October 1995

ADVERSE POSSESSION OF A STREET ACCEPTED AS A "PUBLIC STREET"

Action by plaintiff against adjoining landowner, and City of Yonkers, claiming title to a portion of a mapped street by adverse possession. The disputed road (Longvale Road) abuts the rear of the plaintiff's property and has been maintained as a playground since 1953. Longvale Road was offered for dedication to the City in 1924, at the time the subdivision was filed in the County Clerk's Office. Both plaintiff and defendant Efstathiou's property is shown on said subdivision map.

By authority granted to the City by the State Legislature in the Supplemental Charter of 1908, and as readopted in its subsequent charter, the City has the power to declare streets "public." The City established and re-established the disputed portion of Longvale Street as a public street by General Ordinance Nos. 16-1966; and 3-1984.

Contrary to plaintiff's assertions, the City could accept the offer of dedication at any time prior to a valid revocation by all the interested parties, the other lot owners who purchased by the dedicator of the recorded subdivision, or their successors. (*Hubbard v. City of White Plains*, 236 NYS2d 9 [AD]) Furthermore, these other owners whose lots abut upon the mapped street are entitled to have the left open for their use thereof, whether or not is was accepted as a public highway. (*Borducci v. City of Yonkers*, 534 NYS2d 383 [AD])

The Court concluded that since land held by a municipality for public purposes cannot pass by adverse possession (*City of Tonawanda v. Ellicott Creek Homeowners Assn.*, 449 NYS2d 116 [AD]) the plaintiff's claims must fail.

West Ctr. Congregational Church v. Efstathiou
627 NYS2d 727 [A.D.2.D.1995]

BREACH OF CONTRACT - WHEN TENDER NOT REQUIRED

This is an action to recover the downpayment paid on the signing of the contract for the purchase of real property. Vendor defended on the ground that the purchaser did not attend the proposed closing, and did not make a tender of payment; and did not demonstrate their ability to pay.

Finding for the vendee-purchasers, the Court held that where the title report showed that the defendants title was "incurably defective" in that it showed that they had only a seven-eighths interest in the subject premises, the defendants were then in "automatic breach." (*Cohen v. Kranz*, 238 NYS2d 928 [NY]). The Court, concluded that their representation in the contract that they possessed full title, justified plaintiff's cancellation of the same. (*Junius Constr. Corp. v. Cohen*, 257 NY 393, 400) Accordingly, their presence at the closing was unnecessary.

Spivak v. Farkas
629 NYS2d 45 (A.D.1.D.)

CAPITAL GAINS TAX - AGGREGATION DENIED

Cantrell and Baldassano, each purchased and separately paid for adjacent parcels of land, and determined to develop them in concert. As part of the closing consideration, all purchase money mortgages were secured by both of the tracts, given by each corporation owned and controlled by each of them. Each paid their own closing costs; each conveyed title to third party buyers for lots on their respective parcels. Surveying and engineering bills were apportioned between them. Inequities in operating expenses were adjusted between their two corporations. Baldassano, for conveyance, was the president of both corporations, and negotiated the sales of lots for both corporations. However, each one set the sales prices for the lots owned by their corporation.

The aggregate sales by the Del Lertnac corporation was $884,929.00; and $606,732.00, by the Grandview corporation. Upon the determination by the Administrative Law Judge, that a tax was due after aggregating the sales of both corporations, the taxpayers appealed to the Tax Appeals Tribunal.

Reversing the Administrative Law Judge, the Tribunal ruled that the aggregation rule applies where there are multiple transferors which are beneficially owned by the same individual; or where one transferor controls the acts of another. Citing *Matter of Kim Poy Lee*, 610 NYS2d 330 [A.D.1994], the Tribunal stated that this is not the type of situation that the aggregation rule was intended to encompass. The Tribunal found it crucial that "each corporation separately owned its own parcel; that they did not share in the profits or losses; and that neither of the corporations nor their stockholders controlled the other." Further, citing *Matter of Cove Hollow Farm v. N.Y. State Tax Commission*, 539 NYS2d 127, 129 [A.D.], the Tribunal noted that Ms. Baldassano testified that there was no plan to avoid payment of the capital gains tax.

In conclusion, citing *Steinbeck v. Gerosa*, 4 N.Y.2d 302, app. dism. 358 U.S. 39, the Tribunal held that "the ultimate inquiry, is whether the parties have so joined their properties, interests, skills, and risks that

for the purpose of the particular adventure, their respective contributions become as one, and the commingled property and interests of the parties have thereby been made subject to each of the associates, on the trust and inducement that each would act for their joint benefit."

Matter Of Del Lertnac, Inc. and Grandview Acres, Inc. Dta
Nos. 810929 and 810930, Decided 5-11-1995.

FRAUDULENT CONVEYANCE - STATUS AS CREDITOR REQUIRED

In this action to set aside a deed to his spouse as fraudulent pursuant to Debtor & Creditor Law, Art. 10, plaintiff's claim is based upon loan guarantees which were executed subsequent to the transfer of the real property in question. Reversing the lower court, the appellate division dismissed those causes of action predicated upon Debtor & Creditor, sec. 273, since plaintiff was not a creditor as of the time when the alleged fraudulent conveyance was made. Citing *New Rochelle Trust Co. v. Grab*, (281 NYS2d 69 [AD]), the Court found that this law makes no provision for those who become creditors subsequent to such a transfer.

However, the same was remanded for trial on the issue of the transferor's actual intent, pursuant to Secs. 276, 275, and 276-a.

Standard Chartered Band v. Kittay
628 NYS2d 307 (A.D.2.D.)

MORTGAGE FORECLOSURE - RPAPL 1301(a) NOT A BAR TO DEFENDANT'S SUIT

Plaintiff commenced a foreclose action, naming Dann (mortgagor), MTT (subordinate mortgagee), and the Tax Commission, as defendants. Premises were sold at the foreclosure sale, realizing a surplus of $39,800.00. The Tax Commission moved to confirm the Referee's Report of Sale, and to distribute the surplus. Pursuant thereto, the Tax Commission was paid in full from the surplus; and the balance thereof paid to MTT who had filed its claim thereto. Dann defends this separate plenary suit brought by MTT to recover the balance remaining on Dann's mortgage debt, on the grounds of RPAPL sec. 1301(a) which provides: "While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

This Court found Sec. 1301(a) to be "debt and mortgagee specific." It was intended to prevent the plaintiff from engaging in multiple actions; and did not pertain to other mortgagees named in such a foreclosure action, who did not initiate or obtain judgments in actual statutory foreclosure proceedings. Citing *Reichert v. Stilwell*, (172 NY 83,88) it concluded that its limitations did not apply to one in MTT's position.

Additionally, the Court rejected Dann's contention that *Wyckoff v. Devlin*, 12 Daly 144 [Ct. Common Pleas 1883], a case "on all fours" with that at bar, had been wrongly decided, and should not be followed. It affirmed the language of that court's decision: "the statute 'was never intended to apply to any case except where a judgment for deficiency could be obtained in the proceedings [brought by plaintiff] to enforce the lien of the mortgage'."

Central Trust Co. v. Dann
628 NYS2d 259 (Ct.App.1995)

Note: Another case interpreting RPAPL Sec. 1301 arose where the appellate division affirmed a lower court finding that this statute did not bar mortgagee from foreclosing on real property in a case where the obligation secured by the mortgage was a limited guaranty of payment on a loan made by mortgage to mortgagee separate from the note accompanying the mortgage. The Court concluded here (citing *Bank Leumi Trust Co. of N.Y. v. Sibthorp*, 522 NYS2d 568), that by reason of the obligation being "separate and independent," the plaintiff was not barred from obtaining a judgment of foreclosure and sale.

Bank Leumi Trust Company Of N.Y. v. Marriage Bridals, Inc.
626 NYS2d 535 (A.D.2.D.1995)

RESCISSION TERMINATES PARTIES' CONTRACTUAL RIGHTS

contract for the purchase of the subject premises, required plaintiff-buyers, to take the parcel that was being partitioned from a larger existing parcel, "subject to any covenants and restrictions imposed" by the Village of Muttontown Planning Board. When plaintiffs' ascertained that the Planning Board's approval would be granted only subject to "an express restriction against the erection of accessory structures of any nature whatsoever on the parcel," plaintiffs' demanded the return of their down payment monies. Defendant-sellers then negotiated the sale of the premises to another buyer, and returned the down payment monies to plaintiffs. Plaintiffs have now brought this action, seeking specific performance.

Court concluded that plaintiffs' having rescinded the contract, and the defendants' having accepted the same, the subject contract must be deemed to have been terminated. (*Muller & Co. v. Effangee Tobacco Co.*, 180 NYS 344, affd 229 NY 594) Citing *Brody v. W. & L. Enterprises* (117 NYS2d 719, affd 120 NYS2d 239), the Court concluded that since the subject contract was no longer binding upon the parties, the remedy of specific performance was unavailable to the plaintiffs.

Miles v. Gladstein
625 NYS2d 608 (A.D.2.D.1995)

TAX DEEDS - DUE PROCESS REQUIREMENT OF NOTICE TO REDEEM

Real property taxes for 1988 were unpaid, and pursuant to RPTL 1002(4) then in effect, the County Treasurer sent a notice to those then having a record fee or lien interest in the premises, indicating that the property would be sold to the County in the event the taxes remaining unpaid on September 28, 1990. A further notice was given by the Treasurer to all with a publicly recorded interest in the property, that it would be sold at auction in April, 1992.

Prior to 1988, plaintiff received an assignment of a mortgage on the premises, as well as a deed executed by a trustee in bankruptcy, but did not record the same. Accordingly, plaintiff did not receive any of these notices. Claiming that as of June, 1992, (after the issuance of a tax deed to defendants), that he was not time barred by RPTL 1024(1), plaintiff attempted a redemption. When the same was rejected by the county treasurer, this action ensued.

Sec. 1014(1) provides, inter alia, that where a notice of tax sale had not been given or established, the holder of any mortgage upon real property" duly recorded at the time of the sale thereof for unpaid taxes" may redeem such property at any time following the sale. The Court rejected this argument on the basis that although the mortgage itself was recorded, the assignment to plaintiff had not been.

Quadrozzi v. County Of Ulster
627 NYS2d 843 (A.D.3.D.1995)