# Did You Know?

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## November 1997

### COMMON-LAW TRESPASS; RPAPL 861; TAX TITLE REQUIREMENTS

In 1990, plaintiff seeking damages for common-law trespass, and for a violation of RPAPL Sec. 861, commenced this action alleging that defendant wrongfully entered upon a parcel of land owned by plaintiff, and cut, trimmed and despoiled the trees thereon without her consent or permission. After discovery, defendants moved to dismiss plaintiff's complaint on the ground that defendant did not own the affected premises.

Citing *London v. Courduff*, (529 NYS2d 874, app. Dism. 73 NYS2d 809), this Court held that the remedy created by Sec. 861, extended only to the actual owner of the property alleged to have been harmed. Possession of, or the right to possession, in and of itself, being insufficient for this purpose.

Plaintiff's 25 acre parcel lay within Lot 120 of the Jay Tract, in the Town of Jay, County of Essex; and was derived from a tax deed made to the County of Essex, based in turn upon a 1982 tax sale of premises reputed to have been owned by the Hammond Group., Inc. An examination of the deeds in Hammonds chain of title showed that Hammond had never owned Lot 120, or any portion thereof. Citing, *People v. Helinski*, (634 NYS2d 837 [AD]), this Court concluded that since Hammond had no interest in Lot 120 to convey, Essex County acquired no interest in the parcel in question as the result of the tax sale. Accordingly, as the original grantor in plaintiff's chain of title did not own the property, all subsequent grantees could acquire no better title. [cf. Note 1]

Additionally, the Court found that a claim based in trespass required ownership and the right of possession. Therefore, plaintiff's failure to plead and prove her right of possession, precluded her being able to maintain an action based on trespass. (*Stay v. Horvath*, 576 NYS2d 908 [AD]), The Court properly dismissed plaintiff's complaint.

Note 1: See *Conklin v. Jablonski*, 324 NYS2d 264 (Nassau S.Ct.), not cited by this Court, but in precise point.

***Cornick v. Forever Wild Devel. Corp.***
659 NYS2d 913 (A.D.3.D.-1997)

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## EASEMENT - ACTUAL & CONSTRUCTIVE NOTICE

This appeal is from a judgment of the lower court dismissing plaintiff's complaint to enjoin defendant's from interfering with plaintiff's use of an easement over defendant's lands, to the nearest public highway. Reversed, and the complaint is reinstated.

The Court stated the applicable law as: "[i]n the absence of actual notice before or at the time of . purchase or of other exceptional circumstances, an owner of land is only bound by restrictions if they appear in some deed of record in the conveyance to [that owner] or [that owner's] direct predecessors in title" (*Witter v. Taggart*, 573 NYS2d 146 [NY]). Here, and contrary to the lower court's finding, this Court found that both the contract of sale and the bargain and sale deed which conveyed the title of the servient estate to defendants, created an easement in favor of the plaintiffs over the property of the defendants. The easement was in the chain of title and defendants were on notice of its existence.

Note: Additionally, since the defendants had knowledge of the easement and were aware that the plaintiff could assert a claim for relief, they are not entitled to assert the equitable remedy of laches (*Dwyer v. Mazzola*, 567 NYS2d 281 [AD]).

***Stassou v. Casini & Huang Constr. Inc.***
660 NYS2d 59 (A.D.2.D.-1997)

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## EQUITABLE MORTGAGES - REQUIREMENTS FOR IMPOSITION

Plaintiff's predecessor, Chrysler loaned defendant Rastelli monies for the purchase of certain premises, and among the closing documents was a note and mortgage made by Rastelli's Wade's Canadian Inn to Chrysler to secure repayment of the loan. Rastelli signed the mortgage documents as president of Wade's, and personally guaranteed the obligation. Although testimony was adduced at trial from Rastelli's attorney that he brought with to the closing, a deed running from the seller to Wade's, the documents which were recorded following the closing, included a deed running from the seller to Rastelli alone. Subsequent to this closing, Rastelli obtained a loan from his father and gave him a mortgage on this property, which provided inter alia, that it was subject to the Chrysler mortgage. Plaintiff (Chrysler's assignee) brings this action to establish its mortgage as an equitable lien on the premises.

The threshold issue in any claim for equitable relief, including the seeking of the imposition of an equitable mortgage, is whether plaintiff has an adequate remedy at law. (*Boyle v. Kelley* 396 NYS2d 834 [NY]) In this context, the remedy is deemed to be adequate, if it is "plain and adequate and as certain,

prompt, complete, and efficient to attain the ends of justice" as the remedy in equity. In the instant case, while plaintiff may have legal remedies, ie. to pursue Wade's on the note, and Restelli on the guarantee, defendant has failed to adduce sufficient evidence to support its legal adequacy argument. Citing *Sprague v. Cochran*, (144 NY 114), this Court recited "the cardinal maxim of equity (as being that) which regards that as done which has been agreed to be done, and ought to have been done." Its availability in this instance is not dependant upon the nature or size of the error, but rather upon the clear intent between the parties that [certain] property to be held, given or transferred as security for an obligation, ought to have been so given.

[See also: *York TRW v. Wade's Canadian Inn* 605 NYS2d 139.]

***New York TRW v. Wade's Canadian Inn***
660 NYS2d 491 (A.D.3.D.-1997)

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## ESCROW DEPOSIT - REFUSAL TO RETURN

Purchaser in a real estate transaction, sued the attorney for the sellers, as holder of escrow for his release of escrowed down payment, despite purchaser's timely notice of objection. In pertinent part, paragraph 6(a) of the standard residential contract of sale, provided that if the closing does not occur and one of the parties demands delivery of the down payment, the escrowee is to give prompt notice that demand to the other party, and that "[I]f Escrowee does not receive Notice of objection from such other party to the proposed payment within 10 business days after the giving of such Notice, Escrowee is hereby authorized and directed to make such payment." Paragraph 25 of the contract provided that notices shall be in writing, sent by registered or certified mail, "or (b) delivered in person or by overnight courier, with receipt acknowledged, to the respective addresses given in this contract for the party and the Escrowee.." Appellant, escrowee admits receiving timely, personal delivery of plaintiff purchaser's notice of objection to the release of the down payment, but argues that the notice was defective, and that his release of funds to the seller was therefore proper, because he did not give plaintiff a receipt for the notice. This Court found this argument to be without merit, as the requirement that the recipient of a notice give a receipt to the deliverer was obviously intended not as a condition precedent to the validity of the notice, but rather, as a protection for the deliverer. Accordingly, the Court held that it could not be used by the recipient to deny the validly of a notice properly given, and timely delivered and received.

***Tzanetatos v. Scott***
659 NYS2d 438 (A.D.1.D.-1997)

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## EXPRESS EASEMENT - LOCATION

A deed in the chain of title from prior owners of the property to the defendant, provided that owners of

the superior herediment had the right to use a "main driveway" which ran across a portion of defendant's property. Although the location of the easement had not been fixed in that instrument, testimony was adduced at trial, that a certain portion of defendant's land had been so used by plaintiff's predecessors in title, for 37 years, without objection by the owner of the servient tenement, thus establishing the location of the easement. (*Green v. Mann*, 655 NYS2d 627).

This Court rejected the defendant's attempt to relocate the easement, on the grounds of *Dowd v. Ahr* (577 NYS2d 198 [NY]) holding that once a grant or right in the nature of an easement has been established, the location and definite course so fixed, cannot be changed or substituted without the acquiescence and consent of both parties. The Court herein found that the defendant had failed to proffer any evidence raising an issue of fact as whether plaintiff had consented to the relocation of the easement.

***Lewis v. Young***
661 NYS2d 51 (A.D.2.D.-1997)

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## MORTGAGE TAX - NOT DUE WITH MORTGAGE SUBSTITUTION

Homes Corporation purchased certain real property from J. & M. Realty in December, 1983, and executed a purchase money wraparound mortgage to J & M in the amount of $850,000. Under the terms thereof, Homes assumed an underlying mortgage of $625,372, and received a loan from J & M of $224,,628. This mortgage was recorded in February, 1984; and a mortgage tax paid on the additional amount loaned. In June, 1991, Homes executed a further mortgage in favor of J & M for $170,000, and a mortgage recording tax was paid on that amount. It was consolidated with the earlier wraparound mortgage securing a total indebtedness in the sum of $1,020,000. At the time of the recordation of this latter mortgage, the amount due on the $625,372 underlying mortgage had been paid down to $486,412. Since the total amount secured by the wraparound mortgage remained unchanged, the payment of principal on the underlying mortgage automatically increased from $224,628 to $363,587. The $170,000 loan further increased the total amount of J & M's loan to $533,587.

On that same day, Homes executed a mortgage in favor of Queens Savings Bank in the amount $513,587, which sum was paid directly to Homes; and a consolidated mortgage was executed for $1,000,000 ($513,587 + $486,413, that was the paid down figure remaining on the original underlying mortgage). The $513,587 was paid over to J & M, leaving only $20,000 due on the loan due to J & M. The lien securing J & M's lien was not extinguished, however, and that same $513,487 lien was re-used to now secure the funds advanced by Queens County under its mortgage. This caused the amount secured by the wraparound mortgage to remain at $1,020,000 ($486,413 + $513,487 + $20,000). After a mortgage tax was paid on recording of the $513,587, Homes filed a claim for a refund of that tax, which was denied. Citing *Matter of City of New York v. State Tax Commissioner* (516 NYS2d 132 [AD]), the Tax Tribunal rejected the City's contention that the Queens County mortgages were taxable as "new funds" since they were used to pay part of the principal secured under J & M's wraparound mortgage. It determined that Homes did not pay down its debt and borrow new funds under an existing or another

mortgage but rather, substituted one debt for another by using the funds borrowed from Queen County to reduce J & M's position. Since the total debt remained the same, they concluded that "mere substitution of one mortgage for another, which creates no additional indebtedness, does not create a new mortgage requiring the payment of a recording tax", at the time of the recording of the $513,587 mortgage. Petitioner (City) seeks a review of that determination.

Adopting the Tribunal's determination, this Court rejected the City's contention that the 1989 amendment to Tax Law Sec. 250(2) operated to overturn established case law enunciated in *Matter of City of New York v. Procaccino* (364 NYS2s 582[AD]) It adopted the Tribunal's rationale that the 1989 amendment codified "for purpose of the New York City mortgage recording taxes, a longstanding opinion of the Attorney General.

Note: We printed the entire pattern of this substitution of mortgages for the benefit of the profession.

***City of New York v. Tax Appeals Tribunal***
660 NYS2d 753 (A.D.3.D.-1997)

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## RECEIVERS - EXTENT OF POWERS

In December, 1992, the Receiver appointed in connection with a pending foreclosure action, entered into an exclusive brokerage leasing agreement with the plaintiff for the leasing of certain stores/offices at a shopping center, then under foreclosure. In connection therewith, plaintiff obtained five commercial tenants for the shopping center, which leases were submitted to the Court and approved. During the period of the receivership, plaintiff was paid its annual commissions, as required by the brokerage agreement. In October, 1995, defendants purchased the premises from the referee in foreclosure. Plaintiff (broker) brings this action for further commissions alleged to have been earned pursuant to said agreement.

Defendant relies upon three cases to support its contention that it has no liability to plaintiff for brokerage commissions:

a. *Thorne Real Estate, Inc. v. Nezelek* (473 NYS2d 82 [AD]) stands for the proposition that a purchaser of property is not liable to the broker for annual commissions, since the brokerage agreement was held to create a personal obligation between the contracting parties, one which did not run with the land.

b. *Spivak v. Madison-54th Realty Co.* (303 NYS2d 128) held that a subsequent purchaser was not liable for such commissions since the purchaser never specifically assumed the obligation.

c. *Longley-Jones Assoc. v. Ircon Realty Co.* (496 NYS2d 155, aff'd. 502 NYS2d 706 [NY]), stated the law as being, that absent an affirmative assumption, a grantee is only liable for those covenants which

run with the land; and a covenant in a lease to pay a broker's commission upon renewal of a lease, does not run with the land. Such liability does not attach to a grantee who merely takes title "subject to," and with notice of the terms of the lease.

Since the defendant purchaser cannot be said to have assumed the obligation to pay the brokerage commission, its liability can be predicated only upon a finding that the Receiver's actions somehow bound the foreclosure sale purchaser. In this respect, the Court concluded that as a Receiver has only very limited powers, the particular power to enter into contracts which may endure past the termination of the receivership, must be subject to court approval (*Weeks v. Cornwell*, 106 NY 626). Since plaintiff had full knowledge that it was entering into an agreement with a temporary receiver having limited and terminable powers, which agreement was never approved by the Court, it cannot now show that the brokerage agreement falls within any of the exceptions stated in the three cases cited. Further, as the defendant is not the Receiver's "successor in interest"; and the receivership terminated after final judgment; the receiver had no such successors.

***Century 21 A.L.P. Realty v. South Central Plaza, Inc.***
660 NYS2d 673 (S.Ct. Rockland Co.-1997)