Did You Know?

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AGENCY AUTHORITY; LIEN EXAGGERATION

Defendants Czyz and Beamis signed a contract to purchase a house package whose acceptance was conditioned upon plaintiff's approval. Plaintiff approved the contract in October, 1993, and inserted therein a purchase price of $39,591.45; whereupon defendants hired McKee to serve as their general contractor in building the home on property McKee deeded to them. McKee, was also plaintiff's agent in this transaction. After the building loan commitment was issued by Milo Corporation, defendants ordered delivery of the building kits from plaintiff. The first two of three kits were shipped, and McKee commenced construction. When defendants failed to make any payments, plaintiff filed the subject mechanics lien in the sum of $39,591.45, which is now under foreclosure. [The third kit arrived some time later.]

The lower court determined that C and B had ratified the contract to purchase by accepting the first delivery of building materials, and by authorizing McKee to begin construction. It also sustained plaintiff's mechanics lien, less some small undelivered items (; and made other findings not discussed herein). C and B appeal from the validation of the mechanics lien; and from the lower court's rejection of their argument that McKee, as plaintiff's agent, misled them at to the amount of money they needed to close the deal.

Citing *Legal Aid Socy. of NEn- NY v. Economic Opport. Commn. Of Nassau Co.*, (521 NYS2d 833), this Court stated that parties dealing with an agent, do so at their peril, and must make the necessary effort to discover the agent's actual authority. Here, plaintiff limited McKee's authority in the sales contract. Based on that, McKee did not have the authority to bind plaintiff contrary to its terms, or by oral representations. Accordingly, the Court rejected C and B's argument that they relied upon McKee's offer allegedly made on behalf of plaintiff, to close for only $645.00 over the mortgage proceeds.

The Court likewise denied C and B's contention that plaintiff willfully exaggerated the amount of its mechanics lien. (Lien Law 39) Such a determination requires proof of deliberate and intentional exaggeration. (*Pratt Gen. Contrs. v. Trappey*, 576 NYS2d 160) Although the amount of the lien included

goods which had not yet been shipped, plaintiff testified that it was bound to supply these, and in fact, did so. Accordingly, no willful exaggeration was found.

Barden & Robeson Corp. v. Czyz
665 NYS2d 442 (A.D.3.D.-1997)

Note: We have discussed only two of many issues involved in this case.

CONTRACTS - DUTY OF PURCHASER

The May, 1994, contract for the purchase of certain real property between the parties, was contingent upon the successful testing of the existing well and septic system on the property. The closing took place in September, 1994, without plaintiff having any tests conducted. Subsequently, plaintiff discovered that the well and septic system were not in good working condition. Plaintiff commenced this action to recover damages, alleging defendant's "negligent, intentional and/or fraudulent misrepresentation" concerning the condition of these systems. This appeal followed the lower court's dismissal of the complaint.

This Court rejected plaintiff's claim that they were prevented from conducting appropriate tests of these systems. Citing *Nestler v. Whiteside* (557 NYS2d 747), this Court held that plaintiff "unreasonably failed to investigate the truth of the alleged misrepresentation." Clearly, plaintiff had an obligation to insist upon the performance of the appropriate tests prior to closing.

Mooney v. Buck
667 NYS2d 125 (A.D.3.D.-1997)

COOPERATIVES - CONSENT REQUIRED FOR TRANSFER BY ESTATE

The proprietary lease of plaintiff's decedent provided that said lease could not be assigned without the written consent of the cooperative corporation. An action was brought by estate of deceased tenant to declare that the corporation's consent was not required for the transfer of tenant's shares in the corporation and the assignment of the lease. Defendant appealed from an order of the IAS court which granted to plaintiff the relief sought.

The lower court relied upon *Francis v. Ferguson* (246 NY 516), which held in a commercial lease case, that the executors of a deceased tenant were not bound by a provision in such a lease, prohibiting assignment without consent, despite the existence of a general clause binding the parties and their legal

representatives to the terms of the lease. In that case the landlord had the right to arbitrarily refuse to consent for any reason or no reason. Therein (at page 519), the Court of Appeals refused to permit such interference with the orderly administration of an estate.

Herein, the Court distinguished the Francis case on the basis of its finding, that while defendant's Board of Directors had broad decision-making authority, it must act in good faith, and not arbitrarily. (Cf. Matter of Levandusky v. One Fifth Ave. Apt. Corp., 554 NYS2d 807 [NY]) It also recited as a ground of its decision, that the board owed a "fiduciary duty to its shareholder/lessees"

Cavanagh v. 133-22nd Street Jackson Heights, Inc.
666 NYS2d 702 (A.D.2.D.-1997)

MORTGAGE FORECLOSURE - DEFICIENCY JUDGMENT

In 1975 and 1984, plaintiff made various individual loans to defendant Farone, individually; with his wife; members of his family; and a family corporation; secured promissory notes executed by Farone and his wife, and by mortgages made by the various Farone entities on real property owned by them. Upon default, a mortgage foreclosure action was commenced, and summary judgment was thereafter granted to plaintiff. Upon agreement between the mortgagors and the Referee, it was decided to divide the mortgaged premises into parcels 1, 2, 3, and 4 which were to be sold in numerical order. This agreement was incorporated into the amended judgment of foreclosure and sale. After the foreclosure sale of all the parcels, there remained a sum of over $900,000 due to plaintiff.

Defendant contested plaintiff's motion for a deficiency judgment, arguing that the remaining debt should be extinguished, and the sales of the parcels 2, 3, and 4 be set aside, since plaintiff failed to move for a deficiency judgment following the sale of parcel 1, and before the sale of parcel 2. This appeal followed the lower court's refusal to so rule.

In arriving at its decision, this Court analyzed the holding in *Sanders v. Palmer* (68 NY2d, 507 NYS2d 844). Notwithstanding the dicta [See Note below] in Palmer, this Court rejected defendants' contention, and has chosen to follow the Second Department in limiting Palmer to its facts. These facts involved the foreclosure of a mortgage on corporate property, and a different mortgage on the guarantor's property, there being but one debt. On these facts, the Court of Appeals required that the procedure urged by defendant be followed.

Adhering to the lower court's determination, this Court noted that the foreclosed mortgages involved individual loans; and further, that the language of the amended final judgment which incorporated the stipulated agreement, removed this case from the application of the Palmer rule.

Adirondack Trust Co. v. Farone

666 NYS2d 352 (A.D.3.D.-1997)

Note: The dictum would have extended the Palmer rule to all situations where several mortgages have been given to secure a single debt, unless the court should order otherwise.

TITLE COMPANY LIABILITY - NEGLIGENCE

Subsequent to accepting a mortgage from Duplisses Trading Co., Inc. on certain property owned by them in Franklin County, Duplisses when into default. Considering a transaction involving plaintiff's acceptance of a deed in lieu of foreclosure, defendant was requested to conduct an examination of title to these premises owned by Duplisses. Defendant issued a report dated 2-27-1995, in which it stated that it did not find any liens against Duplisses' ownership of the premises, "except as hereinafter set forth." It did not return an Order of Attachment by one Dupee against the name Duplissey's, recorded 7-12-1994 in the County Clerk's Office for $85,000.00.

Plaintiff contended that defendant's failure to discover the Order of Attachment, was a breach of contract and negligence per se. Plaintiff contends that the unique and uncommon nature of the name, should have alerted defendant. Defendant contends that it was instructed to search a particular name, and that such a search would not have turned up this Order. Both parties submitted affidavits by local examiners supporting their positions.

A tort will not exist for a breach of contract unless a legal duty independent of the contract itself has been violated. (T.A.T. Property v. Concrete Sealants (US), Inc. 585 NYS2d 463) "Lack of a separate relationship between plaintiff and defendant distinct from and independent of the contract, precluded Plaintiff's claim against the Defendant for negligence." A conventional business relationship does not create a fiduciary relationship in the absence of additional factors. One such factor was present in *Cruz v. Commonwealth Land Title, Ins. Co.* (556 NYS2d 270) where the title company was held liable in negligence in failing to promptly record instruments. The Court did not rule on the breach of contract cause of action.

Hamelin v. Etna Abstract Corp.
665 NYS2d 503 (S. Ct. Franklin Co.-1997)

Note: The court decision contains a comprehensive discussion of guides and standards to be followed by title examiners. The Court found no New York precedent addressing an abstractor's duty to search beyond the express terms stated in its title certificate.

YELLOWSTONE INJUNCTION - DEFECTIVE DEFAULT NOTICE

At issue herein was a default notice sent by Landlord in its continuing effort to remove Tenant from the property; and deals with an alleged failure to comply with the Local Law 5 air conditioning requirements. The Notice dated 2-20-1996 did not directly allege that the building's air conditioning system violated the law, but rather, briefly and obliquely alleged that the Tenant's violation consisted of filing false and fraudulent documentation with the Buildings Dept. at the time a variance was obtained in 1980. The Notice did not specify what documents contained the alleged falsity; nor that the alleged falsity concerned the 86th floor, where the observation deck is located. Upon receiving the Notice, Tenant responded that it was investigating the matter. Nevertheless, Landlord sent a Notice of Termination on 2-27-96, seven days later, based on this alleged breach.

Tenant moved for a "Yellowstone injunction" (cf. 290 NYS2d 721) alleging that although the Notice of Default had not cited a particular document that was alleged to be false, it acted on the belief that the basis of Landlords' allegation was a building plan filed in 1980 in connection with their application for a variance; and the statement therein contained, to wit: "All floors above 5 have single floor air conditioning with no air handling ducts piercing floors." [The air conditioning equipment for the 86th floor is actually two stories above the 86th floor.] In the Tenant's view, their statement was not inaccurate in that the area from level 87 to level 102 of the building, which houses only machinery and equipment, is referred to as "the Tower," and contains no "floors" as that term is used in the Certificate of Occupancy. Based on the fact that the initial Notice did not afford Tenant an opportunity to cure the supposed breach, the IAS Court denied "Ýellowstone" relief; but gave Tenant much the same relief, in the form of an ordinary injunction. Both parties took appeals. Tenant for the denial of a "Yellowstone injunction"; Landlord for the granting of an ordinary preliminary injunction.

This Court first discussed the purposes and conditions requisite for the granting of a "Yellowstone injunction." [See: "*L.I. Gynecological Servs. v. 1103 Stewart Ave. Assocs.*, 638 NYS2d 959", reported in these pages in the September, 1997, issue of Rhodes Real Estate Review."]

The existence of a period in which a violation may be cured, depends upon the terms of the lease agreement, not upon the contents of the Default Notice. Therefore, while the failure to state a cure period in the Notice may render it defective, its does not vitiate the cure period itself. (cf. *Filmtrucks, Inc. v. Express Inds. & Terminal Corp.*, 511 NYS2d 862) The subject lease provides in this instance for "a period of sixty days after written notice" of a default.

Finally, the Court rejected the final two arguments put forward by the Landlord. First, that "Yellowstone" relief was inappropriate because the lease was terminated before the Tenant's motion for an injunction. Calling Landlord's notice premature (prior to the expiration of the cure period), the Court found it to be ineffective as a notice of default. (*L. I. Gynecological Servs. v. 1103 Stewart Ave. Assocs.*, Supra). Further, citing *Garland v. Titan West Assocs.* (543 NYS2d 43), it held that the brief statement of the grounds of default set forth in the Notice, was so vague and ambiguous as to likewise render it ineffective as a default notice. Accordingly, "Yellowstone" injunctive relief was granted.

Empire State Building Associates v. Trump Empire State Partners
667 NYS2d 31 (A.D.1.D.-1997)

Note: Landlord's argument that the alleged fraud in the variance filing exposed them to criminal liability, is patently without merit, since said Landlord did not have any interest in the premises at the time of that filing.