Did You Know?

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November 1995

ADVERSE POSSESSION AS AGAINST CO-TENANTS

In 1969, Adelina Sergio and her son, Paul, acquired certain property as tenants in common. In 1975, Adelina died intestate, leaving four children: Josephine Pravato, Fred, Joseph and Paul Sergio. In 1984, representing that he was the only heir of Adelina, Paul sold the property to Herbil Holding Co. In 1990, Josephine commenced this action as Adelina's personal representative, seeking an order declaring her the owner and possessor of an undivided one-half interest in the property. Defendants alleged four defenses: a) Action barred by the Statute of Limitation; b) Ownership of premises by adverse possession; c) Their status as bona fide purchasers for value without notice; and d) The action was barred by equitable estoppel and laches.

The Statute of Limitations (CPLR 212[a]) provides that an action to recover real property cannot be commenced unless plaintiff possessed the premises within 10 years before the commencement of the action. RPAPL 541 provided for a presumption that a tenant in common in possession of the property holds the property for the benefit of all the tenants in common. (*Kraker v. Roll*, 474 NYS2d 527 [AD] This presumption ceases only after the expiration of 10 years exclusive occupancy of such tenant, or upon ouster.

Consequently, the Court held that the 1984 conveyance was such an ouster; and that the ten year period required for adverse possession, only then commenced to run. Accordingly, with the commencement of this action in 1990, the statute of limitation had not expired; and adverse possession had not ripened.

Pravato v. M.E.F. Builders, Inc.
629 NYS2d 796, (A.D.2.D.-1995)

ADVERSE POSSESSION - CONTRAVENED BY PERMISSION

John Martel purchased a parcel of land from a larger tract owned by defendant, upon which he

constructed a water collection and supply system on defendant's land which drew water from a natural spring, and piped it to the camp he built on his property. Apparently, this system was in continuous use from 1960 until June, 1992, when defendant wrote plaintiff demanding that he remove the same. Plaintiff then commenced this action pursuant to RPAPL Article 15, claiming title to the parcel upon which the spring and distribution system are located, under various theories, i.e. adverse possession, easement of prescription, easement of implication, easement by necessity, etc. This appeal ensued upon the lower court's denial of defendant's motion for summary judgment, on the ground that an issue of fact existed as to whether the alleged permissive use of defendant's land, was revoked.

The same elements of adversity, open and notorious, continued and uninterrupted use of property for ten years, apply both as to adverse possession and easements by prescription. (*Led Duke v. Sommer*, 613 NYS2d 985 [AD]) Once the elements of open and continuous use for the prescribed period have been satisfied, a presumption arises that such use was hostile, and the burden shifts to the defendant to show that the use was permissive. (*Van Deusen v. McManus*, 608 NYS2d 569 [AD]) If permissiveness is established, the burden then shifts back to the plaintiff to show that such was transformed into an adverse one, by an assertion of an adverse right that was made known to the landowner. (*Wechsler v. N.Y.S. Dept. of Envtl. Conservation*, 597 NYS2d 507, lv. denied 82 NY2d 656.

Defendant adduced proof from Martel (plaintiff's predecessor in title), that before he constructed the system, he obtained permission from defendant's husband (now deceased), which was never revoked. Since this proof remained uncontroverted, plaintiff's causes of action which required a showing of "hostility," were unproven. Accordingly, plaintiff's complaint was dismissed.

Pickett v. Whipple
629 NYS2d 489 (A.D.3.D.-1955)

Note: Although not addressed on this appeal, the Court addressed plaintiff's remaining causes of action, as follows:

a) To establish an easement by implication, it must be shown that (1) there was a unity and subsequent separation of title, and (2) the claimed easement must have, prior to separation, been so long continued and obvious as to show that it was meant to be permanent, and (3) the use must be necessary to the beneficial enjoyment of the land. (*Kusmierz v. Baan*, 534 NYS2d 786 [AD]) In this case, the second element is lacking since the water system was installed after the title had been separated.

b) For an easement by necessity, in addition to establishing the unity of title, plaintiff must also show, that at the time of the severance, an easement over defendant's property was necessary in order to obtain access to water. (*U.S. Cablevision Corp. v. Theodoreu*, 596 NYS2d 485 [AD]}. In the instant case, plaintiff can obtain water by alternate means. Accordingly, he will be unable to establish the element of necessity.

FORECLOSURE SALE - CHANGE IN PUBLISHED LOCATION

Notice of Sale, as published and posted, stated that the sale would be conducted at a certain time, on the Court House steps. The sale was in fact conducted at the prescribed time, but in a lobby area which connected the Court House with County Office Building. The only bidder at the sale was the plaintiff who bid a sum less than the amount due on the foreclosed mortgage. Plaintiff appeals from the lower court ruling that invalidated the sale on motion of a non-party prospective bidder who established that he had the ability and intended to bid substantially higher than plaintiff. Plaintiff contends that a non-party, such as petitioner, does not have standing to bring this proceeding.

Citing *National Bank of Stamford v. Van Keuren*, (590 NYS2d 946) the Court found, that "almost any individual, even a non-party, who has a legitimate interest in the outcome, can set it [the sale] aside". The Court of Appeals in *Amsterdam Sav. Bank v. City View Mgt. Corp.*, (410 NYS2d 287) noted that "a serious bidder who had made various commitments to effectuate its bid", has such a legitimate interest in the outcome of the sale.

Affirming the lower court's decision, this Court held that a court in the exercise of its equitable powers, has the discretion to set aside a judicial sale where mistake casts suspicion on its fairness. Since the purpose of a publication of a Notice of Sale is to give notice to all who might become bidders so that a fair value can be realized at the sale, when this purpose if frustrated by the movement of the sale to a location other than as published in the notice, the sale may be set aside.

Wayman v. Zmyewski
629 NYS2d 871, (A.D.3.D.-1995)

REFORMATION - DOCTRINE OF EQUITABLE RECOUPMENT

The contract between predecessors in interest of plaintiff (seller) and defendant (purchaser), provided that the Seller would take back a purchase money mortgage for a portion of the consideration, and that the Purchaser would execute a non-recourse note. Despite the fact that all parties at the closing were represented by counsel, the note then presented, and executed by Purchasers, was a recourse note. Upon default, plaintiff brought this action seeking relief against the individual defendants, who assert in their answer, affirmative defenses seeking reformation of the note and mortgage.

The doctrine of equitable recoupment (codified by CPLR 203[d]) permits a defendant to revive as a defense or counterclaim, that which would have been otherwise time barred. For such doctrine to apply, the facts pleaded must arise out of the same transaction, or series of transactions, that form the basis of, and be sufficiently related to, the causes of action alleged in plaintiff's complaint. Matter of *SCM Corp. [Fisher Park Lane Co.]*, 40 NY2d 788, 791. If plaintiff's cause of action relates to its right to performance under the terms of an agreement, defendant's counterclaims arising out of the negotiation and events leading up to the execution such an agreement, are not revived. *Levy v. Kendricks*, 566 NYS2d 604 {AD]. Accordingly, this Court affirmed the lower court's finding that any attempt to obtain reformation of the

note premised on fraud or mutual mistake, continues to be time barred.

Court distinguished the holding in *X.L.O. Concrete Corp. v. Rivergate Corp.* (597 NYS2d 302, affd. 83 NY2d 513), finding that in that case, defendant did not seek to reform the contract upon which plaintiff sued. The defendant there raised the issue of statutory illegality of the contract upon which plaintiff sued. Here, plaintiff seeks to enforce the contractual terms of the note and mortgage, while defendant's claim for reformation, is based upon the earlier version of the contract of sale, and arises out of the negotiation and events leading up to the execution of the note and mortgage. Accordingly, defendants cannot rely upon Levy v. Kendricks, supra, since they do not seek to enforce rights under the same agreement that plaintiff seeks to enforce.

182 Franklin St. Holding v. Franklin Pierrepont Assocs.
630 NYS2d 64 (A.D.1.D.-1995)

Note: The Court noted that to hold otherwise, would have relieved counsel and clients of their obligation to review the note and mortgage at the closing; or, if necessary, in a timely action for reformation.

TAX TITLE - NOTICE TO ADVERSE OWNER

In 1958, plaintiff's predecessors in interest, commenced actual occupancy of their deeded premises, as well as occupying certain portions of defendant's property. Thereafter, defendant's predecessors failed to pay their property taxes; the County foreclosed on same; and subsequently conveyed the property to defendants. Later, plaintiffs commenced this action, alleging, inter alia, that they acquired a portion of defendant's property by adverse possession. It was subsequently stipulated that plaintiff's acquisition of title was prior to the County's sale of the property to defendants.

Plaintiffs contended that since they acquired valid title through adverse possession, prior to the foreclosure sale, Saratoga County could not pass to defendants, any greater title than the original delinquent owners had. Rejecting this argument well sustained by *Conklin v. Jablonski*, the Court noted that the title conveyed in a tax sale is not simply the title of the delinquent owner (*Lee v. Farone*, 27 NYS2d 585, affd. 288 NY 517); rather, the purchaser at a tax sale acquires "a new and complete title to the land under an independent grant from the sovereign, a title free of any prior claims to the property or interests in it." (*Melahn vc. Hearn*, 60 NY2d 944, 946).

This excerpted language from the Lee and Melahn Cases, is taken out of context, and is a misstatement of the applicable law. In the first instance, while for some purposes the purchaser may be deemed to have acquired a new title from the sovereign, it most certainly is not free of all prior claims. It remains burdened by pre-existing easement rights in favor of third parties; as well as pre-existing covenants and restrictions imposed prior to the tax delinquency. In a proper case, it might also be said to be subject to inchoate claims of adverse possession.

In the case at bar, if plaintiff's title by adverse possession had ripened prior to the tax delinquency, his interest can be extinguished only by adherence to statutory notice requirements. Furthermore, the facts in the instant case bear substantial points of similarity with the Conklin Case which stands squarely for the proposition that a tax deed can convey no better title than the delinquent taxpayer had.

Borisenok v. Hug
630 NYS2d 122 (A.D.3.D.-1995)

Note: We submit that the sole issue in this case should be whether one in plaintiff's position was entitled to notice of the delinquency proceedings, there being no record evidence of its claim of title at the time these proceedings took place. We believe that plaintiff's reliance on *Cong. Yetev Lev D'Satman v. Co. of Sullivan*, (59 NY2d 418, was well placed.

TITLE INSURANCE - LIABILITY IN NEGLIGENCE

As reported in RHODES, Nov. 1994, p.6 (*Citibank v. Chicago Title Insurance Co.*, 620 NYS2d 717), the Supreme Court N.Y. County upheld plaintiff's contention that it could maintain an action in tort for the negligent preparation of the title policy; and on the ground of breach of contract founded on tort, the negligently performed title search. That Court also cited *Chrysler First Financial Services v. Chicago Title*, (595 NYS2d 302) which in turn cited L. Smirlock Realty Co., v. Title Guarantee (421 NYS2d 232 [AD]), to the effect that rather than being merely a contract of indemnity, "it is more in the nature of a covenant of warranty against encumbrances."

The Appellate Division framed the issue on this appeal as being whether a mortgagee, insured under a mortgage title insurance policy, "may, absent proof that its alleged loss was occasioned by the subordination of the insured mortgage to other liens and encumbrances, recover damages against the insurer in negligence and/or breach of contract based upon the insurer's faulty title search." This question was answered in the negative, and the lower court decision was unanimously reversed.

Following the time honored *Trenton Potteries Co. v. Title Guarantee & Trust Co.* (176 NY 65, the Court held that a cause of negligence does not lie in an action on the policy; holding that the "contract of insurance is separate and distinct from the contract of searching." Under a contract for searching, defendant may be liable for any damages which its negligence may have imposed upon the plaintiff; while under a contract of insurance, no question of negligence in searching may lie.

Again citing *Smirlock*, at p. 465-466, the Court held that "where as here, the certificate of title has merged in the subsequently issued title insurance policy, any action for damages arising out of the search - whether sounded in tort or contract - is foreclosed." The Court noted, that nowhere in the decision in the Smirlock Case did the Court of Appeals mention the Trenton Potteries Case, which it would have, if it intended to overrule the same, and impose a negligence liability under the policy of title insurance.

Citibank N.A. v. Chicago Title Insurance Co.
N.Y.L.J., 10-2-1995, p.25, col 3.; (A.D.1.D.)

Note: We take issue, however, in the Court's citing of the Smirlock case for the proposition that a policy of title insurance is a policy of indemnity. To the contrary, that case held, notwithstanding the quoted policy language, that the policy assures to the policy holder, the benefit of its bargain. Although in the instant case involving mortgage insurance, it is a distinction without a difference. In many instances of fee title insurance, the resulting difference would be drastic.