, for the period from June 1, 1993 to May 31, 1994; and otherwise expressly incorporated by reference the terms of the 1982 lease agreement. Paragraph 7 of the 1982 lease provided that it would be subject and subordinate to all mortgages which "may now or hereafter" encumber the property. When EAB refused the Receiver's demand to pay to him the $160,000 of rents which it prepaid, this proceeding followed.

As a general rule, the exercise of an option to renew a lease, does not create a new lease. It does prolong the original lease for the further period. Such an exercise of an option creates a unitary lease for the extended period. (*Masset v. Ruh*, 235 NY 462, 464) The parties hold not under a contract of renewal, but rather by virtue of the original lease, pursuant to the option to renew granted by the Landlord. (*Gulf Oil Corp. v. Buram*, 11 NY2nd 223, 236; 228 NYS2nd 225)

However, where the parties, in the absence of an option to renew contained in thee original lease, enter into a lease extension agreement, which includes new provisions not present in the original lease, such was deemed by the Court to be a new lease agreement, and not a continuation of the old lease. Citing *Bank of Manhattan Trust Co. v. 571 Park Ave.* (263 NY 57, 62), this Court held that as plaintiff's mortgage cannot be impaired by a post-dated agreement, any rights that the tenant acquired under the extension agreement, were subordinate to the mortgage which the successor landlord had signed after the original lease, but prior to the extension agreement.

Accordingly, plaintiff did not have to provide EAB with written notice of the restriction in the mortgage limiting defendant- borrower's ability to accept prepayment of rent despite the statute (RPL 291-f) obligating mortgagor to provide such notice to tenant under the existing lease agreement, since the tenant occupied the premises not under the original tenancy agreement; but under the renewal agreement executed after the mortgage went into effect. EAB, the non-party defendant was ordered; to attorn for the prepaid rents.

Dime Savings Bank of N.Y. v. Montague St. Realty Assocs.
664 NYS2nd 246 (Ct. of Appeals-1997)