Did You Know?

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BREACH OF CONTRACT - UNILATERAL TIME OF THE ESSENCE

By a June 16, 1994 contract, plaintiff agreed to purchase certain premises in Brooklyn, with the closing scheduled for "no later than August 21, 1994." The down payment sum of $50,000 was held in escrow by defendant's attorney, Frost. By letter of June 21, plaintiff informed defendants that the subject premises were not suitable for her use as a commercial warehouse, and demanded the return of the down payment. By letter of August 4, Frost requested that plaintiff advise him of a suitable closing date, or be deemed in breach of contract. Ten days after the closing date set forth in the contract at issue, defendant contracted to sell the subject property to a third party for much more than the price contracted for with plaintiff. Plaintiff commenced this action for the return of her down payment.

When a contract for the sale of real property does not make time of the essence, the law permits a reasonable time in which to tender performance, regardless of whether the contract designates a specific date for performance. What constitutes such a reasonable time, turns on the facts and circumstances of the case. {I>Zev v. Merman, 521 NYS2d 455, [AD}; affd. 73 NY2d 781} Time unilaterally may be made of the essence by "clear, distinct and unequivocal note to that effect, giving the other party a reasonable time in which to act."

This Court held that as a matter of law, Frost's letter of August 4 was premature {f. *3M Holding Corp v. Wagner*, 560 NYS2d 865 [AD]}, in that it failed to afford plaintiff a reasonable time after the August 21 closing date set forth in the contract within which to perform. Consequently it was inadequate to make time of the essence. Therefor, the sale to a third party prior to the expiration of a reasonable adjournment of plaintiff's time to perform, constituted a breach of contract by defendant.

Because plaintiff's letter of July 21 "did not evince an absolute repudiation [of the contract] by language or act making it futile for the [defendants] to proceed", the defendant's contract with a third party cannot be deemed an effort to mitigate damages in the face of an anticipatory breach by plaintiff. {I>Didier v. Macfadden Publications, 299 NY 49,53} The Court concluded that plaintiff's assent to defendant's abandonment of their contract, dissolves the contract, so that plaintiff cannot sue for the breach or

compel specific performance. Accordingly, plaintiff was limited to the return of her down payment.

Savitsky v. Sukenik
659 NYS2d 48 (A.D.2.D.-1997)

EASEMENTS - EXTINGUISHMENT BY MERGER

In 1977, both plaintiff and defendant-Gates acquired parcels of land from a common owner, abutting the southern spur (of a tri-part right of way), in proximity to the north-south spur, all as shown on a certain subdivision map No. 32 (Map of Estate of John Garrison) Their deeds granted them non-exclusive easements for ingress, egress and regress over said north-south right of way to a public highway. In 1991, Gates conveyed a portion of their land which was burdened by one of these easements, to defendants-Brower; limited Brower's easement use to the southern spur; and purported to extinguish any rights Brower would have had in the north-south spur which extended over the Gates residential parcel. Likewise, Gates waived their right to use that portion of the north-south spur which went over the Brower property. Plaintiff brought this action to contest said "waivers;" and to establish his right to use the north-south spur.

It is clear, that an easement may be created by designation of same to a plat map {I>Higgins v. Castle Estates, 369 NYS2d 80 [NY]}; and exists in favor of owners whose deeds refer to the filed map showing such easement. Once created, it would continue to pass with the dominant estate unless it was extinguished by abandonment, conveyance, condemnation or adverse possession. {I>Gerbig v. Zumpano, 197 NYS2d 161 [NY]} An easement may also be extinguished by the merger of the dominant estate with the servient estate. This doctrine proceeds from the recognition that a person cannot have an easement in his own land, because all uses of an easement are fully encompassed within the general right of ownership. {I>Beekwill Realty Corp v. City of New York, 254 NY 423, 426}/P>

However, when only a portion of the dominant or servient estate is acquired, there is no complete unity of title; and there remain other dominant estate owners whose rights are inviolate. Hence, the rights of these owners cannot be extinguished by a conveyance to which they are not a party.

Will v. Gates
658 NYS2d 900 (NY-1997)

MECHANICS LIENS - FILED AGAINST CONDOMINIUM UNITS

Plaintiff alleges that between September, 1987 and March, 1990, plaintiff, agreed with the contractor, SMG; and the pre- conversion owner of the premises, to install new electrical wiring and equipment in the subject premises. On February 15, 1989, the Declaration of Condominium was filed; and in May-

June of 1990, five of the six units were sold to the individual defendants. Plaintiff completed all its work in February-March, 1990; and upon not being paid, filed mechanics liens against the premises on April 24, 1990.

The "Condominium Law," {Real Property Law, Sec. 339-l}, provides in relevant part, that while the property remains subject to this article, no lien of any nature shall thereafter arise or be created against the common elements except with the unanimous consent of the unit owners. During such period, liens may arise or be created only against the several units and their respective common interests. Further, labor performed on, or materials supplied to a unit, shall not be the basis for filing of a lien against the unit of any unit owner, not expressly consenting to or requesting same; except for emergency service.

Since there is no dispute that the liens were filed after the Declaration of Condominium; and there was no documentary proof such owners expressly consented to, or requested such improvements, summary judgment would have been properly granted to the individual unit owners dismissing the complaint as against them, if this Court accepted the simplistic approach of the lower court. {*Matter of Country Village Heights Condominium*, 393 NYS2d 501 [S.Ct.]} Here, however, plaintiff alleged inter alia, that some of the work was performed prior to the recording of the Declaration; and some of it after, which led the Court to note the analogous situation found in *United Brotherhood of Carpenters v. Nyack* {6 NYS2d 665 [AD]} where a contractor's mechanic's lien was found invalid as to the initial completed phase of the project, but found valid as to the project owner's retained lands. Here, the Condominium developer retained ownership of an individual unit and the common elements, at the time the liens were filed by plaintiff.

A.C. Green Electrical Contractors, Inc. v Fu & SMG Construction, Inc.
658 NYS2d 602 (A.D.1.D.-1997)

REAL ESTATE TRANSFER TAX-CONTINUING LIEN DEDUCTION

On December 30, 1992, petitioner conveyed to AHFA Properties, Inc., 27 parcels of real property in Albany, New York by a single deed. These parcels were each single and distinct parcels, each being separately assessed, and each being four or five unit residential properties, or commercial properties. The sole consideration paid by AHFA for these properties was the assumption of blanket first and second mortgages thereon, having unpaid balances of $2,604,000, and $1,385,142, respectively; which liens continued to burden the premises after the conveyance.

The various allocations of mortgage amounts attributed to the respective parcels were all less than $500,000; the highest being $233,470. It was agreed between petitioner and the Tax Department, that if each of these 27 parcels had been conveyed by a separate deed, that the continuing lien deduction would be available to petitioner, resulting in a taxable consideration of zero; and therefore, no real estate transfer tax would be imposed upon the transfer. If the conveyance was determined to be one conveyance, the almost $4 million continuing lien deduction would not be available to petitioner,

because the consideration would have then been in excess of $500,000.

The 1989 amendment to Tax Law Sec. 1402 changed the imposition of the tax from "each deed" to "each conveyance of real property or interest therein." The purpose of this amendment was to broaden the base of the real estate transfer tax, thereby including a conveyance of an economic interest in real property, of property sold other than through a deed transfer. This amendment focused upon the conveyance of property or interests therein, rather than upon the deed document itself.

Citing *Sverdlow v. Bates* {129 NYS 88 [AD]}, the Tax Tribunal stated that if a transaction comes within the form which the statute has made taxable, it is no answer to say that it is indistinguishable in substance from a transaction in a different form which could have accomplished the same result in a nontaxable form. Citing Matter of Landmark Dining Systems v. Tax Appeals Tribunal {37 NYS2d 524 {AD]} this Tribunal concluded that "a taxpayer is bound by the form it invokes when structuring its transactions, and may not later restructure them in order to avoid taxation."

The Tribunal concluded that Petitioner should have taken a safe approach by using multiple deeds for its conveyances herein, instead of relying upon the position that the 1989 did not effect a substantive change in the law. The Tribunal found in accordance with *Matter of Benacquista, Polsinelli & Serafini Mgt. Corp v. Commissioner of Taxation & Fin.* {598 NYS2d 829 [AD]}, that the "reasonableness of a taxpayer's position must be evaluated by a comparison to the Division's articulated policy."

In the Matter of the Petition of Arbor Hill Associates
Tax Appeals Tribunal, June 26, 1997; DTA No. 812825

SUBDIVISION MAP FILING - LAND SURVEYOR REQUIRED

Real Property Law Sec. 334 governs the requirements for filing of a subdivision in all counties except Nassau (Sec. 334-a) and Suffolk (Sec. 335). In a prior opinion (1970 Op. Atty. Gen. (Inf) 210), the attorney general cited *Matter of Nassau- Suffolk Civil Engineers, Inc. v. Albertson,* {Sup. Ct., Suffolk Co., 10-9-1970 [Unreported]} as holding that Sec. 335 required a certificate stating that the map had been prepared by a licensed land surveyor, and that one prepared by a professional engineer, was not sufficient. Sec. 335 requires a "certificate of the surveyor;" while Sec. 334 is more specific, and requires a "certificate of a licensed land surveyor."

Since Education Law Sec. 7208 specifically gives licensed land surveyors, rather than professional engineers, the responsibility to determine real property boundaries, the Attorney General concluded that a county clerk may not accept for filing, subdivisions maps that are certified by a professional engineer, rather than by a licensed land surveyor.

1997 Op. Atty. Gen. (Inf) 28

June 13, 1997

WATER DAMAGES - MATERIAL INCREASE IN RATE OF FLOW

Plaintiff brought this action to recover for water damages during the floods of 1991 and 1992, caused by the flow of surface waters from defendants premises onto plaintiff's land. This action was brought on the theory or nuisance based on negligence; and not upon a claim of "strict liability." Plaintiff's property was the source of drainage for a large drainage basin, only a part of which belonged to defendant.

To hold a defendant landowner strictly liable for the discharge of surface waters by artificial means upon plaintiff's lands, plaintiff must establish that the discharge was materially different from prior drainage. (*Gellis v. Town of Harrison,* {59 NYS2d 228; aff'd 172 NYS2d [AD]; lv. den. 4 NY2d 677} Accordingly, the Court's charge that defendant must have caused a substantial increase in the quantity and/or flow of surface waters to be strictly liable, was correct. Such a finding of substantial increase of quantity or flow, is equally required under the nuisance theory. On Trial, plaintiff failed to establish these conditions.

Batavia Turf Farms, Inc. v. County of Genesee
659 NYS2d 681 (A.D.4.D.-1997)