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ADVERSE POSSESSION - STANDARD OF PROOF

This action resulted from a dispute between owners of adjoining parcels, each claiming title to a triangular strip of land, over which plaintiffs maintained a driveway to their home. Notwithstanding that in the opinion of the appellate division, plaintiffs presented unrebutted evidence that the triangular area was within the boundary line of their property, the trial court jury awarded judgment and title to defendants.

In modifying the lower court judgment to one in favor of plaintiffs, (cf. *Cohen v. Hallmark Cards*, 410 MYS2d 282 [NY]), this Court concluded that there was no valid line of reasoning or permissible inferences which could have let a rational jury to conclude that the triangular strip was within the property line of the defendants. (Italics ours)

Trinkle v. Cordisco
643 NYS2d 626 (A.D.2.D.-1996)

NOTE A: This Court noted that since this was a declaratory judgment action, the Supreme Court should have directed the entry of a judgment in favor of plaintiff (cf. *Lanza v. Wagner*, 229 NYS2d 380 [NY]), App. dism. 371 US 74; cert. den. 371 US 901.)

NOTE B: In a related case, *Winchell v. Middleton* NYS2d 208 (A.D.3.D.-1996), the Court held that where claim of title is not based on a written instrument, any claim founded upon adverse possession, "must be established by the stringent and demanding standard of clear and convincing proof." (Italics ours)

CONDOMINIUM - PRIORITY OF CONDOMINIUM LIEN

Condominium association which filed its lien against the premises prior to the recordation of defendant Northfield Savings Bank's mortgage, brought this action to establish the priority of its lien over that of the said mortgage. RPL 339-z provides in part, that a condominium association lien is superior to all other liens, except as to that of a first mortgage.

On rehearing, the Court held that the appropriate interpretation of this statute, pertained to situations where the said mortgage was recorded prior to that of the condominium lien. It was not intended to be in derogation of the well established rule, "prior in time, prior in right. Citing *hington Fed. Savg. & Ln. Assoc. v. Schneider* (408 NYS2d 588 [AD]), the Court held that where such a first mortgage is recorded subsequent to that of the condominium lien, priorities are governed by the order of recordation of the several instruments.

Fox Run Condominium v. Goller Place Corp.
642 NYS2d 758 (S.Ct. Richmond Co.-1996)

CONTRACTS - RELIANCE ON ORAL REPRESENTATIONS

Shortly after closing of title, purchasers discovered leaks in the roof and commenced this action against Sellers, claiming that they had represented that the roof was leak-free.

The contract provided that all prior writings were merged therein; that "no representations would survive the closing; that the purchasers had inspected the property and were entering into the contract based upon the purchasers' own investigation; that the purchasers were taking the property as is, without any reliance upon among other things, any oral representations; and that acceptance of the deed was to be considered full performance of all obligations". Finally the contract stated that "[t]his representation [that the roof is free of leaks] shall not survive the later of closing or delivery of possession of the premises to purchaser".

While it is true that a general merger clause is ineffective for the purpose of excluding parol evidence of fraud in the inducement, a specific disclaimer will defeat an allegation that a contract was executed in reliance on certain representations (*Couch v. Schmidt*, 612 NYS2d 511 [AD]). Citing (*Taormina v. Hibsher*, 626 NYS2d 559[AD]), the Court concluded that the foregoing clauses were sufficiently specific to bar an allegation of reliance on an oral representation.

Masters v. Visual Building Inspections, Inc.
643 NYS2d 599 (A.D.2.D.-1996)

MECHANICS LIEN - VALIDITY - ERRONEOUS DESCRIPTION

Fee owner sought to cancel plaintiff's mechanics lien, and dismiss the lien foreclosure action because the lien description included more property than that which was directly benefited by the improvement; which fact they alleged was fatal to the lien's validity. Relying upon *Woolf v. Schaefer*, (93 NYS2d 180 [AD]) and *Jannotta v. Noslac Realty Corp.*, (246 NYS2d 510 [AD]), the Court held that the defect was not fatal since the lien would be limited and restricted only to that part against which it could be properly enforced.

Clearly, the Court stated, the instant lien was for services rendered and materials delivered by plaintiff for the construction of the golf course. Citing *Metro Masonry v. West 50th St. Assocs.*, (558 NYS2d 470), the Court concluded that Lien Law Sec. 23, "is to be construed liberally to secure the beneficial interest "that substantial compliance with its several provisions, shall be sufficient for the validity of the lien."

East Coast Mines & Minerals Corp. v. Golf Course Properties, Co.
644 NYS2d 326, (A.D.2.D.-1996)

Note: The lower Court's dismissal of plaintiff's cause of action in quantum meruit was held to be improper. Although a property owner who contracts with a general contractor, generally does not become liable to a sub-contractor on a quasi-contract theory, that is not the case where the owner expressly agrees to pay for that sub-contractor's performance. (cf. *Perma Pave Contracting Corp. v. Paerdegat Boat & Racquet Club*, 549 NYS2d 57 [AD])

MORTGAGE FORECLOSURE - DEFICIENCY JUDGMENT

Plaintiff loaned defendant Tom-Art money secured by a mortgage on Queens County property owned by Tom-Art; and additionally secured by a mortgage on property owned by Tom-Art' principals, Lukas, in Nassau County. Upon default, the Nassau property of Lukas was foreclosed, and the property sold at foreclosure. Plaintiffs did not seek a deficiency judgment in the Nassau foreclosure.

Subsequently, plaintiffs commenced this action in Queens County to foreclosure Tom-Art's property there. The Supreme Court dismissed the complaint based on RPAPL 1371(3), since plaintiff failed to move for a deficiency judgment in the Nassau Action.

This Court reversed on the basis of the *Bodner v. Brickner* (288 NYS2d 342 [AD]) holding, that where a debt is secured by a mortgage lien on more than one parcel of property, the right to apply for a deficiency judgment does not arise until all property which secures the debt, has been sold. Consequently, plaintiff's failure to seek a deficiency judgment in the Nassau action, did not preclude them from maintaining a foreclosure action on the Queens parcel.

The Court of Appeals has enunciated an exception to this rule in the circumstance where a single debt is secured by a corporate debtor, and a mortgage of separate property of an individual corporate principal is

given as a guaranty of payment of the debt. (*Sanders v. Palmer*, 507 NYS2d 844 [NY]) In this circumstance, the high court has held that failure to apply for a deficiency judgment bars an action to foreclose the individual guarantor's property.

This Court held that, notwithstanding the same factual situation, since the property of the guarantors was first foreclosed, the Sanders v. Palmer exception was not applicable. Reversing the lower court, this Court held that failure to seek a deficiency judgment in the prior, Nassau action, was not a bar to this Queens foreclosure action.

Steckel v. Tom-Art Associates, Ltd.
643 NYS2d 630 (A.D.2.D.-1996)

MORTGAGE CANCELLATION - CHOICE OF REMEDIES

Plaintiff brought this action to cancel and discharge a mortgage on real property pursuant to RPAPL 1921. That statute authorized a party in interest to apply for a mortgage discharge where, after payment in full of principal and interest, the holder of the mortgage refuses to execute a satisfaction thereof. Here, petitioner offered no corroborative proof beyond his oral statement of payment. Consequently, this Court affirmed the lower court's decision dismissing this petition, finding that petitioner failed to meet his burden of proving that the mortgage obligation had been fully satisfied. (cf. *Albany Savings Bank v. Seventy-Nine Columbia St.*, 603 NYS2d 72 [AD])

The Court concluded that petitioner, for this proceeding only, was bound by his choice of remedies. This did not preclude petitioner from bringing another action under RPAPL, Article 15, alleging that since the mortgage holder would be barred by the six year statute of limitations (CPLR 213(4)) from foreclosing said mortgage, the same should be discharged.

Goldin v. Levinson
641 NYS2d 731 (A.D.2.D.-1996)

MORTGAGE FORECLOSURE - ERRONEOUS REPORT OF SALE

Opposing plaintiff's motion for a deficiency judgment, and relying upon the referee's report of sale, and other closing documents, mortgagor alleged that plaintiff had bid the full amount of the debt, and was therefor precluded from obtaining such a judgment. (cf. *Whitestone Savings & Loan Assn. v. Allstate Insurance Co.*, 28 NY2d 332, 335) At a Court ordered hearing, the Referee testified that she was a "novice" in this area of practice, and that she incorrectly placed the mortgage amount due in the space where the bid price should have been inserted. The Referee further testified that the plaintiff's representative was similarly confused and copied on the the tax form and deed, the erroneous figures

from the report of sale.

Believing the countervailing evidence not to be sufficiently strong, the Court chose to believe the Referee's contemporaneous notes that the bid price was actually one million dollars; and confirmed an award to plaintiff of a deficiency judgment for $2,834,517, which was the excess of the monies due plaintiff over the market value of two million dollars, the property value as established by plaintiff's appraiser.

Midlantic National Bank v. Mid Rockland Medical Center
644 NYS2d 445 (A.D.3.D.-1996)

MORTGAGE FORECLOSURE - NON-SERVICE

In this mortgage foreclosure action which went to final judgment of foreclosure and sale, defendants contested the alleged service of process upon them. The defendants did not appear or answer the complaint; plaintiff's motion for summary judgment was granted without opposition; as was the final judgment of foreclosure and sale.

Alleging non-service of process, defendants moved, inter alia, to vacate the judgment of foreclosure and sale. Initially, the lower court decided defendant's motion, by setting the matter of service down for a hearing, on this issue. However, that court conditioned the hearing upon defendant's payment of $6,000.00 to plaintiff before the hearing. Upon defendant's failure to make such payment, that court cancelled the hearing.

Relying upon *Dime Savings Bank v. Steinman* (613 NYS2d 945 [AD]), this Court reversed, holding that where defendants submitted a sworn a denial of service, they were entitled to a hearing on the propriety of service, without the imposition of any condition.

Apple Bank For Savings v. Georgatos
643 NYS2d 670 (A.D.2.D.-1996)

MORTGAGE TAX - FUTURE ADVANCE CLAUSE

Defendant second mortgagee opposed plaintiff's motion for summary judgment on the basis that the mortgage was not enforceable by reason of non- payment of the applicable mortgage tax. At issue was a mortgage for $87,000 upon which a mortgage tax was paid; and which contained a "future advances clause", pursuant to which an additional advance of $100,000 was loaned. At the time of the foreclosure, the unpaid principal balance due on the mortgage, was $79,575.

Citing RPL 256, defendant contended that the existence of the "future advances clause" rendered the principal indebtedness secured by such mortgage, "indeterminate," as defined by such section, requiring that the mortgage tax be assessed "upon the value of the property covered by the mortgage." This section provides in relevant part, "[I]if the principal indebtedness secured or which by any contingency may be secured by a mortgage is not determinable from the terms of the mortgage ... and the maximum amount secured or which by any contingency may be secured by the mortgage is not expressed therein, such mortgage shall be taxable under Sec. 253 upon the value of the property covered by the mortgage...." The mortgage tax was been paid only upon the sum of $87,000.

Citing *State Bank of Albany v. Fioravanti* (435 NYS2d 947 [NY]), the Court agreed that the parties had "neither a plan of future advances, nor a fixed sum in mind when the mortgage [was] executed,"and that by reason thereof, the principal sum secured, was" indefinite." However, since the mortgage did contain a statement that $87,000 was to be the maximum secured by any contingency, and a mortgage tax was paid on that amount, (and citing *Matter of Rockefeller Center v. Bragalini* 185 NYS2d 82 [AD]), the Court dismissed defendant's contention, holding that Sec. 256 applies only in a case where such words of limitation do not exist. It concluded, that in this instance, the "future advances clause" did not render the mortgage "indeterminable" for the purpose of this statute, and therefor held that the property mortgage tax had been fully paid.

National Bank Of Stamford v. Recreational Acreage Exchange, Ltd.
644 NYS2d 600 (A.D.3.D.-1996)

NOTE: After reading this decision, we are left to wonder how, with the acceptance of an additional loan of $100,000, the Court could give weight to a provision that limited the mortgage security to $87,000.