Did You Know?

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ADVERSE POSSESSION - COMMON LAW & STATUTORY REQUIREMENTS

In this action founded on adverse possession, the deed to plaintiff in 1959, did not contain a metes and bounds description. It stated that it was bounded East and South by "premises of George A. Deane." On the death of Mary Deane Beattie in 1979, defendant was devised these premises on the East and South of plaintiff, subject to the life estate of Mrs. Beattie. Defendant did not occupy these premises until the life estate expired in 1992. At that time, a survey showed that "her" property included a portion of property allegedly possessed by plaintiff since 1959. Defendant appeals from the granting of summary judgment to plaintiff.

The Court found that plaintiff had sustained her showing of both common law and statutory elements of adverse possession (*Vil. of Castleton-on-Hudson v, Keller*, 617 N.Y.S.2d 386, 387 [AD]), which it enumerated as follows.

Given the general language of the deed description, plaintiff's actions in mowing the law, cutting and clearing the shrubs and trees, and using this backyard area for recreational activities, all without any evidence that such possession was with the consent or permission of defendants predecessors in title (cf. *Franzen v. Luthe Forest Corp.* 426 N.Y.S.2d 855, the appellate Court found for plaintiff.

Wagman v. Village of Catskill
623 N.Y.S.2d (A.D.3.D.-1995)

(In a footnote, the Court noted that "adverse possession for the requisite period of time not only cuts off the true owner's remedies, but also divests him [or her] of his [or her] estate." *Connell v. Ellison*, 448 N.Y.S.2d 580 [AD], aff'd. 58 N.Y.2d 869. Therefore, the fact that the property is now owned by a municipality as a "public park" is of no consequence, as the statute of limitations had fun before it acquired title. *Litwin v. Town of Huntington* 617 N.Y.S.2d 888, 889 [AD]).

CO-OPERATIVES - PRIORITY OF U.C.C.-1 FILING

A U.C.C.-1 Security Instrument is perfected by filing same in the County Clerk's office. The money judgment held by petitioner is perfected against personal property (ie. a co-operative corporation's shares of stock and/or proprietary lease), by delivery of the same to a sheriff or marshal. [Priority was determined under the old Sec. 9-304(1) by either filing or taking possession of the premises. (cf. *Matter of State Tax Commission v. Shor*, 43 N.Y.2d 151, 158; 400 N.Y.S.2d 805).]

Accordingly, since petitioner's filing predated the perfection of their judgment liens by appellant, the rights of petitioners were superior.

In re Resner v. Greeley
622 N.Y.S.2d 331 [A.D.2.D.-1995]

COMMON LAW - DOCTRINE OF ACCESSION

As followed in New York, this doctrine provides that the owner of property is "entitled to all that is added or united to it, either naturally or artifically." (*Peo. ex. rel. Intl. Nav. Co. v. Barker*, 153 N.Y. 98) It has been relaxed in the limited circumstance, if the mistaken improvement was made in good faith under claim of title. (*Vulovich v. Baich*, 143 N.Y.S.2d 247, aff'd. 1 N.Y.2d 735); and is either some misconduct on the part of the owner, or a failure to act after the owner knows that the improvement was being made. (*Miceli v. Riley*, 436 N.Y.S.2d 72[AD]).

Subsequent to the time Brazauskas and Kraft purchased adjacent lots, B. showed respondant builder certain survey stakes that he alleged, represented the boundary lines of his proprty. In point of act, these states represented Kraft's boundaries. The builder constructed a house on Kraft's property, without his knowledge. When nearly finished, a surveyor hired by B. informed the builder that the house was built on Kraft's land. Kraft then insisted that the builder and B. remove themselves from his property. This appeal followed the lower Court granting the builder's motion seeking access to Kraft's property for the sole purpose of removing the structure and foundation, and to re-grade the terrain.

Finding no fault on the part of Kraft who alleged that this was a most unique parcel of land, the lower Court's decision was modified; and judgment was granted to Kraft, awarding him free and clear title to the house "mistakenly" constructed on his land.

De Angelo v. Brazaukas & Kraft
620 N.Y.S.2d 692 (A.D.4.D.-1994)

MORTGAGE FORECLOSURE - LACK OF CONSIDERATION

Plaintiff seeks to foreclose a mortgage made by defendant pursuant to an oral agreement with plaintiff. Defendant contended that the note and mortgage were unenforceable for lack of consideration, and sought recision of the same.

Having made s loan to a client of the bank of which he was president, in excess of his authority, one Antonucci persuaded defendant to execute a note and mortgage as an accomodation to him. Antonucci further represented to defendant, that if he executed such instruments, the mortgage would not be recorded, and that the defendant would not have to make any payments on account of the same. Said mortgage was later recorded without defendant's knowledge or consent.

Plaintiff contends on this appeal, that the lower court erred in finding a lack of consideration, inasmuch as the funds were deposited to defendant's account; and that defendant consented to the transfer of these funds to plaintiff's client.

Sustaining the lower court's finding, this appellate court held that no loan was ever intended, and that the transfer was merely an accomodation by defendant for his friend Antonucci. Citing 58 58 NY Juris. 2nd (Evidence & Witnesses, Sec. 609 at 239), the Court concluded that while "parol evidence is inadmissable to contradict or vary a written contract, evidence that negates the existence of a binding contract is admissable, not to contradict or vary its terms, 'but to destroy the written agreement as one unfit to represent the engagement of the parties.'"

Adirondack Bank v. Simmons
619 N.Y.S.2d 383 (A.D.3.D.-1994)

MORTGAGE FORECLOSURE - SUPERIORITY OF H.P.D. LIEN

Petitioner obtained a judgment after trial in July, 1983, against the then owner of the subject premises. Upon default by a subsequent owner of a subsequently made mortgage, the premises were sold and title delivered to respondant in July, 1992 Petitioner was named as a party defendant in this action, appeared, and did not contest. The final judgment of foreclosure and sale, provided that the real property be sold subject to "all other liens of record ... if any which are prior and superior to the mortgage foreclosed herewith.

Just prior to the expiration of the ten year period from the date of docketing of the judgment, petitioner commenced a special proceeding pursuant to C.P.L.R. Secs. 5203 and 5236, to foreclose its judgment

lien.

Reversing the lower court, this Court held that the property sold in foreclosure may only be sold subject to the prior encumbrances, since a judgment lien prior in time remains superior to the lien of the mortgage to be foreclosed. Petitioner's judgment became a lien when docketed and continued as a "charge against the property" for a ten year period from its entry. (*Quarant v. Ferrara*, 445 N.Y.S.2d 885) Petitioner's application to foreclose its lien was held to be timely brought.

Dept. of Housing Preservation & Development v. Ferranti
622 N.Y.S.2d 717 (A.D.1.D.-1995)

RESTRICTIVE COVENANTS - RIGHT TO ENFORCE

Plaintiffs are donors, or sucessors in interest to donors who conveyed title to certain premises to the County of Rockland for use as a conservation area and nature sactuary, and as a passive recreation area. During the period from 1975 to 1982 when these parcels of land were acquired, each deed of conveyance contained a restrictive covenant to this effect, including a acre parcel was acquired from a Chase Manhattan REIT. Plaintiffs allege that the guy wires supporting a 205 foot television tower encroach upon this land, and constitute a violation of this covenant. The County contends that plaintiffs lack standing to enforce this covenant, since the REIT was not made a party to this action.

Citing *Graham v. Beermunder* (462 N.Y.S.2d 231 [S.Ct.]), the Court rejected this argument. It held that a third party may equitably enforce a restrictive covenant where the subject parcels are part of "plan or general scheme" of development, and when the party against whom enforcement is sought, had actual or constructive knowledge of the plan of development.

West Branch Conservation Ass'n Inc., v. County of Rockland
621 N.Y.S.2d 271 (S.Ct.Rock.Co.-1994)

TITLE INSURANCE - DUTY TO DEFEND-CONFLICT OF INTEREST

Appellant was notified by their fee owner, that their leasehold estate (as insured by Ticor) was being terminated. Appellant's ability to remain in business depended upon their obtaining mortgage financing, which was seriously compromised by this termination. Pursuant to the title insurance policy, they served Ticor with timely notice of the foregoing and of their intention to obtain expedited handling of their action against the fee owner. Ticor required as a condition paying the assured's legal fees, that the assured turn over to Ticor control of the litigation, and substitute Ticor's counsel for their own. The

assured indicated their willingness to have Ticor's counsel, as "lead" counsel; but Ticor insisted that there could be but one counsel. This appeal followed when the lower court failed to find a conflict of interest; and dismissed appellant's action for reimbursement for legal costs, and monies to settle the action.

New York law is clear that where a conflict of interest is probable, selection of attorneys to represent the insured should be made by the insured rather than by the insured, which should remain liable for reasonable fees. (*Prashker v. U.S. Guarantee Co. 1 N.Y.* 584, 593, 154 N.Y.S.2d 910) The appellate Court defined the issue as follows: "In practically all, if not in all cases, the insured and the insurer will have a common interest in defeating the claim made against the insured. What changed the rights of the insurer and the insured in those cases (cf. Prashker, and cases therein cited), were the conflicts arising from their divergent interests, in how they would prefer to go about defeating such claims." In this instance, stated the Court, Ticor having insured the title of a heavily mortgaged property, could proceed "leisurely." For the assured, time was an urgent matter.

Finding a conflict of interest, the appellate Court found that Ticor had breached its obligaton to defend, and awarded judgment to the assured, allowing it to recoup its attorneys' fees, and costs for settling the title claim.

69th Street and 2nd Ave. Garage Assocs. L.P. v. Ticor Title Guarantee Co.
622 N.Y.S.2d 13 (A.D.1.D.-1995)

TITLE INSURANCE - "AFTER CLOSING" POLICY LIMITATION

At the time of the closing of a fee transaction, the title report showed that the City of New York owned the subject real property. It had acquired title via a tax deed issued as the result of an In Rem, tax delinquency proceeding. Picking up money at the closing for the redemption of title, the title company found that sum insufficient as the result of the City having levied a post closing charge for a management fee.

The Court rejected the title company's contention that they did not have to indemnify plaintiff for this charge, since the title policy did not cover "defects and incumbrances arising or becoming a lien after the date of the policy. Citing *Inavest Enters. v. TRW Title Ins. of N.Y.* (595 N.Y.S.2d 837[A.D.]), the Court found that notwithstanding that the lien was placed after the closing, the City's ownership as of the date of the closing, constituted a defect in the title for which the defendant underwriter was responsibile.

Alexis v. City of N.Y. & Security Title & Guar. Co.
622 N.Y.S.2d 106 (A.D.2.D.-1995).