December 1995

LAWS OF INTEREST TO REAL PROPERTY PRACTITIONERS - PASSED DURING THE 1995 LEGISLATIVE SESSION AND SIGNED BY N.Y. GOVERNOR GEORGE PATAKI

CO-OPERATIVE APARTMENTS - TENANCY BY THE ENTIRETY

Estates, Powers and Trusts Law, Secs. 6-2.1 (4) and 6-2.2 (c,d) were amended so as to provide that shares of stock of a cooperative apartment corporation, allocated to an apartment unit with the proprietary lease to a husband and wife create in them a tenancy by the entirety, unless a contrary intention is expressed. A similar result of a tenancy by the entirety is created if allocated to persons who are le all married, but who are described in such disposition as husband and wife. This law takes effect January 1, 1996.

Note: This is still another step in the incremental process of treating co-operative apartments as real property, for as we know, the legal status of ownership as tenants by the entirety is limited to real property holdings. There still remains a substantial body of case law that treats co-operatives as personal property. We still await statutory provision for the recordation in county clerk's and registers offices of ownership interests in co-operative apartments.

CO-OPERATIVE APARTMENTS - TAX ABATEMENTS

Toward the end that senior citizens owning apartments in co-operative entities may receive tax or rent abatements now available to them were they owners or in possession of other forms of housing, new subdivision 3-a has been added to Real Property Law, section 467.

For this purpose, such owner of a co-operative apartment shall be deemed to be the fee owner of his apartment unit, and that proportion which his apartment bears to the total entity shall be deducted from the taxes payable by the co-operative corporation and credited toward the carrying charges otherwise payable by such apartment owner.

P>This law. as other such abatement taws, is dependent upon adoption of these provisions by the goveming board or the municipality at which the co-operative apartment's corporation's property lies. If adopted, the co-operative corporation shall advise the apartment owners of its availability. This law became effective August, 2, 1995.

REAL PROPERTY CONTRACT DISCLOSURE

Real Property Law Sec. 443-a provides that no cause of action against owners or occupants of real property shall arise by reason of their, or the agent of a buyer, or seller. having failed to disclose in a real estate transaction, a fact or suspicion that an owner or occupant has been diagnosed as having A.I.D.S. or that the property was or is suspected of being the site of a homicide, suicide or other death by accident or natural causes, or any crime punishable as a felony. Such failure shall not be deemed a material defect or fact relating to property offered for sale. Further, failure of real estate brokers or agents to make such disclosures shall not be grounds for disciplinary action being taken against them. This law became effective September 8, 1995.

SENIOR CITIZEN RENT ABATEMENT

Real Property Tax Law Sec. 467-6, which provides for tax abatements to be given to landlords on account of senior citizen tenants having rent increase exemptions, has been amended so as to increase the level of eligibility to such tenants who have a combined income nor exceeding $20,000. Previously, such limit was $16,000. This law became effective July 28, 1995.

SENIOR CITIZEN TAX ABATEMENT

Real Property Tax Law was amended by adding a new subparagraph 3 to Section 467 (1) (b), to allow any local taxing district to afford senior citizens (65 years or older) a five (5%) percent tax exemption if their annual income is between $4800 and $7500. The period of ownership required before eligibility was also reduced from two years to one year. This law become effective January 1, 1996.

Real Property Tax Law was also amended by the addition of new subdivision 9 to Section 467, which

provided for a mechanism whereby an eligible owner who acquires title after the fixed status date, may file an application for exemption to the assessor within thirty (30) days of the transfer of title to such person. It provides for a proportioned abatement for the remainder of the tax year (subsequent to the taking of title), a mechanism for review, and a credit back against the tax due for the next fiscal year, where the tax for such period to be apportioned has been paid. This law became effective November 2, 1995.

CASES ON COVENANTS AND TAX TITLES

Commentary: In the last issue (11/95) of the Rhodes Review, we reported the Appellate Division decision reversing the lower court in the case of Citibank, N.A. Ticor Guarantee Company (NYLJ (10/2/95), which held that an action in negligence lay against an underwriter.

We now call attention to that appellate court's erroneous citing of *Smirlock v. Title Guarantee* (421 NYS2d 232) for the proposition that a policy of title insurance "is a policy of indemnity."

While that may be the case with policies of mortgage insurance, it certainly may not be the case with policies of fee insurance. Recognizing that a transfer of real property may be by gift, or at a much reduced consideration based in part on family or other considerations. Smirlock held a policy of title insurance to assure to the policy holder the "benefit of its bargain."

In many instances, the resultant difference could be drastic.

COVENANTS & RESTRICTIONS - EXTINGUISHED BY MERGER

In 1913, a certain four-lot subdivision was filed. In 1914, Lot 4 was conveyed to Andros Realty Company, a corporation owned by William, Julian and Hamilton Benjamin. This conveyance provided that said lot could not be subdivided without the consent of the owners of the other lots. In 1922, Lots 1, 2 and 3 were conveyed to Julian Benjamin and in 1928, Andros Realty conveyed Lot 4 to William M. Benjamin, subject to the aforesaid covenant and restriction.

In 1980, one Stadd a successor owner of Lot 4, conveyed a portion of Lot 4 to one Nichols, who, in 1983, reconveyed the same to defendants. In 1984, defendants obtained a building permit and renovated the historic windmill thereon, to serve as their residence. This action brought by plaintiff to enforce the aforesaid covenant wasn't commenced until after the bulk of the reconstruction pursuant to said permit had been achieved. The trial court, citing *Castle Assoc. v. Schwartz* (407 NYS2d 717) found that the

covenants and restrictions had been extinguished by the merger when title to the dominant and servient tenements vested on one person.

This court reversed finding that on the facts herein, a merger did not occur, Citing *Koshcan v. Kirschner* (527 NYS2d 92 1), the court held that an extinguishment by merger does not occur when an owner of one parcel acquires only a "fractional part of the other estate." Since the owner of the other estate was a separate corporate entity in which Julian Benjamin was a shareholder, there was no unity of title which could allow for such an extinguishment. (See note below).

Nonetheless, the court barred plaintiffs attempted enforcement of the covenants and restrictions on the grounds of laches the elapsed time after the 1980 conveyance of a portion of Lot 4 until the 1990s commencement of the action and after defendant spent considerable sums of money on the renovation.

Perry-Gething Foundation v. Stinson
631 NYS2d 170 (A.D.2d-1995)

Note: Unanswered by the court's decision is whether a merger and extinguishment thereby would have been found if Julian Benjamin had been the sole shareholder of Andros Realty. In such instance, he might have been considered the effective sole, owner of Lot 4 and the remaining lots.

TAX TITLE - NOTICE TO ADVERSE OWNER

In 1958, plaintiffs predecessors in interest commenced occupancy of their deeded premises, while occupying certain portions of defendant's. Thereafter, defendants predecessors failed to pay their property taxes; the county foreclosed and subsequently conveyed the property to defendants. Later, plaintiffs began this action, alleging, inter alia, that they acquired part of defendant's property by adverse possession. It was later stipulated that plaintiff acquired title prior to the county's sale to defendants.

Plaintiffs contended that since they acquired valid title through adverse possession prior to the foreclosure sale, Saratoga County could not pass any greater title than the original delinquent owners had. Rejecting this argument, enunciated by *Hannah v. Babylon Holding Corp.* (28 NY2d 895 93) the court noted that the tax deed conveys 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 interests in it" (*Melahn v. Hearn*, 60 NY2d 944, 946).

This excerpted language from the Lee and Melahn cases is taken out of context and is a mis-statement 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. In a proper case, it might also be said subject to inchoate claims of adverse possession.

In the case at bar, if plaintiffs title by adverse possession had ripened prior to the tax delinquency, his interest can be extinguished only by adherence to statutory notice requirements. Futhermore, the facts bear substantial points of similarity with *Conklin v. Jablonski* (324 NYS2d 264, 271 [S.Ct. Nassau Co.) which stands 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. 3rd-1995)

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