Did You Know?

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ADVERSE POSSESSION - AGREEMENT NEGATING "HOSTILITY"

This dispute involved a strip of land, 10' x 40', adjoining premises acquired by plaintiff (on its westerly border). Defendant, is the record holder of legal title to this entire parcel, having acquired same in 1984. The Court noted that defendant and its predecessor in title, are presumed to have been possession of the disputed strip. Accordingly, plaintiff's occupancy was found to be "subordinate, not hostile to [defendant's] legal title." (*City of Tonawanda v. Ellicott Cr. Homeowners Ass'n.*, 449 NYS2d 116 [AD], app. dism. 58 NY2d 824)

The 1982 Agreement entered into by plaintiff with the State of New York to acquire the premises, and their permissive use of same thereafter, constituted tacit acknowledgement that actual ownership rested in others. Citing *Van Gorder v. Masterplanned, Inc*. (578 NYS2d 126 [NY]), this Court held that this Agreement negated an essential element of plaintiff's adverse possession claim.

Guariglia v. Blima Homes, Inc.
652 NYS2d 731 (Ct.App.-1996)

Note: Importantly, this Court noted in its decision, that the fatal effect of the Agreement could have been overcome, if plaintiff had submitted proof in admissible form, that their predecessors in title, had adversely possessed this disputed strip for the statutory period prior to the Agreement. (Di Leo v. Pecksto Holding Corp. 304 NY 505, 514)

ADVERSE POSSESSION - UNDER COLOR OF TAX DEED

In this action, plaintiff claims title by adverse possession, to a 16 acre tract. Resolving this issue, the Court treated this tract into a northerly and a southerly portion, and resolved the dispute as set forth below.

The tax deed which is the basis of plaintiff's claim of title by adverse possession under a written instrument, is admittedly sparse, and leaves much to be desired. ["16 acres-Gypsy Trail. Bounded N. and E. Trail; S. Ryder"] However, given the application of extrinsic proof adduced by plaintiff's experts, its location and boundaries established with enough certainty to support their claim. (*Town of Brookhave v. Dino*s, 431 NYS2d 567 [AD]; aff'd. 54 NY2d 911) Accordingly, summary judgment should not have been granted to defendant as to the northerly portion. *Goff v. Shulti*s, (26 NY2d 246, 247-248).

As to the denial of defendant's motion for summary judgment as to the southern portion, the trial court's decision was affirmed. In the many years of examining upstate titles, this author is quite familiar with the problem of erroneous descriptions in deeds generally; and in tax deeds in particular. In the process of placement of properties, one must quite often deal with inconsistent "callings" as to abutting owners and/or roads. It therefor, not at all unusual for experts interpreting these deeds, to disregard inconsistent "callings. Clearly, issues of act remain regarding the southerly portion of the tract; and summary judgment was properly denied by the trial court as to this portion.

Whipple v. Trail Properties, Inc.
652 NYS2d 657 (A.D.3.D.-1997)

BANKRUPTCY - REORGANIZATION - EQUITABLE SUBORDINATION

Banque Nationale de Paris ("BNP") extended consolidated loans to the Debtor, which were guaranteed by the Debtor's general partners. In 1993 BNP commenced a foreclosure action; in March, 1994, it sought and in October, obtained a partial summary judgment against the Debtor and the guarantors for over $40 million.

At this point the parties entered into a series of negotiations, the thrust of which was for the Debtor and guarantors to transfer title to the premises to BNP; pay a certain sum of money to BNP; and BNP was to release the Debtor and the Guarantors from their obligations to BNP. BNP asserts that no agreement was ever executed, finalized, fully documented, or approved by its senior management. Ultimately, BNP decided not to consent to the agreement.

Debtor filed a petition of bankruptcy in April, 1996, just ahead of the foreclosure sale;and in May filed an adversary proceeding against BNP, asserting a claim for equitable subrogation. In September, in the adversary proceeding, the Bankruptcy Court granted BNP's motion to lift the automatic stay; but noted that no finding made in the adversary proceeding trial, should be binding beyond the lifting of the stay.

Analyzing the evidence before it, this Court found the parties did not intend to be bound by the draft settlement proposals. As to whether the Debtor could reorganize, this Court held that the Debtor could reorganize only if it won its adversary proceeding and was able to equitably subordinate or reduce BNP's claims. In this regard, the Court found that even if some of Debtor's debt was subordinated or reduced,

its debt would still exceed its equity in the property. Affirming the Bankruptcy's Court lifting of the stay, this Court concluded that a stay of the order lifting the automatic stay has been granted only when the Debtor has demonstrated a strong likelihood of success on the appeal.

Citing Code Sec. 362(d)(2), this Court held that the stay can be lifted only if the debtor does not have an equity in such property;" and "such property is necessary to an effective reorganization. (cf. In re 160 Bleecker Street Assocs., 156 B.R.405, 410 (S.D.N.Y.) [Also see termination for cause. Code Sec. 362(d)(1)] Since Debtor did not meet these tests, the Bankruptcy Court correctly lifted the automatic stay. The Supreme Court held that if a debtor cannot show that reorganization is possible, then that debtor cannot show that it is necessary for an effective reorganization. (cf. *United States Savings Assoc*., 108 S.Ct. 633-634). Accordingly, the stay can be lifted if the debtor does not meet that test.

Debtor's basis for the imposition of equitable subordination, is based upon its contention, that BNP engaged in inequitable conduct during the course of the negotiations. To prove that BNP breached its contractual obligation of fair dealing, Debtor must first prove that a legally enforceable obligation existed. To avoid the general rule that negotiations do not create binding obligations, Debtor must show that the parties have agreed on all the essential terms, subject only to the formality of reducing it to writing; or that the parties have settled on certain important issues, and that they bind themselves to negotiate in good faith and work out the remaining terms. (cf. Shann v. Dunk, 84 F.3d 73, 77) Affirming the Bankruptcy Court finding that no binding contract existed, this Court noted that the agreement was conditioned upon approval by BNP's senior officials. This and other items in the negotiation correspondence demonstrated that the parties did not intend to be bound by the settlement negotiations.

In Re 1567 Broadway Ownership Associates, Debtor
202 B.R. 549 (U.S.D.C.-S.D.N.Y.-1996)

CONSTRUCTIVE NOTICE - ERRONEOUS INDEXING

Both parties claim a first lien on certain premises situate in Schenectady County. Defendant, as assignee of a mortgage recorded in 1973; and plaintiff, by virtue of a mortgage in its favor recorded in 1991. It is undisputed that at the time plaintiff's mortgage was recorded, an erroneous notation existed on a copy of defendant's mortgage, duly on record in the County Clerk's Office, indicating that defendant's mortgage had been "Discharged; and referring to the precise book and page of the document which purported to discharge that mortgage. The abstractor did not examine the discharge instrument (which would have indicated that it had nothing to do with plaintiff's mortgage). Instead, and notwithstanding that a complete examination of relevant documents in the County Clerk's Office would have revealed that defendant's mortgage was open of record, the abstractor relied upon the said erroneous notation.

This Court affirmed the trial court's refusal to give consideration to the title insurance examining standards in Schenectady County. It held, that while such a consideration might have a bearing on either the County Clerk's or abstractor's liability; it had no bearing on the dispositive issue of whether at the

time its mortgage was recorded, plaintiff had constructive notice of defendant's undischarged mortgage. Citing *F.N.M.A. v. Levine-Rodriguez* (579 NYS2d 975), this Court concluded, that based upon a full examination of the relevant documents recorded in the County Clerk's Office, which showed that defendant's mortgage was not discharged, plaintiff was provided with adequate notice of an open lien.

First National Bank of Scotia v. Ricco
652 NYS2d 908 (A.D.3.D.-1997)

Note: In my thirty odd years in the title insurance field, I have observed that not once in a hundred times have examiners pull and examine mortgage satisfactions. A practice that is unlikely to change. Nonetheless, this case is most assuredly, correctly decided.

EASEMENT - ADVERSE POSSESSION; RELOCATION

Plaintiffs reached the premises owned by means of a roadway passing over the land of defendant, Whitton, since they had no other means of overland access. After a dispute arose, defendant, Whitton, attempted to redirect traffic crossing his land, by erecting poles and a gate, forcing these vehicles further to the west that they had previously traveled; onto a twelve foot wide passageway and along the edge of a swamp. Plaintiffs brought this action seeking, inter alia, a declaration that they had obtained an easement to use the former roadway by grant, necessity, and/or prescription; and for an injunction barring Whitton from blocking that route.

The plaintiffs used the former roadway across Whitton's land "continuously, openly, and under claim of right," for more than the statutory time period. This in turn, gave rise to a presumption that such use has been "hostile." (cf. *Miller v. Ra*u, 597 NYS2d 532 [AD]) Whitton contends that he, as owner, is free to designate the particular path to be used for that purpose. Citing *Evangelical Lutheran St. John's Orphan Home v. Buffalo Hydraulic Ass'n*., (64 NY2d 561, 564), the Court rejected this argument, and held that where the easement is definitely located by grant or use, it cannot be unilaterally changed.

Clayton v. Whitton
650 NYS2d 404 (A.D.3.D.-1996)

MORTGAGES - ACCOUNTING FOR NET PROFITS

Provision in mortgage provided for an accounting and disbursement of net profits after the sale of all condominium units. A further provision set forth that the lien on the additional satisfaction compensation would expire seven years after the satisfaction of the underlying mortgage. On the issue raised, this Court determined that there was a distinction between a debt, and the security for that debt. (607 NYS2d 293 [AD]); and that nothing in these provisions should be construed as a condition limiting plaintiff's right to

share in the defendant's profits. [This Court also affirmed its own holding in a prior appeal in this case, that he foregoing provision should be read not as a condition precedent; but rather as a mere identification of the event when such monies would become due.]

Long Island Savings Bank v. Gelodal/Briarwood Corp.
652 NYS2d 611 (A.D.1.D.-1997)

RECEIVERS - POWERS - DUTIES & LIABILITIES

A. Unauthorized Disbursements: In this mortgage foreclosure action, issues arose in connection with the Referee's disbursement of certain funds without first securing the authority of the court. This Court set forth as basic law, the fact that a receiver's acts, as the "hand" of the court, with only those powers granted in the order of appointment; and may perform only those acts therein expressly authorized. (*Security Pac. Mtge. Real Estate Services v. Republic Philippine*s, 962 F2d 204, 211)

However, the Court noted that even this absence of its initial judicial approval, did not preclude the trial court in the exercise of its discretion from approving certain of these unauthorized expenses, ie. the employment of, and expenditures for an agent who had been employed by defendant in that capacity. (cf. *Litho Fund Equities v. Alley Spring Apts. Corp*., 462 NYS2d 907 [AD]) Citing *Holmes v. Gravenhors*t (263 NY 148, 152), this Court found that since these payments inured to the defendant's benefit; and were in accordance with the general functions of a receiver, it approved of the trial court's exercise of discretion in post approving these expenditures.

Constellation Bank, NA v. Binghamton Plaza, Inc.
653 NYS2d 208 (A.D.3.D.-1997)

B. Liability for Negligence: The trial court properly granted plaintiffs motion in the within foreclosure action, for leave to permit plaintiff to sue the Receiver for alleged injuries sustained by it during her receivership by reason of such Receiver's negligence. (cf. *Copeland v. Solomo*n, 56 NY2d 222, 230-234; 451 NYS2d 682). While any damages awarded for such injuries would properly be considered as part of the expenses of the administration payable out of the receivership funds, Receiver was not entitled to have any additional sums set aside herein, to cover such possible liability of hers. [The inference being, that the Receiver would have to cover any shortfall from her own funds].

North Side Savings Bank v. Arieh
651 NYS2d 471 (A.D.1.D.-1996)