Did You Know?

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CONTRACT OF SALE - EFFECT OF LIMITED WARRANTY

A contract for the purchase of a condominium unit, contained in part, the following statement regarding warranties: " The sponsor makes no housing merchant implied warranty or any other warranties, express or implied, in connection with this purchase agreement or the unit, and all such warranties are excluded except as provided in the limited warranty annexed to this purchase agreement..." The statutory limited warranty offered purchaser, required that plaintiff- purchaser give defendant-sponsor, notice of any claim of a breach of the limited warranty; and the right to inspect; and cure any defect. After giving the sponsor notice of defects, purchaser failed to grant it the right to inspect and repair. Accordingly, the lower court dismissed plaintiff's breach of warranty cause of action; but held that plaintiff could rely upon a common-law breach of contract theory of liability.

Under the General Business Law, Article 36-B, a builder- vendor may exclude or modify all express and implied warranties created by statute or by common-law, provided that the purchase agreement contained a limited warranty in accordance with he provision of GBL Sec. 777-b, which was provided here. While Art. 36-B does not preclude plaintiff from maintaining a common-law cause of action (*Schuster v. City of New York*,180 NYS2d 265 [NY]); defendants contract excluded common-law warranties, as permitted by the statute. (A disclaimer excluding all warranties is void as against public policy. *Bd. of Mgrs. Of Alfred Condo v. Carol Mgmnt.* 524 NYS2d 598 [AD])

As plaintiff failed to comply with the terms of the limited warranty as required by GBL Sec. 777, he cannot claim under the breach of contract provision; and the provisions of the purchase agreement excluded common-law breach of contact relief. Accordingly both of plaintiff's causes of action were dismissed.

Fumarelli v. Marsam Development, Inc.
657 NYS2d 61 (A.D.2.D.-1997)

EASEMENT APPURTENANT - ITS TRANSFER & ENFORCEMENT

An easement was created in 1905 by express grant across lake-front property, to permit the holders thereof to cross certain property so as to obtain access to the lake, and to construct and use a dock thereon. Through subsequent conveyances, plaintiffs became owners of subdivided lots on the dominant estate; and the defendants became the owners of the lots on the servient estate. After more than 30 years of use and of notice of the easement, the defendants constructed a bulkhead which blocked plaintiff' access to the lake. Plaintiffs' brought suit.

An easement appurtenant is created when the easement is conveyed in a writing, subscribed by the person creating it, which burdens the servient estate for the benefit of the dominant estate. Thereafter, when the dominant estate is conveyed, the easement passes to the subsequent owner(s) through the appurtenance clauses, even though there is not specific mention of it in the deed. Once created, such an easement can only be extinguished by abandonment, conveyance, condemnation or adverse possession. (*Strnad v. Brudnicki*, 606 NYS2d 913 [AD])

Absent specific contrary language in the grant, the law will not presume that either party at the time of the creation of the easement, intended that the grantee thereof had no right to alienate the easement; or that by such alienation, the easement should be extinguished. Therefor the grantee of any portion of such estate, may claim the easement as it is applicable to his part of the property. Further, the long time use of the easement over a certain portion of defendants' property without objection, serves to overcome the failure of the original grant to specifically describe the easement.

Whether an obstruction constitutes an unreasonable interference is generally a question of fact. The Court concluded herein that the interference was unreasonable; and since compensatory damages would be inadequate, ordered the removal of the bulkhead obstruction, and restoration of the area.

Green v. Mann
655 NYS2d 627 (A.D.2.D.-1997)

MECHANICS LIEN - NON-APPLICABLE TO LEASING SERVICES

At issue in this case of first impression, is the interpretation of a 1982 amendment to Lien Law Sec. 2(4), which expanded the definition of "improvement" to included the performance of certain specified real estate brokerage services, thereby enabling real estate brokers to file mechanic's liens.

In 1992 appellant entered into a written real estate brokerage agreement which granted respondent the exclusive right to locate for appellant property for purchase or lease in the New York metropolitan area. In 1994, appellant entered into a commercial lease with Grumman for a term in excess of three years. When a dispute arose between them regarding the payment of a brokerage commission, respondent filed a

mechanics lien against Grumman's property. This appeal followed the lower court's denial of appellant's proceeding to summarily discharge this lien.

Lien Law Sec. 2(4) defines "improvement" as, "the performance of real estate brokerage services in obtaining a lessee for a term of more that three years ... of real property to be used for other than residential purposes pursuant to a written contract of brokerage employment or compensation." The lower court in rejecting appellant's claim, felt that the identity of the party for whom the services we performed, was not dispositive. This Court concluded, that while the statute does not explicitly state that the contract must be with the owner, the Legislature's use of the word "lessee", reflected its intention to restrict the provision to a contract between a property owner/lessor and a broker. Further, the fact that the property owner, Grumman consented to the performance of the services, did not alter this conclusion.

Robert Plan Corporation v. Greiner-Maltz Company, Inc.
655 NYS2d 648 (A.D.2.D.-1997)

MORTGAGEE - WHEN NOT PURCHASER FOR VALUE

In 1990, this Court held void two certain deeds which purported to transfer Frederick Catalano's interest in his marital residence (held with his first wife, Isabella): one from Frederick to Hilary House Properties; and the second from Hilary House to Virginia Catalano, his second wife. The basis of this determination was that such conveyances violated a restraining order entered in the matrimonial action which resulted in the first marriage being dissolved. The Suffolk County Clerk was ordered (on 10-7-1991) to cancel these deeds of record. Prior to the commencement of this action by Isabella against Virginia, to cancel both of these deeds, Virginia made this mortgage to plaintiff, which is now being foreclosed.

This Court affirmed the lower Court's holding that plaintiff only held a lien on a one-half interest in the premises, since plaintiff was not a bona fide mortgagee, by reason of the fact that the deeds in the chain of title out of Frederick, were void, not voidable. (cf. *Catalano v. Catalano*, 551 NYS2d 539 [AD]) Plaintiff was found to have a valid one-half lien interest on the property, by reason of Virginia's acquisition of that separate interest via a Sheriff's deed based upon a judgment execution sale.

Greenpoint Savings Bank v. Guiliano
656 NYS2d 646 (A.D.-2.D.)

MORTGAGE FORECLOSURE - EQUITABLE SUBROGATION DENIED

Although defendant's mortgage was obtained and recorded prior to plaintiff's mortgages, plaintiff contends that its mortgages have priority over defendant's, because it claims that it should be subrogated to the rights of a prior purchase money mortgagee, which was satisfied by the proceeds of plaintiff's

mortgages.

The doctrine of equitable subrogation applies “where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior encumbrance. (*King v. Pelkofski*, 282 NYS2d 753 [NY]) Citing *Pawling Sav. Bank v. Jeff Hunt Props.* (639 NYS2d 462 [AD]), this Court sustained the lower court’s conclusion that this doctrine should not be applied, as the evidence established that plaintiff had knowledge of the lien over which it sought to gain priority.

R.C.P.C. Assocs. v. Karam Dev.
656 NYS2d 666 (A.D.2.D.-1997)

MORTGAGE FORECLOSURE - REDEMPTION

In a mortgage foreclosure action, defendant appeals from an order of the lower court which denied her motion to compel the plaintiff to accept the monies deposited by her with the County Clerk, in satisfaction of the judgment of foreclosure; and to vacate the referee’s deed and judgment of foreclosure. Defendant had deposited monies with the County Clerk sufficient to satisfy the judgment, one day prior to the day of the foreclosure sale.

RPAPL Sec. 1341 states in part, “Where an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due,... and the defendant pays into court the amount due... the court shall: (2) Stay all proceedings upon judgment, if the payment is made after judgment directing sale and before sale.... This statute is mandatory in nature, and does not allow for a discretionary interpretation or application. (*Gabriel v. 351 St. Nicholas Equities*, 562 NYS2d 660 [AD]) RPAPL Sec. 1341(2) is not self-executing; and the only way for defendant to have stayed the sale of the property, once the judgment of foreclosure and sale was entered, was to comply with Sec. 1341(2) and to move to stay the sale. This, defendant failed to do. Accordingly, (cf. *Financy Inv. Co. [Bermuda] v. Gossweiler*, 535 NYS2d 632) the sale properly went ahead as scheduled; and was not rendered null and void.

Green Point Sav. Bank v. Oppenheim
655 NYS2d 560 (A.D.2.D.-1997)

UNIFORM VENDOR-PURCHASER RISK ACT - MORTGAGE FORECLOSURE

At the foreclosure sale conducted by plaintiff, Citibank, various successful bidders assigned their bits to appellant, Zelik. The closing did not take place as called for on 4- 25-1994, and in May, 1994, plaintiff

assigned its rights the note, mortgage and judgment to BHT Limited. In July, Zelik notified plaintiff that upon his inspection of the premises, he discovered severe water damage allegedly caused by broken water pipes on the premises. In February, 1995, Zelik commenced an action for specific performance of the contract of sale, with a price abatement due to the water damage. Previously, BHT had informed him of his breach of the terms of sale, because of his failure to pay water and sewer charges. Unable to reach a settlement by October, 1995, BHT moved to vacate the foreclosure sale and allow for a resale of the premises. Zelik cross-moved to stay all proceedings pending the final resolution of his specific performance action. This Court reversed the lower court's granting of BHT's motion, and denial of Zelik's cross-motion.

The Uniform Vendor and Purchasers Risk Act, enacted in New York as General Obligations Law, Sec. 5-1311, provides in relevant part, that in the absence of contrary contract provisions, the parties to a realty contract, shall have the following rights and duties, when neither legal title or possession has passed: (1) If all or a material pat of the subject matter of the contract has been destroyed without fault of the purchaser, the vendor cannot enforce the contract, and the purchaser is entitled to a return of any portion of the purchase price paid; and (2) If an immaterial part of the premises is destroyed without fault of the purchaser, neither party is deprived of the right to enforce the contract, but there shall be an abatement of the price to the extent of the destruction. This statute has been interpreted so as to allow a purchaser faced with material damage, who still desires to enforce the contract, to elect between recission of the contract, or an abatement of the price. (*Lucenti v. Cayuga Apts*, 423 NYS2d 886 [NY]) It has also been held to apply to judicial sales. (*Onondaga Sav. Bk. V. Wagner*, 420 NYS2d 657 [S.Ct.])

Further adduced evidence showed that the damage sustained by the premises, occurred after the judicial sale; and that there was no evidence of water damage having occurred prior thereto. Additionally, while BHT admitted that their inspection in May, 1995, found a water problem requiring water to be pumped out of the basement; it contradicted Zelik's assertion that there was residual damage in need of repair. Accordingly, this Court reversed the judgment of the lower court, holding that the foreclosure sale closing should be stayed until a determination could be made as to whether Zelik was entitled to an abatement; or if as BHT claimed, the problem was corrected, and Zelik should be given the opportunity to purchase the premises for the amount of the original bid.

Citibank v. Liebeskind (and Zelik, a nonparty appellant)
656 NYS2d 39 (A.D.2.D.-1997)