Did You Know?

by Theodore P. Sherris

June 1998

CONTRACTS (GOOD FAITH)

In a contract for the purchase and sale of certain real property, plaintiff was given five years within which to close, ostensibly to assemble investors to assist in the development of the property. Plaintiff was obligated to make monthly payments to the defendant-vendor during this period. After making such payments for about 31/2 years, plaintiff ceased doing so and commenced this action, inter alia, for damages for breach of contract. Testimony adduced at trial revealed that defendants had blocked two of plaintiffs prospective partners from access to the property and on numerous occasions had confronted and dissuaded prospective partners from pursuing plans for the property. Plaintiff also established that its negotiations with three parties had progressed to the point that each of them was ready to enter into a binding contract, and in all likelihood, would have done so but for the defendants' interference.

Citing *Croce v. Marisi* (651 NYS2d 867 [AD]), the trial court found that the defendants' purposeful and active dissuasion of plaintiffs prospective partners, and the denial of access to the property as required by the contract, violated the implicit obligation and covenants of good faith and fair dealing required by all such contracts, notwithstanding that no contract between any third party and the plaintiff had ever been executed.

Assessing the damages for breach of contract, the court noted the contract provision to the effect that if vendor "shall default in closing title, then the sole obligation of [the Elks] shall be to refund to purchaser any and all sums therefor paid to it by purchaser" plus certain interest, and the net cost to the purchaser of any examination of title, "and [the Elks] shall have [no] other or further obligation to purchaser." Nevertheless, the court noted that a vendor who breaches the contract in bad faith, can not limit the damages recoverable by the injured purchaser by relying on a contractual limitation *Progressive Solar Concepts v. Gabes* (556 NYS2d 105 [AD]).

In conclusion, and following the long established rule enunciated in *Conger v. Weaver* (20 NY 140), this court held that "where the proof established that the vendor of real property failed to perform in good faith, the purchaser may recover the loss of its bargain" and those expenses and disbursements

reasonably and necessarily incurred in preparation for its performance which were within the contemplation of the parties when the contract was made. The measure of damages for "loss of bargain" in a case in which the vendor breached a contract in bad faith, and which has been partially performed by the purchaser, is the difference between the market value of the property and the amount unpaid on the purchase price. However, as plaintiff never submitted proof as to the market value of the property at the time of the breach, it cannot recover for loss of bargain damages.

BGW Development Corp. v. Mt Kisco Lodge ...of the Benevolent Order of the Elks, etc.
669 NYS2d56 (A.D.2.D.-1998)
Rabinowitz, Cohlan & Dubow, White Plains for P1-App; Pirrotti & Pirrotti, Ardsley, for Def-Res.

COVENANTS & RESTRICTIONS (ENFORCEABILITY)

Plaintiffs are the owners of seven lots on a 41- lot subdivision filed in 1974, each of which is subject to a "Declaration of Covenants and Restrictions," that provides that all premises conveyed shall be used exclusively for residential purposes, that no business, trade and/or profession or calling of any kind can be maintained on the lots, and that no noxious or offensive activity shall be carried on upon any lot, including any activity which may be, or become, an annoyance or nuisance to the neighborhood. Defendants, in the business of gravel mining, operate near this development and seek to expand their operations onto the 28 remaining undeveloped lots within the development, which were acquired by them in 1988. Plaintiffs seek to prevent such mining operations.

Citing *Dean v. Heathcote Assn.* (595 NYS2d 556 [AD]), this court found that "[T]he issue in determining whether a restrictive covenant is unenforceable is not whether the party seeking the enforcement of the restrictions obtains any benefit, but whether, in a balancing of equities, the restrictive covenant is of no actual and substantial benefit...."

The defendants, claiming unenforceability of the restrictions, bear the burden of proving plaintiffs' lack of benefit derived from the enforcement of the covenant, as well as a legally cognizable reason for their extinguishment, such as changed conditions, which render their purpose incapable of being accomplished. (*Orange & Rockland Utils. v. Philwold Estates*, 437 NYS2d 291 [NY]). Reviewing the record, this court found that these covenants were in existence in 1988 when defendant purchased the lots in question with the intention of conducting mining operations and that the development itself has not of undergone any significant changes since its origins in 1974, and has remained residential in nature.

The court, in affirming judgment for plaintiffs, that even if the purpose of the covenants was incapable of funds being accomplished due to a change of circumstances, defendant cannot claim benefit of the equities, since they were aware of the circumstances when they purchased the premises with the intention of conducting mining operations and the hardship they suffer was self-created.

Cody v. Anthony Fabiano & Sons, Inc.
667 NYS2d446 (9A.D.3 .D.- 1998)
DeGraff, Foy, Holt-Harns & Kunz, Albany, for Def-App; Osofsky & Raplansky. Pine Plains, for P1-Res.

DOMINANT ESTATE OWNER (LIMITATION OF RIGHTS)

Plaintiff owned a servient estate fronting on Lake Champlain. Defendant owned an adjacent parcel, which contained a deeded right-of-way over plaintiffs parcel to provide access to the lake. The easement granted contained the following provisions:

"(A) Ingress and egress to the waters of Lake Champlain over said easement is to be limited to foot travel only; (B) Only boats which can be carried by humans may be carried over said right of way; (C) No trees may be cut on said easement nor may said easement be defaced in any way... In May, 1996, defendant left his boat on such right-of-way without plaintiffs' permission. Plaintiff by this action sought, inter alia, a permanent injunction precluding the placement of such boat or any other personal property belonging to defendant on the right-of-way. Defendant contended that he was entitled to so place his boat by the language of the easement and through his acquisition of a prescriptive right to do so.

Citing *Marra v. Simidian* (435 NYS2d 182 [AD]), this Court affirmed the lower court's decision, holding that simply as the owner of the dominant estate, defendant was not permitted to store his boat on the right of way. Additionally, the Court found no evidence to support a claim of a prescriptive easement to allow for boat storage.

Buran v. Peryea
668 NYS2d 265 (A.D.3.D.-1998)
Mark A. Peryea, Def. in person; Anderson, Wolinaky & Sunshine, Burlington, vt. for Pl-Res.

FRAUDULENT CONVEYANCE (PRENUPTIAL AGREEMENT)

The Nassau County Supreme Court entered judgment against defendant Cameron-Webb, based upon a judgment of the Queens Bench Division, of England's High Court Justice, in the sum of $8,580,000. This judgment was based upon a finding of the English Court that Cameron-Webb knowingly and dishonestly misappropriated trust funds for his own benefit. Said defendant took title to certain premises in Mill Neck, L. I. as a joint tenant with defendant, Funk, and later conveyed his half interest to her. During all these times, Cameron-Webb was insolvent. The latter conveyance was made without fair consideration.

This court rejected defendant's contention that the conveyance of the one-half to defendant Funk was in

exchange for a fair consideration. i.e. that party's promise, as reflected in a prenuptial agreement, to waive "all rights ... she may at any time have ... by reason of [her] marriage to Cameron-Webb." Citing *HBE Leasing Corp. v. Frank* (61 F.3rd 1054, 1059), the court found that such waiver was not fair consideration, in that it only constituted a surrender of "contingent rights that ... might accrue to her benefit in the future if she married [Cameron-Webb] and if she later divorced him or he predeceased her."

Corporation of Lloyd's v. Funk
668 NYS2d 211(A.D.2.D.-1998)
Beldock, Levine and Hoffman, LLP, NYC, for Def-App; Haight, Gardner, Poor & Havens, NYC, for Pl-Res.

MARKETABILITY OF TITLE (LACK OF "LEGAL" ACCESS)

Plaintiff, as vendor of premises sold at public auction, sought specific performance of such contract, while vendee sought to rescind on the ground that plaintiff is incapable of conveying marketable title. A State condemnation over 30 years ago left the subject premises without a right of access. The condemnation award was contingent upon the State providing "suitable access" by means of a service road to an abutting parcel to the north, which had also been appropriated. The service road, Howell Drive, is owned by the State and maintained by the Town of Chenango. While the State has permitted limited access to the premises via Howell Drive through an informal arrangement, this road was never designated a public road.

In order for a vendor to be entitled to specific performance of a real estate contract, that vendor must be able to. tender a marketable title. Citing *Pollak v. State of New York* (394 NYS2d 617 [NY]), this court found that lack of legal access onto a parcel of property renders title thereto unmarketable. Affirming the lower court decision, it determined that property (as herein) which is accessible only by limited State permission is landlocked, and without legal right of access. Title was found unmarketable, and the contract was rescinded.

Howell v. Brozzetti
667 NYS2d 831 (A.D.3.D.-1998)
Fauci & Fauci, Endicott for P1-App; Levine, Gouldin & Thompson, Binghampton, for Def-Res.

MECHANICS LIEN (COUNTY CLERK AS A STATE OFFICER)

In this action against the County Clerk acting as a State officer for the negligent filing of mechanics lien, the court distinguished the filing of a mechanics lien and a lis pendens. The county clerk exercises the

duties of a court clerk in connection with the filing of a lis pendens (cf. *Ashland Equities Co. v. Clerk of N.Y. County*, 493 NYS2d 133[AD]). A county clerk will not be deemed to be acting as a State officer except insofar as he or she"...performs acts that are in themselves a part of the judicial system" (*Nat'l. Westminister Bank v. State of New York*, 561 NYS2d 541 [NY]).

Unlike a lis pendens which cannot be filed except in the context of ongoing or imminent litigation; a mechanics lien can, and often does exist in the absence of any related judicial process. Finding that the County Clerk was not acting as a State officer, this action against the State was dismissed.

Ellrott Excavating Contractors v. State
668 NYS2d 766 (A.D.3.D.- 1998)
Biscone & Neri, Albany, for Claimant-App; Dennis C. Vacco, Atty Gen'l

---

MORTGAGES (OBLIGATION TO ISSUE SATISFACTION)

This dispute is between U.S. Mortgage, the holder of the mortgage made June 22, 1992, and a credit line mortgage made previously, held by plaintiff. By letter dated June 22, 1992, U.S. Mortgage forwarded its checks to plaintiff in a sum sufficient to pay plaintiffs mortgage in full, which letter stated that the tendered funds represented "payment of the mortgage" and requested that plaintiff "send the satisfaction of mortgages to the undersigned". No satisfaction was sent, nor was the credit line closed, although plaintiffs letter indicated that the account, still open and active, had "no principal balance." Although twice requested by U.S. Mortgage and the title company, no satisfaction was sent. Subsequently, the mortgagors reaccessed the credit line and then defaulted upon both obligations, forcing both mortgagees to commence foreclosure actions, in which each contended that its mortgage was a first lien on the premises.

Plaintiff argued that because of the unique nature of credit line mortgages, it must insist upon strict compliance with the provisions of the borrower's credit line agreement and that the account could only be closed upon notice from the borrower, accompanied by outstanding credit cards and unused checks (which did not occur herein), or it risked being sued by the borrower.

The court found that since the credit line agreement provisions relied upon by plaintiff were not recorded as part of their mortgage, U.S. Mortgage had no record knowledge of same. Additionally, this court on the basis of *Barclay's Bank of NY v. Market St. Mtg. Corp.* (592 NYS2d 874 [AD]), rejected plaintiffs reliance upon its status as the holder of a credit line mortgage, holding that the failure of U.S. Mortgage to include a proposed satisfaction form with its payment was a factual difference without legal distinction.

Merrill Lynch Equity Mng't, Inc. v. Kleinman
668 NYS2d 726 (A.D.3.D.- I 998)

Parisi, Englert, Stiliman, Coffey & McHugh, Schenectady, for Def-App; Hecker, Colasurdo & Associates, White Plains, for Pl-Res.

MORTGAGE FORECLOSURE (PURCHASER FOR VALUE)

A good faith purchaser from a referee at a mortgage foreclosure sale was entitled to retain title to premises purchased from the referee prior to the appellate court's reversal of judgment of foreclosure. Having failed to seek a stay of enforcement of the foreclosure sale, mortgagees were relegated to an action for money damages on their underlying debt. That such purchaser had actual knowledge at the foreclosure sale that an appeal was pending did not affect its status as a purchaser for value.

Aubrey Equities, Inc. v. SMZH 73rd Associates
668 NYS2d 598 (A.D. I .D.- 1998)
Jerome Lasky for P1; Lawrence G Soicher, for Def.